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MINOR Impact MAJOR Litigation

by Keith E. Donovan

For most of us who try personal injury cases which arise out of motor vehicle accidents, the routine case was the minor impact, rear-end accident with admitted liability. Whether you are a plaintiff or defense practitioner, this was the type of case which tended to have predictable issues at trial. When the Delaware Supreme Court decided Davis v. Maute, 770 A.2d 36 (Del. 2001), we all had to re-think how we would prepare to try these previously routine cases. The decision in Davis called our prior practices into question by requiring competent expert testimony before a party can argue a correlation between the extent of property damage and the seriousness of one's personal injuries. The litigation which followed Davis resulted in an additional three Delaware Supreme Court decisions which relate to the scope of the Davis decision. Those cases are Eskin v. Carden, 842 A.2d 1222 (Del. 2004), Mason v. Rizzi, 843 A.2d 695 (Del. 2004), and Potter v. Blackburn, 850 A.2d 294 (Del. 2004). I was asked to write this article to identify and discuss the legal issues that arose in a case of mine that started out as a typical rear-end accident case.

My case involved a young woman who was involved in a motor vehicle accident on June 17, 2000. Her case proceeded to trial in December 2002, and ultimately was appealed to the Delaware Supreme Court. The significance of the timing of the trial is that it occurred after the Davis decision, but before the Eskin, Mason, and Potter decisions. This led to an odd appellate record because the issues framed by counsel and decided by the Superior Court were all based on Davis and the mix of Superior Court decisions that existed at the time of trial. After two sets of briefing and an en banc oral argument, the Delaware Supreme Court concluded that it had an inadequate trial record to analyze the substantive issues and determine whether there was either an error of law or an abuse of discretion. As a result, the jury's verdict of $26,000 in favor of the plaintiffs was affirmed. The substantive issues raised in this particular case remain unanswered.

THE CASE

The plaintiff was a passenger in a car that was rear-ended by defendant at a yield sign. At the time of trial, the defendant admitted liability for the accident. The plaintiff admitted at the scene that she was not experiencing any pain. The evidence was that the plaintiff began to experience the effects of the accident a few days later. The injuries claimed by the plaintiff were neck pain and headaches. The plaintiff's history was significant in that she had three prior motor vehicle accidents which resulted in similar injuries. Plaintiff presented the testimony of two medical doctors in support of her claim. The defendant presented the testimony of a medical expert of her own and he opined that the plaintiff sustained a cervical strain, by history. The legal controversies surrounded whether the defendant could present the testimony of a biomechanical expert, the scope of the testimony of the defense medical expert, and the scope of the defendant's testimony.

BIOMECHANICAL TESTIMONY

The defendant sought to present the testimony of a biomechanical expert who would have testified that the loads placed on plaintiff's spine were comparable to or less than the loads placed on her spine during everyday activities. The trial court excluded this witness from testifying. The issues surrounding the admissibility of this witness's testimony were many. What is the impact of the fact that the defense medical expert seemingly conceded that the plaintiff sustained some injury as a result of the accident? Can the proffered biomechanical testimony stand on its own merits regardless of the expected testimony of any medical expert? Does it make a difference that the plaintiff has a history of three prior motor vehicle accidents with resulting similar injuries? Part of the language in the recent Delaware Supreme Court cases states that any generalized conclusions of a biomechanical expert must be applicable to the particular plaintiff. The implication of that statement relates to the admissibility of expert testimony when the plaintiff has pre-existing medical conditions which may place plaintiff outside that scope of generalized conclusions which have not been validated to someone with plaintiff's unique medical history. In this area, there is an ironic twist of the interests of the parties. In order to successfully convince the trial judge that the generalized conclusions of the biomechanical expert should be admissible, defense counsel will be forced to downplay the significance and relationship of any medical history of the plaintiff to the case at bar. Plaintiff's counsel, by contrast, will be forced to argue that the plaintiff's medical history is significant enough to make the biomechanical expert's testimony inapplicable to this particular plaintiff. At trial, the attorneys will be tempted to argue just the opposite. The question remains whether counsel's arguments at trial will be limited by the pretrial arguments made over the admissibility of a biomechanical expert. A related question is who has the burden of proving plaintiff's pre-existing medical condition when the issue is the admissibility of a biomechanical expert? And what is the standard to be applied in assessing this claim? In my case, the trial judge applied the rationale of Davis and excluded the biomechanical expert from testifying. When this case went to trial, many practitioners assumed that if the medical experts agreed that there was some injury caused by the accident, a biomechanical expert could not testify in a manner that suggests a different conclusion.

The Delaware Supreme Court has cast doubt on that assumption by explaining in Rizzi that "[w]e reject the notion, suggested by the term 'medical causation,' that biomechanical expert opinion can never be admitted unless the opinion is seconded by or relied upon by a physician in forming that physician's opinion about whether an accident caused physical injury to a person." It remains to be seen under what circumstances such biomechanical testimony alone would be deemed admissible.

LIMITING THE DEFENSE MEDICAL EXPERT

I moved to limit the scope of the defense medical expert's testimony. In this particular case, I sought to prevent the defense medical expert from testifying that "there was no air-bag deployment and the damage to the plaintiff's vehicle was very limited." The quoted statement was taken directly from the doctor's expert report. The trial court excluded this portion of the doctor's testimony. The issue here focuses on the scope of the doctor's expertise. The difficulty is in differentiating what is considered expert opinion and what is considered part of the history provided to the doctor by the plaintiff directly or through the plaintiff's medical records. In addition, the doctor may have access to information that came not from the plaintiff, but from defense counsel. If a medical expert says that he relied, in part, on a particular piece of information in formulating his opinions, does the expert's reliance on that information make the information admissible at trial? Many times the medical experts have been provided with the police report, photographs of the vehicles, and property damage estimates. Practitioners must be prepared to address the significance of who provided the information to the medical expert and whether the medical expert has competence to analyze the particular information. In this particular case, I argued to the trial judge that the "no air bag deployment" comment should be excluded because air bags are not supposed to deploy in a rear-end accident. My argument prompted the trial judge to ask whether we would need an air-bag expert or automotive engineer to first establish whether the lack of air-bag deployment was significant in the context of a rear-end accident. Understanding the medical expert's credentials and what he relied upon in reaching his conclusions are important when faced with this type of issue.

LIMITING THE DEFENDANT'S TESTIMONY

Prior to the defendant taking the stand, I requested that defense counsel provide a proffer of the anticipated testimony. In the context of this case, the biomechanical expert had been excluded and the defense medical expert had been limited in the scope of his testimony. My concern was that the defendant would take the stand and would say things that would essentially undue the rulings that the court had made. Specifically, I was trying to prevent the defendant from saying what we have all heard so many times: I was completely stopped and was three feet away from the plaintiff's vehicle when my foot slipped off of the brake; I just rolled forward and tapped plaintiff's bumper; I talked to the plaintiff and we didn't see anything wrong with the cars – except that tiny scratch on the bumper. It was the implication of these types of statements that I was attempting to prevent. The trial judge prevented the defendant from making any statements about speed of impact or damage to the vehicles. As a result, defense counsel decided not to call the defendant to the stand. Attorneys trying these cases must be prepared to address what a defendant or a plaintiff can and cannot say with respect to speed and nature of impact.

CONCLUSION

The purpose of this article was not to provide an analysis of every issue which can arise, but only to highlight the issues which arose in one routine minor impact, rear-end accident with admitted liability. Attorneys who are handling these types of cases should think about these issues well in advance of trial. It may be that discovery depositions of the biomechanical experts and the medical experts will be necessary to properly frame the legal issues for the trial judge. At the very least, presenting the legal issues to the trial judge in the form of a written Motion In Limine is the safer way to try to prevent improper information from getting to the jury.