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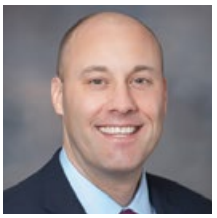

Disproving Exaggerated Injuries from Low Impact Collisions

Court Restores Common Sense to the Admissibility of Vehicle Damage Photos at Trial

Background

Trial attorneys of a certain vintage, this author included, like to spin tales of the olden days, and one of our favorite yesteryear subjects is the simplicity with which we were able to defend low impact motor vehicle accident cases, before many state courts began imposing barriers to doing so. Years ago, an enlarged color photo of an undamaged or gently scuffed bumper was sufficient proof that such a minimal impact could not have possibly caused a severe injury. That approach coupled with effective cross-examination during trial and a jury with demonstrable common sense, and practical life experiences, helped keep trial strategies simple and verdicts low.

The ability to disprove low impact damage injuries particularly benefitted the Special Investigation Units and the insurance industry, since so many questionable injury claims arise from these types of accidents. Then came one rather unexpected decision in Illinois, eventually to be mimicked by other states.

Gaetano DiCosola v. Karyn Bowman – 342 Ill. App. 3d 530, 794 N.E.2d 875, 276 Ill. Dec. 625, Appellate Court of Illinois, First District, Sixth Division (July 11, 2003)

In 2003, the Illinois appellate court handed down a seemingly anomalous decision in *DiCosola v. Bowman*. The court in that case required the use of expert testimony to support the defense argument that the subject vehicle damage was too minimal to have caused injury. At first, very few read this seemingly narrow decision to mean that expert biomechanical or medical testimony was necessary to support defense arguments that minimal vehicle damage was insufficient to cause injury. Unfortunately, however, courts throughout Illinois, and in other states, began misinterpreting *DiCosola* and other similar cases as requiring that insurers retain biomechanical and medical experts in *all* cases in which minimal force of impact and vehicle damage formed the basis of their defense to proximate cause and damages. In fact, though, the court in *DiCosola* did not establish such a bright line rule.

This widespread misinterpretation of *DiCosola* spread from trial court to trial court quickly, and ultimately changed the landscape of low impact collision cases. Thus, soon the costs of defending an injury case skyrocketed as insurers were required to retain costly biomechanical and medical experts to refute even the most minimal and insignificant impact collision case. At the same time, shrewd and effective plaintiffs' attorneys began enjoying success by convincing the courts to bar those expert opinions if they were not airtight in their foundation. This situation gave rise to a stark uptick in cases with increased medical specials associated with low impact collisions. Moreover, insurers spooked by the prospect of having their expert's opinions stricken, found themselves offering more towards the settlement of cases that once warranted the payment of significantly less. Meanwhile, everyone's insurance premiums began a steady march upward (even for plaintiff's attorneys!).

Common Sense Restored

Peach v. McGovern – Supreme Court of Illinois, 95 N.E. 3rd 513, 2019 IL 123156 (January 25, 2019)

Happily, at least for some, the Illinois Supreme Court has recently restored common sense. On January 25, 2019, that court handed down its decision in *Peach v. McGovern* and addressed the question of whether it was error for the trial court to admit photos of the rear of plaintiff's vehicle, and error to allow defense to make arguments that the photos showed such minimal damage that plaintiff could not have been injured in the rear-end collision. Defendant did not put forth any expert testimony in support of that argument, and the jury entered a verdict in favor of the defendant and plaintiff appealed.

Peach was nothing short of the Supreme Court's opportunity to either to make *DiCosola*, and its apparent misinterpretation the law of the land, or overrule it. Fortunately, after sixteen years of clear misinterpretation of that decision, the Court followed the path of reason and common sense and ruled that *DiCosola* is no longer good law. Therefore, a trial judge, at least in Illinois, is free once again to allow a jury to assess, through the prism of its everyday common sense, whether vehicle damage photos support a claim of injury.

Conclusion

Although *DiCosola* was a hindrance to cost-effective litigation for years, its legacy was somewhat positive for the claims industry and defense bar. Because, today, most insurers and their defense attorneys have compiled formidable arsenals of well-qualified and effective medical and biomechanical experts. In addition, we now have the option to use them as we see fit, on especially worthwhile cases, without having to endure the time and expense associated with retaining them on every file. All in all, a real peach of a development.

Note from the Editor: *Law Update's regular columnist, Rick Hammond, is on vacation for this issue of "SIU Today." We welcome his Partner, Eric Moch, a well-known insurance fraud attorney as his stand-in.*

Eric W. Moch, a partner in the Chicago office of HeplerBroom, LLC, focuses his practice on organized medical fraud and insurance fraud cases, including organized activity and staged and caused losses, as well as first and third party coverage and bad faith defense. Mr. Moch counsels and represents national insurers, businesses, not-for-profit organizations and individuals in a variety of matters and litigated disputes. His insurance fraud practice entails the defense of insurers and their insureds against fraudulent claims at trial and the pursuit of civil recoveries for insurance carriers that have resulted in financial recoveries against medical fraud perpetrators. He has extensive civil litigation experience in Illinois state and federal courts, including in excess of fifty jury verdicts, oral arguments before the Illinois Supreme Court and Seventh Circuit Court of Appeals and several published appeals. He is a former national board member of the National Society of Professional Insurance Investigators and is the former President of the Illinois chapter. Mr. Moch has also held several positions in the insurance industry, including as a founding member of a Special Investigations Unit for an international insurer, a role in which he investigated alleged fraudulent claims across a wide range of insurance lines. Mr. Moch can be reached at (312) 205-7712 and at eric.moch@heplerbroom.com.