TRIAL TALK

COLORADO TRIAL LAWYERS ASSOCIATION

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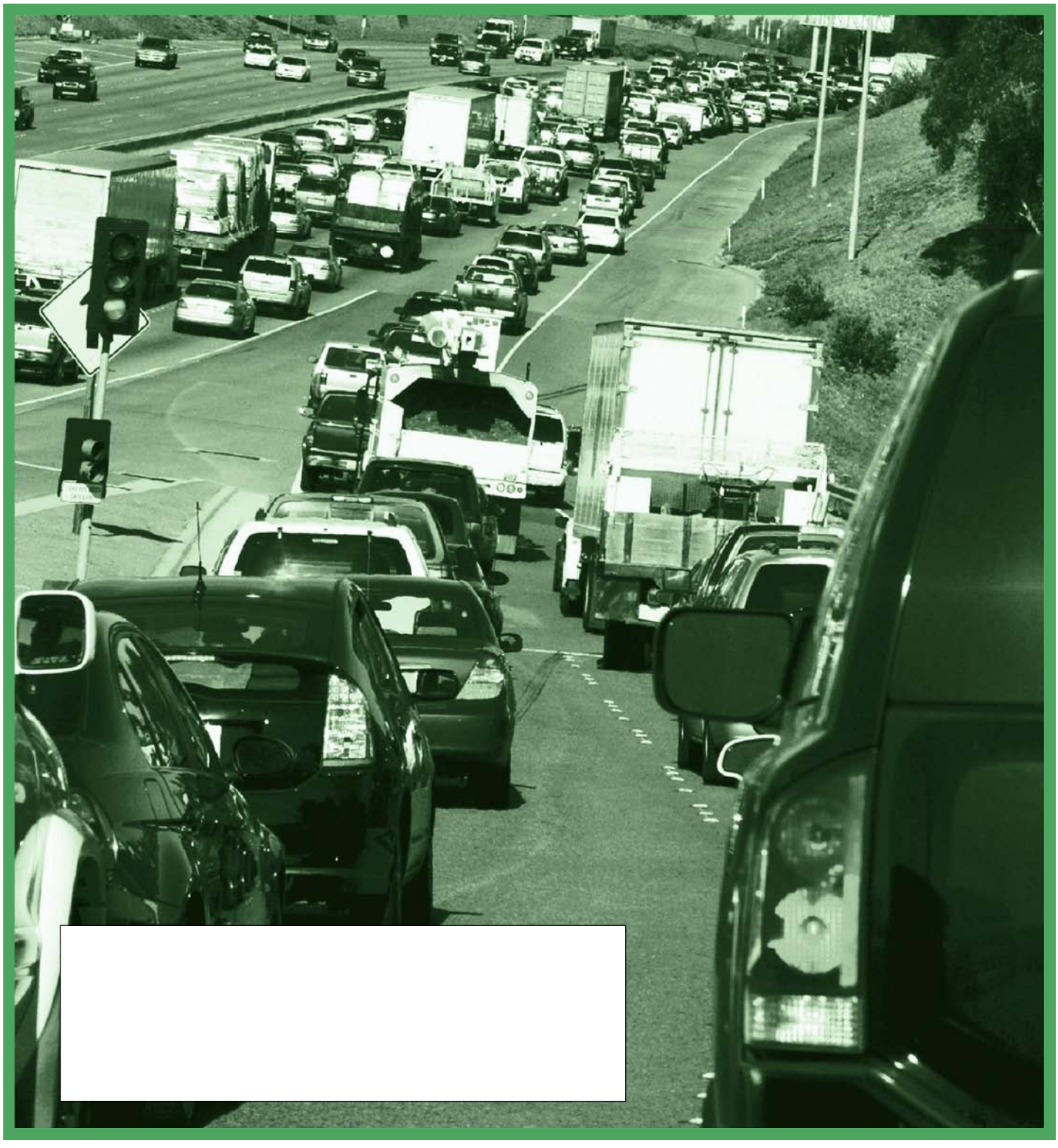

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FEATURES

DEPARTMENTS

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Ninety-Year-Old Incivility

John Sadwith, Esq.

Thought I would tell you a bit about my Florida visit with my 92-year-old mom. She lives alone in a rather new condominium development in Delray Beach having sold her house after my dad passed away.

Now you should know that I am a non-practicing Jew. That doesn't mean that I don't recognize my roots or that I am not proud of my heritage, rather that I am not into ritual and ceremony. I was to visit during Yom Kippur, the holiest of the Jewish High Holidays, the day of repentance.

My mother was raised in a Kosher and Orthodox household in New Jersey; her mother's marriage was an arranged one with a rabbi who arrived by boat from Riga, Latvia. Knowing that my mother would be all over me about attending services, I cut a deal with her. She agreed, in advance, not to put the religion trip on me. In return, I agreed to go to temple on Sunday night for Kol Nidre. The cantor (chanter-singer of prayers) had such a good voice that it wasn't that bad just listening to her sing, though my mother thought the trainee cantor had a better voice (interesting considering my mom is getting more deaf by the day). She also thought the cellist was terrible and hated the way the rabbi used his hands when he was talking. It is hard to satisfy this woman.

Anyway, I expected her to leave for temple on Monday morning at 8:45, but when I went into the dining room at 9:00 a.m., there she sat. She said that the woman who planned to give her a ride had fallen and could not go. I offered to take her to the 10:00 service, but she said she would just go to Yisker (a service to pray for the dead) at 5:30. She said that God would probably forgive her.

I then asked about the symbolism of the seven candles she lit on the stove. She explained that they were for my dad, her mother (and maybe her father), dad's mother and father and her brother and someone else. I asked about her other siblings but she said she didn't light one for anyone who had children who could be lighting candles for them. I asked why she stopped at her mother. Why not light for her grandparents? How does one determine with whom to stop? I was truly interested but she got angry and started yelling at me that I had no heart, I had no faith and was essentially worthless because I had not fasted (fasting being an essential element of Yom Kippur day).

This, after the first thing she asked me that morning was what I wanted to eat for breakfast. I retreated to my room and only stated that she promised not to get mad about temple and religion. She said, "I only promised not to kill you." I laughed to myself, put on a suit and took her to temple for another 3 hours. I had to go with her after her witty and meaningful response.

The development she lives in is for older folks (over 65) and the developer only recently turned management over to the resident-controlled association. It is not an assisted living facility. Until this year, the developer controlled the board. As the economy soured, promised services and repairs went by the wayside. The developer stopped the valet service (yes, she is still driving), eliminated bus service to shopping and doctor appointments and cut dining room hours from the promised seven days a week to five. Many of the units sit unsold. The developer and other investors held onto their units as they lost value and eventually rented as many as they could.

Not only had I arrived for Yom Kippur, I was lucky enough to be there for the culminating vote to rescind an agreement everyone signed when they bought their units. The agreement was to pay a mandatory $400 per month to belong to the "Club." The developer owned the "Club," which consisted of the dining room, an exercise room, some office spaces and three condominiums that members could rent for visiting families. The residents needed 75% of votes of non-developer owned units to rescind.

The fight over the mandatory fee had been brewing for many months because the developer was not charging the fee to the renters of his many units. He also curtailed the dining room hours, failed to pay his own association dues and was in arrears for hundreds of thousands of dollars. Now, obviously, I know nothing about condominium law in Florida but you all know how it is. Your mother thinks (at least the Jewish ones), because you are a lawyer that you are an expert on all things - unless those things relate to her personally, in which case you know nothing. So there she is bragging about her lawyer son from Colorado and suggesting that anyone wavering on his or her vote hear my opinion.

The rescission fight was brutal. There was a board meeting the night preceding the vote. The average age of the membership had to be 90. Many came in wheelchairs and almost all were hard of hearing. It was a free for all of yelling, threats and accusations. It was incivility at its best. Those opposed to rescission relied on the dining room for many of their meals and were afraid that it would close (I guess they didn't like to cook in their own units - or couldn't). The others saw a savings of $400 per month and had a huge mistrust of the developer (rightfully so). I was shocked. I really thought someone was going to throw an oxygen cylinder at someone. All the while many were continuously yelling that they couldn't hear. Thank God there were no machine gun turrets on those wheelchairs. Then the developer's son, when asked what would happen to the dining room if they voted to rescind the mandatory $400 @ month, said that they would serve TV dinner type meals; this from someone

who wouldn't know a TV dinner from the silver spoon in his mouth. The developer was absent. They told us he was at the Mayo Clinic, though three days earlier he was present for an invitee-only reception for residents who might be on the fence with their vote. I understand that they served big shrimp.

Earlier, the developer's lawyer posted a letter on the wall by the elevators to tell the residents that they couldn't serve free bagels and coffee in the common area or put out cookies on the front desk counter (as was their custom). Supposedly they agreed when joining, as part of the "Club" contract that as long as the developer had the restaurant (notwithstanding that it was only open 5 days a week) that no one could serve any food in the common areas. I dubbed this the "Bagel Wars." The place was in an uproar - probably the most excitement the residents had seen in years.

Finally, the voting was Wednesday morning, and the residents voted to rescind the mandatory payments and the "no food in common areas" clause. They needed 75% of the non-developer owned units to vote yes. They got that plus four. I addressed them before the vote and asked them to respect each other in the way they would want their children to act in similar circumstances. The meeting was civilized with the exception of one of the developers who jumped down my throat for trying to make sure he got a satisfactory answer to a question he asked of the association lawyer. I heard later that within an hour of the meeting, management pulled the table clothes off the tables in the dining room and replaced them with paper placemats. They arranged the tables in a cafeteria style set up. I understand that some residents are now bringing their own tablecloths and have a choice of only two entrées. By the way, the $400 didn't cover the cost of the food, just admission to the dining room. "Members" paid for their food as they would in any restaurant. The food fight has only just begun.

The economy and condo market in Florida is so bad that another three-bedroom unit (my mother's is a three-bedroom unit) was sold in the building at auction (after foreclosure) for something like $25,000. Four years ago three-bedroom units in that development sold for more than $300,000. So, that is my story. You ask what relevance this has to CTLA? Well probably not much, other than musing from an executive director without much to say. Or…are we once again talking about incivility, one of my favorite topics? The incivility of neighbors fighting each other, of a developer towards his customers, and of conflicts over religion. Sounds like the real world doesn't it?

The Admissibility, Disclosure and Exclusion of Expert Opinion Testimony in Auto Cases

By Mac Hester, Esq.

Introduction

The Colorado Rules of Civil Procedure (CRCP) and the Colorado Rules of Evidence (CRE) were, as were all the other rules governing the various aspects of our judicial system, created and implemented to bring some order out of the chaos that is the common law. The CRCP and CRE have been somewhat effective at instituting order. However, courts have been quite effective at reinstituting chaos: trial courts on the micro level with interesting interpretations and applications of the rules, the Colorado Court of Appeals on the macro level with erroneous interpretations and applications of the rules, and the Colorado Supreme Court with reversals of court of appeals decisions and long-standing precedents. This is particularly true in the past couple of years. The Colorado Supreme Court stunned the bench and bar in 2007 with *People v. Ramirez*,[1] which changed the standard for the admissibility of expert opinion evidence and then pleasantly surprised much of the bench and bar with *Trattler v. Citron*[2] in 2008 by restoring some sanity to the issue of the exclusion of expert opinion evidence due to inadequate disclosure.[3]

This article examines the interplay between the Colorado Rules of Civil Procedure (CRCP) and the Colorado Rules of Evidence (CRE) to illustrate that a correct application of the rules often requires counsel to do things differently than "the way things have always been done" or "the way things are done." This is the predominant basis of the common law and how many people, especially attorneys and judges, operate on a daily basis. More specifically, this article focuses on CRE 702, which governs the admissibility of expert opinion evidence; CRCP 26, which governs the disclosure of expert opinion evidence; and CRCP 37, which governs the exclusion of expert opinion evidence due to inadequate disclosure. It will illustrate that trial courts often go overboard on the exclusion of some expert opinion evidence while not going far enough on the exclusion of other expert opinion evidence.

Lay Opinion Testimony

The common law restricted lay testimony to observed facts and personal knowledge. Courts prohibited lay opinion testimony due to concerns about the reliability of lay opinions except in two situations: "collective fact opinions" and "skilled lay observers."[4]

The collective fact doctrine allows lay witnesses to testify to opinions about such things as height, distance, speed, time, color and identity. The lay witness must base opinions on observed facts, the opinion must be a type of inference that lay persons commonly make, and the lay witness cannot verbalize all the underlying sensory data supporting the opinion.[5] Common law based this exception on common experience - most people can estimate such things as height, distance, speed, time, color and identity.

The skilled lay observer is someone who has more experience or skill in a particular area – but not necessarily subject matter. For example, a person may have experience in recognizing another person's voice or handwriting. The lay witness is not a voice or handwriting expert but nonetheless has more expertise in such areas with regard to this particular person than the general public. Opinions are permitted in such areas as voice, handwriting, appearance of persons, manner of conduct, general mental condition (but not diagnosis), and a person's competency or sanity if intimately familiar with the person.[6]

The CRE has addressed concerns about the reliability of lay opinion testimony with CRE 602 and 701. CRE 602 provides that a witness may not testify to a matter unless the witness has personal knowledge of the matter – subject to CRE 703 regarding expert opinion testimony. CRE 701 provides that lay witness opinions must be limited to those opinions which are (a) rationally based on perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of CRE 702.

Police officers and State Patrol troopers may provide lay opinion testimony regarding their traffic incident investigations – as long as they do not go too far. In *People v. Stewart,* the court held that a police officer with accident investigation training could not offer accident reconstruction opinions.[7]

Expert Opinion Testimony

CRE 702 governs expert opinion testimony, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Prior to April, 2007, if there was one thing that was certain in the world of expert opinion testimony it was that expert opinions must be stated to a reasonable degree of certainty or probability in order to be admissible. Then, in April, 2007, the Colorado Supreme Court decided *People v. Ramirez* and turned the world upside down.

People v. Ramirez

In *People v. Ramirez*, the state charged Ramirez with sexual assault on a child. At trial, a pediatric nurse practitioner testified that she conducted a sexual assault examination on the child and that the examination yielded a "suspicious" result out of the four possible results (normal; non-specific; suspicious, definitive).[8] On voir dire examination, the nurse admitted that she had not stated her opinions to a reasonable degree of medical certainty. Defense counsel then objected to the nurse's opinions as not helpful to the jury under CRE 702 and *People v. Shreck*[9] because she had not stated her opinions to a reasonable degree of medical certainty. The trial court ruled that the nurse's opinions would be helpful to the jury and allowed the nurse to testify.[10]

The jury convicted Ramirez. Ramirez appealed, challenging the admission of the nurse's testimony. The court of appeals reversed the trial court, holding that the nurse's testimony was speculative and therefore not a competent basis for an expert opinion.[11] The Colorado Supreme Court granted certiorari, reversing the court of appeals and holding that CRE 702 establishes the standard for the admission of expert testimony. The court held that the nurse's testimony was relevant, reliable and helpful to the jury and was therefore admissible under CRE 702.[12] The court overruled *Songer v. Bowman*[13] and *Daugaard v. People*[14] and all other cases that approved of the reasonable medical probability standard for the admission of expert testimony.[15]

The court noted that *People v. Shreck* held that scientific evidence is admissible under CRE 702 if the testimony is reliable and relevant.[16] The court then outlined the proper analysis for the admission of expert testimony.

The threshold determination is whether the expert evidence is relevant under the broad standard of CRE 401.[17]

The next determination is whether the expert evidence is reliable and relevant under CRE 702.[18]

The reliability prong of CRE 702 has two determinations: (1.) Whether the scientific principles underlying the expert evidence are reasonably reliable; and (2.) Whether the expert is qualified to opine on such matters.[19]

The court addressed the question of speculative testimony under the reliability prong of CRE 702.

> Testimony is not speculative simply because an expert's testimony is in the form of an opinion or stated with less than certainty; i.e., 'I think' or 'It's possible. . .' Instead, speculative testimony that would be unreliable and therefore inadmissible under CRE 702 is opinion testimony that has no analytically sound basis.[20]

The court then stated that a trial court may reject expert testimony that is connected to existing data only by a bare assertion resting on the authority of the expert.[21]

Whether the expert evidence would be useful to the fact finder determines the relevance prong of CRE 702.[22] The court stated that evidence would be useful to the fact finder if it assisted the fact finder in understanding other evidence or in determining a fact at issue.[23]

Finally, the danger of unfair prejudice or the other factors set forth in CRE 403 must not substantially outweigh the probative value of the evidence.[24]

Although this article does not examine the court's application of the facts and evidence in *Ramirez* to each step in the outlined analysis, the author will note the following facts in the case: The emergency room physician who examined the victim testified that the sexual abuse exam was normal and that a normal exam does not rule out sexual abuse.[25] The pediatric nurse practitioner conducted her sexual assault examination a month later and used a special instrument (colposcope), which the emergency room physician did not use.[26] The nurse testified that the sexual abuse exam has four categories – normal, non-specific, suspicious, and definitive – and that her finding was "suspicious" which means that the finding could have been caused by sexual abuse or by something else.[27] The nurse testified that "definitive" findings include sperm in the anus, immediate dilation of the anus during the exam due to loss of muscle tone, and skin tags outside of the midline of the anus.[28] The nurse did not testify as to the meaning of a "non-specific" finding.[29] From these facts, the court stated that it is logical to assume that the four-category test is a progressive scale with the scale being progressively indicative of sexual abuse. Further,

> ... it logically follows that 'suspicious,' being closer on the scale to

'definitive' than 'normal,' indicates a finding that is more indicative of sexual abuse than a 'non-specific' finding, which is closer to 'nomal' than 'definitive' on the scale.[30]

The nurse did not testify that there was a logical progression. Because of the logical progression of the scale, the scale is based on reasonably scientific principles sufficient to satisfy CRE 702.[31] The court then noted that the defendant, on cross-examination, "could have pursued further information regarding the difference between 'non-specific' and 'suspicious' findings, but elected not to do so."[32] In other words, the defendant was partly to blame for the lack of foundation for the adverse expert's opinion! The court went on to state that CRE 705 does not require the expert in direct examination to testify as to the underlying facts or data on which the expert opinion is based, but would have to do so on cross examination if questioned on that issue.[33]

Finally, the court stated, "The court of appeals found that a statement of mere possibilities does not rise to the level of evidence and could not have assisted the jury in deciding the outcome. We disagree."[34] So, *Ramirez* holds that a statement of "mere possibilities" may be sufficient for the admission of expert testimony under CRE 702.

Ironically then, the one area of certainty of the common law that heretofore existed has been replaced with a rule that is certain to cause chaos. How does one consistently apply a "possibilities" standard to expert testimony? The answer – not entirely satisfactory – is that one simply applies the analysis outlined in *Ramirez*.

An additional consequence of *Ramirez* is its impact upon the disclosure of expert testimony.

The Impact of *People v. Ramirez* on the Disclosure of Expert Opinions

Most attorneys think about the disclosure of expert opinion evidence before they think much about the admissibility of such evidence. This is due to two factors:

1) The disclosure of expert opinion evidence occurs prior in time to the admission or exclusion of expert opinion evidence at trial, and

2) It is still ingrained in the brains of attorneys and judges, despite the holding of *Ramirez* to the contrary, that the standard for the admission of expert opinion testimony is that experts must testify to a reasonable degree of certainty or probability. However, *Ramirez* held that experts can testify to "possibilities" subject to CRE 702.[35] This change in the standard of admissibility of expert opinions impacts the standard for **disclosure** of expert opinions.

CRCP 26(a)(2) requires the disclosure, prior to trial, of all expert opinions as to who will testify at trial and the basis and reasons for the opinions (120 days before trial for plaintiff's experts; 90 days before trial for defendant's experts; 70 days before trial for plaintiff's rebuttal experts). CRCP 26(e) requires the timely supplementation of expert opinion evidence. CRCP 26(a)(2) does not require the disclosure of expert opinions held by experts who are not going to testify at trial.

Because CRCP 26(a)(2) requires attorneys to disclose expert opinions they will offer **at trial**, the standard for disclosure of expert opinion is "possibilities" subject to CRE 702.

However, prior to *Ramirez* (and maybe to the present), trial courts essentially required a standard of reasonable probability regarding the disclosure of expert testimony. That is, expert opinions stated in the disclosure must be held by the expert to a reasonable degree of probability or be subject to being stricken - and possibly sanctions being imposed against the attorney who disclosed the stricken expert opinions.

Attorneys sometimes depose experts to discover whether the experts hold the opinions expressed in their CRCP 26(a)(2) disclosure to a reasonable degree of probability and, if they do not, then the attorney may file a motion to strike or limit the expert's testimony.

Attorneys sometimes self censor their expert disclosures. They do not disclose expert opinions that are scientifically reliable but which their experts hold to less than a reasonable degree of probability.

Now, in view of *Ramirez,* trial courts should stop applying a reasonable probability standard to expert disclosures, attorneys should stop filing motions to strike or limit expert opinions that are not stated to a reasonable degree of probability and attorneys should stop self-censoring their expert disclosures when it is not necessary to do so.

And, the bench and bar should start applying the correct standard to the disclosure of expert opinions.

So what is the correct standard for the disclosure of expert opinion testimony?

Is it "mere possibility?" Anything is possible, but it is obviously ridiculous to admit evidence of anything that is possible. Is it "reasonable possibility?" What is reasonably possible versus unreasonably possible? Would reasonable possibilities cross over into the realm of probabilities? Who knows? Nobody knows.

Asking the question about reasonable possibilities reveals our undying attachment to the reasonable probability standard ("you can take my reasonable probability standard – when you pry it from my cold, dead hands"). Fortunately, we can avoid the question altogether – like the court did in *Ramirez* – by letting go of the sacred past and by applying CRE 702 through the analysis outlined in *Ramirez*.

Disclosure of Expert Opinions and Non-Opinion Information

CRCP 26(a)(2) requires the disclosure of opinions that experts will express at trial and the disclosure of certain additional information. The additional information to disclose depends upon the type of expert who will testify.

CRCP 26(a)(2)(B)(I) experts (Specially retained experts; Professional experts) - Specially retained experts are experts counsel retained or hired specifically to testify at trial. They may or may not have had a role in the case prior to their being retained (usually not). They often make a living or derive a substantial portion of their income from working as an expert hired to testify.

CRCP 26(a)(2)(B)(II) experts (Non-specially retained experts; Occupational experts) - These experts are experts who counsel did not retain or hire specifically to testify at trial. They usually had a role in the case; e.g., treating physicians of the injured plaintiff.

The rule requires more extensive disclosures for specially retained/professional experts than for non-specially retained experts.

The disclosure for specially retained (CRCP 26(a)(2)(B)(I)) experts must include a written report or summary. The report or summary must contain:

1. A complete statement of all opinions the experts will express and the basis and reasons for those opinions;
2. The data or other information considered by the witness in forming the opinion;
3. Any exhibits the experts will use as a summary of or support for the opinions;
4. The qualifications of the witness, including
   a. A list of all publications authored by the witness within the preceding ten years;
   b. The compensation for the study and testimony; and
   c. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

In addition, the expert shall provide any report that the expert issues.

The provision requiring disclosure of information "considered" by the witness in forming the expert opinion includes attorney work product that the expert reviewed even if the expert did not rely upon it.[36]

The disclosure for non-specially retained (CRCP 26(a)(2)(B)(II)) experts must include a written report or summary. The report or summary must contain:

1. The qualifications of the witness; and
2. A complete statement describing the substance of all opinions the expert will express and the basis and reasons for those opinions.

Inadequate Disclosure of Expert Information

CRCP 37(c)(1) provides that the court may impose sanctions for violations of the disclosure requirements of CRCP 26(a). If counsel fails to make a required disclosure, then the undisclosed evidence is not admissible at trial unless the non-disclosure was substantially justified and is harmless. In addition to or in lieu of the exclusion of the non-disclosed evidence, the court may impose other sanctions.

Despite the clarity of CRCP 37(c)(1) that *non-disclosed* information is to be excluded only if the non-disclosure was substantially unjustified and prejudicial, panels of the Colorado Court of Appeals twisted the rule into its exact opposite: the entire testimony of an expert – including *disclosed* substantive opinions – could be excluded if there was incomplete disclosure of non-opinion information. In *Carlson v. Ferris*, the court excluded the entire testimony of a physician because his testimonial history was not disclosed.[37] In *Svendsen v. Robinson*, the court excluded the entire testimony of a physician because the disclosure of his testimonial history listed case names, attorney names, law firm names, and his testimony at trials and arbitrations but did not list case numbers, court names, venue, or his deposition testimony.[38]

If a party completely fails to file expert disclosures or if a party discloses only substantive opinions but none of the other required information, then the first element of the CRCP 37(c)(1) sanction – exclusion of the non-disclosed information – would be meaningless, as the non-disclosing party would benefit from the non-disclosure and the adverse party would be prejudiced. In that case, the second element – additional or other sanctions such as exclusion of the entire testimony of the expert– might be appropriate. Unfortunately, however, the trial courts went overboard on the exclusion of expert testimony for relatively minor and harmless violations to such an extent that the exclusion of expert witnesses became a hypocritical game in which adverse parties attempted to exclude experts despite the adverse parties already having the information (through data banks) that the other side did not disclose.[39] This ridiculous situation led to *Trattler v. Citron*.

Trattler v. Citron

In *Trattler*, the trial court excluded two of the plaintiff's physician experts. The defendant had moved to exclude Dr. Birrer because he failed to document six prior cases in which he testified.[40] The significance of this fact being that the defendant could not have known that Dr. Birrer had left six cases off the list unless the defendant already had the entire list. The plaintiff supplemented the disclosure with the six cases nineteen days prior to trial.[41] The defendant had moved to exclude Dr. Schapira on the ground that he had failed to document over one hundred previous cases in which he testified.[42] Again, how did the defendant know that it was over one hundred cases? The plaintiff supplemented the disclosure with 155 cases twenty-five days prior to trial and stated that it was a complete list.[43] Despite

these supplementations, the trial court entirely excluded the testimony of Drs. Birrer and Schapira.

The plaintiff appealed and the court of appeals affirmed the trial court in an unpublished opinion. The Colorado Supreme Court granted cert, reversed the court of appeals, and overruled *Carlson, Svendsen & Woznicki v. Musick*[44] to the extent that they are inconsistent with *Trattler*.[45] The court held that the court of appeals misread CRCP 37(c)(1) to require witness preclusion for failure to disclose testimonial history, failed to consider other sanctions provided in the "in addition to or in lieu of" section of the rule and imposed a sanction that was not commensurate with the nature of the violation. It held that the trial court abused its discretion by precluding the testimony of the physicians.[46]

While *Trattler* illustrates the tendency of trial courts to go overboard on the exclusion of expert opinion testimony due to testimonial history disclosure inadequacies, trial courts often do not go far enough in excluding other types of expert testimony – such as the junk science of biomechanics as applied to auto collision injuries.

Biomechanics Applied to Disprove Auto Injuries: Junk Science

Biomechanics deals with the application of forces to living or formerly living beings.[47] Biomechanics is a valid science and its most common application to motor vehicle incidents is to examine how injuries occur in order to improve safety and protect the occupants of motor vehicles.[48] An application of biomechanics typically not found outside of litigation is the use of biomechanics to attempt to prove that a motor vehicle collision did not injure a person.[49]

Defense biomechanics experts (biomechanists) claim there is a threshold level of force below which physical injury cannot occur. They call these forces "G-forces" and say they can determine the G-forces in the auto collision. They compare these G-forces to the G-forces experienced by people in everyday activities and state that the G-forces experienced by the plaintiff in the subject collision were less than the G-forces the plaintiff experiences in everyday life. Therefore, they say the collision could not have injured the plaintiff. Each of these claims is false and the attempted application of biomechanics to prove that the subject auto collision did not injure the plaintiff is junk science.

However, considering the earlier discussion of *People v. Ramirez* and its adoption of a "possibilities" standard for the admission of expert testimony, why would the court exclude a biomechanist's testimony about G-forces from evidence? The answer is that the offered biomechanical evidence fails every step of the CRE 702 analysis.

The forces acting on the occupant in an automobile in a collision are so much more numerous, so much more complex and so different from the forces experienced by a person in daily activities that the forces in daily activities may not even be relevant under CRE 401.

The scientific principles underlying the proposed expert testimony are not reasonably reliable for the same reasons and many more.[50] Courts precluded, in whole or in part, the biomechanical engineers from testifying in the following cases because of the unreliability of the underlying scientific principles:

- *Schultz v. Wells*[51]
- *Clemente v. Blumenberg*[52]
- *Bonilla v. New York City Transit Authority*[53]
- *Whiting v. Coultrip*[54]
- *Azzano v. O'Malley-Clements*[55]
- *Tittsworth v. Robinson*[56]
- *Brock v. Artis*[57]

The biomechanics expert is not qualified to opine on personal injuries. An engineer is not competent to testify as to medical causation of injury:

- *Smelser v. Norfolk Southern Ry. Co.*[58]
- *Combs v. Norfolk and Western Ry. Co.*[59]
- *Gammill v. Jack Williams Chevrolet, Inc.*[60]
- *Cromer v. Mulkey Enterprises, Inc.*[61]
- *Doherty v. Municipality of Metropolitan Seattle*[62]
- *Kelly v. McHaddon*[63]

The proffered biomechanical testimony would not be helpful to the jury:

- *Schultz v. Wells*[64]

Finally, the danger of unfair prejudice substantially outweighs the probative value of the evidence:

- *Schultz v. Wells*[65]

Apply the CRE 702 analysis to the other defense experts (and to one's own experts to ensure that their opinions will be admissible).

Obtaining Information for the Disclosure of Expert Opinions and Information

How does the plaintiff's attorney obtain expert opinions and information for the CRCP 26(a)(2) disclosure of the plaintiff's experts in an auto case?

The CRCP(26)(a)(1) initial witness and document disclosure and supplemental disclosures will identify most or maybe all of the occupational experts such as police and patrol officers and treating physicians. If liability is at issue, then the plaintiff's attorney must determine whether a liability expert, such as an accident reconstructionist, is needed in addition to the law enforcement personnel who investigated the collision. The plaintiff's attorney should review the plaintiff's medical records to determine whether the treating physicians have rendered adequate causation opinions. If not, then the plaintiff's attorney should consult with the treating physicians regarding causation and/or consult with and possibly retain an expert to address causation. Finally, the plaintiff's attorney should do an early workup of damages and

determine whether to retain experts such as vocational counselors and economists.

Specially retained experts usually provide a written report, but sometimes the written report is inadequate. And occasionally, an expert will not do a report and the attorney has to draft a summary of the expert's opinions. Consequently, the plaintiff's attorney should conduct in person or telephone conferences with specially retained experts well in advance of the expert disclosure deadline – at least thirty days and preferably sixty days prior to the deadline. Non-specially retained experts usually do not provide written reports, but sometimes, key experts provide narrative reports.

Although conferences with all experts are ideal, CRCP 26 does not require them (contrary to the positions of some trial court judges). Some cases have dozens of treating medical providers, and in cases of severe injury, there may be over a hundred providers. Personal conferences at a cost of several hundred dollars up to a few thousand dollars per conference for conferences with all experts are simply not reasonable in such cases. Counsel must choose which providers to meet with and which providers' opinions are to be gleaned from medical records. It is not sufficient simply to say that Dr. X will testify regarding the matters in his/her medical records. Counsel must disclose the substance of all occupational experts' opinions and the basis and reasons for them. Some attorneys retype the providers' chart notes verbatim into the disclosures. That may be doable when there are only a few or several experts, but not when there are dozens of providers and when there are hundreds or thousands of pages of medical records.

There is not one right way to obtain information for the expert disclosure nor is there one right way to disclose the expert opinions. The attorney will have to figure out what is reasonable under the circumstances. However, in all cases the attorney should try to obtain curriculum vitaes (CVs) as soon as possible because a statement of the qualifications of all expert witnesses is required (A CV is not required but it probably is the easiest way to disclose the expert's qualifications). The testimonial history of retained experts should be pursued as soon as possible because only full time professional expert witnesses keep detailed, up to date testimony lists. Obtaining testimonial histories from part-time professional experts and out of state experts that comply with CRCP 26 is usually a major and continuing headache.

Medical records usually do not expressly contain all the opinions that the treating providers hold, and they often do not express opinions in the form required or preferable in the law or rules. Additionally, some unstated opinions are implicit in expressly stated opinions. However, it would be risky to depend upon implicit opinions being allowed into evidence when such implicit opinions have not been expressly disclosed.

Therefore, the attorney must review the medical records and determine the best course of action to convert implicit opinions into express opinions. Counsel must decide whether to request a narrative report, whether to meet with the provider, whether to provide the client's discovery responses and/or deposition to the treating provider or whether to take a deposition of the provider. Another method is to meet with the client and have the client sign an affidavit regarding his/her pre-incident and post-incident conditions and then provide that affidavit to the provider.

An exemplar form for patient's affidavit follows the endnotes to this article. The provider can then rely upon the patient's affidavit in drafting a narrative report or in advising the attorney of his or her expert opinions, or the provider can complete a report based upon the format of the patient's affidavit. A sample physician's report re: expert testimony also follows the endnotes to this article.

Conclusion

People v. Ramirez radically altered the standard for admissibility – and thus for disclosure – of expert opinion evidence. The current standard for the admissibility and for the *disclosure* of expert opinion evidence is "possibilities" subject to CRE 702. *Trattler v. Citron* restored some much-needed sanity to the sanctions for inadequate disclosure of expert non-opinion information. The ways things have always been done has changed, so change the way you do things. Disclose all expert opinions, whether held to a reasonable degree of probability or not, when those opinions are based upon reasonably reliable underlying scientific principles.

[Note: the Patient's Affidavit and Physician's Report that follow this article are available on CTLA's website, ctlanet.org. Search the Case Assistance materials in the members' only section.]

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Endnotes

1 *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

2 *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008).

3 *See* Francis V. Cristiano, *Trattler v. Citron – Sanity Restored?*, TRIAL TALK, Dec./Jan. 2009, pp.17-20.

4 HON. ROXANNE BAILIN, ET AL., COLORADO EVIDENTIARY FOUNDATIONS, 2d Ed (2008), pp. 373-374.

5 *Id.*, at p. 374; s*ee Stamp v. Vail Corp.*, 172 P.3d 437 (Colo. 2007).

6 *Bailin*, *supra* n. 4 at p. 376.

7 *People v. Stewart*, 55 P.3d 107, 123-24 (Colo. 2002).

8 *Ramirez,* 155 P.3d at 373-374.

9 *People v. Shreck*, 22 P.3d 68 (Colo. 2001)

[10] *Ramirez*, 155 P.3d at 374.
[11] *Id*.
[12] *Id*., at 378-382.
[13] *Songer v. Bowman*, 804 P.2d 261 (Colo. App. 1990).
[14] *Daugaard v. People*, 488 P.2d 1101 (Colo. 1971).
[15] *Bailin*, *supra* n. 4 375-378.
[16] *Id*., at 378.
[17] *Id*., at 380.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*., at 379.
[22] *Id*., at 381.
[23] *Id*. at 379.
[24] *Id*., at 382.
[25] *Id*., at 373.
[26] *Id*., at 373-374.
[27] *Id*.
[28] *Id*., at 381.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Gall ex rel. Gall v. Jamison*, 44 P.3d 233 (Colo. 2002).
[37] *Carlson v. Ferris*, 58 P.3d 1055, 1058-1059 (Colo. App. 2002).
[38] *Svendsen v. Robinson*, 94 P.3d 1204, 1206 (Colo. App. 2004).
[39] *See* Cristiano, *supra* n. 3 at 17-20 for a detailed and excellent discussion of *Todd v. Bear Valley Village Apts.*, 980 P.2d 973 (Colo. 1999), the cases leading up to *Trattler* and *Trattler*, 182 P.3d 674.
[40] *Trattler*, 182. P.3d at 677.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Woznicki v. Musick*, 119 P.3d 567 (Colo. App. 2005).
[45] *Trattler,* 182 P.3d at 681.
[46] *Id.*, at 683.
[47] *See* article by biomechanics expert John Smith in this edition of TRIAL TALK® at p 21.
[48] *Id.*
[49] *Id.*
[50] *See* Smith, *supra* n. 47.
[51] *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).
[52] *Clemente v. Blumenberg*, 705 N.Y.S.2d 792 (N.Y. Supp.1999).
[53] *Bonilla v. New York Transit Authority*, 742 N.Y.S.2d 903 (2d Dept. 2002).
[54] *Whiting v. Coultrip*, 755 N.E.2d 494 (Ill. App. 2001), *as modified on denial of reh'g*, (Sept. 12, 2001).
[55] *Azzano v. O'Malley-Clements*, 710 N.E.2d 373 (Ohio App. 1998).
[56] *Tittsworth v. Robinson*, 475 S.E.2d 261 (Va. 1996).
[57] *Brock v. Artis*, (45C01-9602-CT-0034, Cir.Ct., Ind. 1998).
[58] *Smelser v. Norfolk Southern Ry. Co*., 105 F.3d 299 (6th Cir.1997).
[59] *Combs v. Norfolk and Western Ry. Co*., 507 S.E.2d 355 (Va. 1998).
[60] *Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713 (Tex. 1998).
[61] *Cromer v. Mulkey Enters., Inc*., 562 S.E.2d 783 (Ga. App. 2002).
[62] *Doherty v. Muni. of Metro. Seattle*, 921 P.2d 1098 (Wash. App. 1996).
[63] *Kelly v. McHaddon,* 2001 WL 209858 (Del. Super. 2001) (not reported in A.2d).
[64] *Schultz v. Wells*, 13 P.3d 846, 852 (Colo. App. 2000).
[65] *Id*.

FORM FOR PATIENT'S AFFIDAVIT

PRIVILGED ATTORNEY WORK PRODUCT – DO NOT DISLCOSE

Today's Date _____ Date of Incident _____

Patient _____ D.O.B. _____

The attorney, in consultation with the client, will complete this form in preparation for litigation. The client will verify the statements by initialing the box to the right of the applicable and correct statements. Cross out inapplicable and/or incorrect statements. After you complete this form, and the client signs it, the attorney will convert it into an affidavit to furnish to medical providers.

#	Statement	Initials
1	My name is ____. My date of birth is _____.	
2	I reside at	
3	I was involved in an automobile incident on:	
4	Just prior to the crash I was doing this in the car:	
5	Describe crash and vehicle damage.	
6	The incident caused by body to move like this:	
7	Immediately after the incident I felt like this (physical and mental/emotional):	
8	Later, I felt like this (physical and mental/emotional):	
9	The medical providers and the medical care that I have had for my incident related injuries or symptoms are:	
10	My injuries and symptoms from the incident (medical diagnoses) are:	
11	I did not have the same or similar injuries and symptoms *prior* to the incident.	
12	I had the following similar injuries or symptoms *prior* to the incident:	
a.	I did not receive any medical care for the prior injuries or symptoms prior to the incident.	
	i. The prior injuries or symptoms have completely resolved and they resolved prior to the incident. [No apportionment] The prior injuries or symptoms resolved on:	
	ii. The prior injuries or symptoms have completely resolved but they resolved after the incident. [Apportionment of injuries/symptoms – but not necessarily treatment – may be required.] The prior injuries or symptoms resolved on:	
	iii. The prior injuries or symptoms have not completely resolved. [Apportionment of injuries/symptoms and treatment may be required.] I am still experiencing the following prior injuries or symptoms:	
b.	I received medical care for the prior injuries or symptoms prior to this incident but not after the incident.	
	i. The medical providers, medical care, and approximate dates of treatment that I received for the prior injuries or symptoms were:	
	ii. The prior injuries or symptoms have completely resolved and they resolved prior to the incident. [No apportionment] The prior injuries or symptoms resolved on:	
	iii. The prior injuries or symptoms have completely resolved but they resolved after the incident. [Apportionment of injuries/symptoms and treatment may be required.] The prior injuries or symptoms resolved on:	
	iv. The prior injuries or symptoms have not completely resolved. [Apportionment of injuries/symptoms and treatment may be required.] I am still experiencing the following prior injuries or symptoms:	
c.	I received medical care for the prior injuries or symptoms prior to this incident *and* after the incident.	
	i. The medical providers, medical care, and approximate dates of treatment that I received for the prior injuries or symptoms prior to the incident were:	
	ii. The medical providers, medical care, and approximate dates of treatment that I received for the prior injuries or symptoms after the incident were:	
	iii. The prior injuries or symptoms have completely resolved. [Apportionment of injuries and treatment is required] The prior injuries or symptoms resolved on:	
	iv. The prior injuries or symptoms have not completely resolved. [Apportionment of injuries and treatment is required] I am still experiencing the following prior injuries or symptoms:	
d.	I am currently receiving medical care for prior injuries or symptoms.	
	i. The current medical providers and current medical care for prior injuries are:	
	ii. The expected course of treatment and progress is as follows:	
e.	I am not currently receiving medical care for prior injuries or symptoms.	
f.	I have been released from medical care for the prior injuries or symptoms. I was released on:	
13	I was in good health prior to the incident.	
14	I was not in good health prior to the incident. I had the following serious conditions or problems:	
15	I have not sustained any similar injuries or symptoms *subsequent* to the incident.	
16	I sustained the following similar injuries or symptoms *subsequent* to the incident:	
a.	I did not receive any medical care for the subsequent injuries or symptoms.	
	i. The subsequent injuries or symptoms have completely resolved. The subsequent injuries or symptoms resolved on:	
	ii. The subsequent injuries or symptoms have not completely resolved. I am still experiencing the following injuries or symptoms.	
b.	I have received medical care for the subsequent injuries or symptoms.	
	i. The medical providers, medical care, and approximate dates of treatment that I received for the subsequent injuries or symptoms are:	
	ii. The subsequent injuries or symptoms have completely resolved. The subsequent injuries or symptoms resolved on:	
	iii. The subsequent injuries or symptoms have not completely resolved. I am still experiencing the following injuries or symptoms.	
c.	I am currently receiving medical care for the subsequent injuries or symptoms.	
	i. The current medical providers and current medical care for subsequent injuries are:	
	ii. The expected course of treatment and progress is as follows:	
d.	I am not currently receiving medical care for the subsequent injuries or symptoms.	
e.	I have been released from medical care for the subsequent injuries or symptoms. I was released on:	
17	My incident related and non-incident related similar injuries or symptoms have not been apportioned.	
18	My incident related and non-incident related similar injuries or symptoms have been apportioned. On _____, Dr. _____ performed an apportionment as follows:	
19	I have been advised by Dr. _____ that I reached a point of maximum medical improvement (MMI) on _____.	
20	I have been released from any further medical treatment for my incident injuries and symptoms.	
21	I have been released from medical treatment for my incident injuries and symptoms except:	
22	I have recovered completely from my incident injuries and symptoms and I am in as good a shape as I was in immediately prior to the incident.	
23	I have not recovered completely from my incident injuries and symptoms and I am not in as good a shape as I was in immediately prior to the incident.	
24	The following incident related injuries or symptoms (physical and mental/emotional) have resolved (and state when resolved):	
25	The following incident related injuries or symptoms (physical and mental/emotional) have not resolved:	
26	I have been advised by Dr. _____ that the following injuries and symptoms are permanent:	
27	I have been advised by Dr. _____ that I have suffered permanent impairment as follows:	
28	I have been advised by Dr. _____ that the following conditions may develop in the future:	
29	I have been advised by Dr. _____ that I will need the following medical treatment in the future:	
30	My incident related medical expenses to date are:	
31	My future medical expenses will be:	
32	Future medical expenses were calculated as follows:	
33	I was totally restricted in activities of daily living (e.g., confined to bed or couch) for the time period:	
34	I was never totally restricted in activities of daily living (e.g., confined to bed or couch).	
35	I was partially and temporarily restricted in activities of daily living - and this affects my enjoyment of life - as follows:	
36	I am currently restricted in activities of daily – and this affects my enjoyment of life - as follows:	
37	I do not need home care or other services.	
38	I need the following home care or other services:	
39	I have a Life Care Plan as follows:	
40	I was not employed at the time of the incident.	
41	I was employed at the time of the incident.	
42	My employer, job title, and job duties at the time of the incident were:	
43	My hours of work and rate of pay at the time of the incident were:	
44	I did not miss any work due to the incident.	
45	I did miss work due to the incident:	
46	I first returned to work on the following date:	
	a. I returned to work full time and full duty.	
	b. I returned to work full time and restricted duty. Restrictions by Dr. _____. My work duty restrictions were:	
	These work duty restrictions were modified or lifted as follows:	
	The following work duty restrictions are still in place:	

	c.	I returned to work part time and full duty. Restrictions by Dr. _____.	
		My part time hours were:	
		These part time hours were changed as follows:	
		I returned to full time work on:	
		I have not returned to full time work. My current part time hours are:	
	d.	I returned to work part time and restricted duty. Restrictions by Dr. _____.	
		My part time hours were:	
		These part time hours were changed as follows:	
		I returned to full time work on:	
		I have not returned to full time work. My current part time hours are:	
		My work duty restrictions were:	
		These work duty restrictions were modified or lifted as follows:	
		The following work duty restrictions are still in place:	
47	I have lost the following wages due to the incident:		
48	My past loss of wages was calculated as follows:		
49	My ability to do work and earn money has not been diminished due to incident injuries and symptoms.		
50	My ability to do work and earn money has been diminished due to incident injuries and symptoms as follows:		
51	I am not able to return to my pre-incident employment as a result of my incident injuries.		
52	I have been advised by Dr. _____ that I am not able to return to my pre-incident employment as a result of my incident injuries.		
53	I am not able to return to *any* of my former employment as a result of my incident injuries.		
	My former occupations are:		
54	I have been advised by Dr. _____ that I am not able to return to any of my former employment as a result of my incident injuries.		
55	I am not able to work in *any* job a result of my incident injuries.		

56	I have been advised by _____ that I am not able to work in any job as a result of my incident injuries.	
57	I have lost the following benefits due to the incident:	
58	My physical and functional capacities have been evaluated and are as follows:	
59	My earning capacity has been assessed by a vocational evaluator as follows:	
60	My economic loss has been assessed by an economist or economic loss expert as follows:	

_____ _____

Date Patient's Signature

PHYSICIAN'S REPORT RE EXPERT OPINIONS

Today's Date _____ Date of Incident _____

Physician _____ Patient _____

Please circle the number of all statements that apply and enter any corresponding information in the comments section. Please cross out all statements that do not apply.

#	Statement	Comments
1	I am a treating physician of the above named patient regarding the referenced incident.	
2	I am licensed to practice medicine in the State of Colorado.	
3	I specialize in the following area(s):	
4	I am Board Certified in the following area(s):	
5	I will testify regarding opinions and matters addressed in my medical records, reports, notes, charts, correspondence, and bills.	
6	I will testify regarding my examination, history, evaluation, diagnoses, treatment, prognoses, treatment and consultations regarding the patient.	
7	I will testify as to anatomy, the movement of the patient's body, head, and extremities in the incident and the mechanisms of injury.	
8	The patient had the following complaints or symptoms:	
9	My diagnosis was:	
10	The incident caused the diagnosed injuries.	
11	The mechanism of injury in the incident was:	
12	The patient did not have the diagnosed injuries prior to the incident	
13	The patient had similar injuries or conditions prior to the incident but the	

1

	injuries or conditions were asymptomatic.	
14	The patient's prior asymptomatic injuries or conditions should not be apportioned.	
15	The patient had similar injuries or conditions prior to the incident and the injuries or conditions were symptomatic to some extent:	
16	The patient's prior symptomatic injuries and conditions should be apportioned as follows:	
17	The patient had similar injuries or conditions prior to the incident and the injuries or conditions were symptomatic to some extent but the patient was not receiving treatment for these symptoms prior to the incident.	
18	The patient received the following incident related medical care:	
19	The patient's post incident treatment is attributable solely to the incident and should not be apportioned.	
20	The patient had similar injuries or conditions prior to the incident and the injuries or conditions were symptomatic to some extent and the patient was receiving treatment for these symptoms prior to the incident.	
21	The patient's post incident treatment is attributable to the incident and to prior symptoms and should be apportioned as follows:	
22	The patient has not sustained any similar injuries or conditions subsequent to the incident.	
23	The patient has sustained the following similar injuries or conditions subsequent to the incident:	
24	The patient's incident injuries and subsequent injuries and conditions should be apportioned as follows:	

25	The patient has reached maximum medical improvement or maximum therapeutic benefit.	
26	The following injuries or conditions have resolved:	
27	The patient sustained the following temporary physical impairments as a result of the incident:	
28	The following injuries or conditions have not resolved and are permanent:	
29	The patient has sustained the following permanent physical impairments as a result of the incident:	
29	The patient was totally restricted from work for the time period:	
31	The patient was able to return to work with restrictions on the following date:	Date: Restrictions:
32	The patient is not able to return to his or her former employment as a result of incident injuries.	
33	The patient is not able to return to any of his or her former employment as a result of incident injuries.	
34	The patient is not able to engage in any substantial gainful employment as a result of incident injuries.	
35	The patient has sustained permanent total disability as a result of incident injuries.	
36	The patient was totally restricted in activities of daily living (e.g., confined to bed) for the time period:	
37	The patient was temporarily restricted in activities of daily living as follows:	
38	The patient is permanently restricted in activities of daily living as follows:	
39	The patient needed home care and essential services as a result of incident injuries.	

54	I will use medical records, x-rays, CT scans, MRI media, other diagnostic media, models and exemplars (including brain, skull, spine, skeletal, and organic models and exemplars), medical illustrations, drawings, diagrams, charts, posters, photographs, videos, animations, physical objects, slides, and multi-media presentations to demonstrate the general medical principles of anatomy, injury, mechanism of injury, and as they apply to the patient and the patient's injuries in order to assist the jury in understanding my testimony.
55	My testimony will include all opinions expressed in subsequent records, reports and materials, supplemental records, reports and materials, affidavits, depositions, and preserved testimony, and will also include opinions in rebuttal to the opinions of opposing experts.

Date _____ Physician's Signature _____

40	The patient will need home care and essential services for the rest of his or her life as a result of incident injuries.	
41	The patient needs services as set forth in the Life Care Plan.	
42	The patient has a normal life expectancy.	
43	The patient suffered physical pain as a result of incident injuries.	
44	The patient will permanently suffer physical pain as a result of incident injuries.	
45	The patient suffered mental and emotional distress as a normal consequence of incident injuries.	
46	My treatment of the patient was reasonable, necessary, and related to the incident.	
47	My medical charges to date are:	
48	My medical charges were reasonable, necessary, and related to the incident.	
49	The patient will need the following medical care in the future:	
50	The patient will incur the following future medical expenses as a result of the incident:	
51	I hold the opinions stated herein to a reasonable degree of medical certainty (meaning more probable than not) based upon my education, training, expertise, and experience, the patient's history, my clinical observations, examinations, treatment of the patient, review of medical records, diagnostic film, media, tests, and studies, consultations with other physicians, medical literature, and medical experience and knowledge of injuries and conditions such as those diagnosed in the patient and all materials and information used, consulted, or relied upon in formulating my opinions.	
52	The following opinions are stated to less than reasonable degree of medical certainty but are based upon reasonably reliable underlying scientific principles:	
53	The materials and information that I use, consult, or rely upon includes but is not limited to traffic accident report, incident report, incident diagram, witness statements, conversations with parties and witnesses, photographs, maps, diagrams, medical records and information, books, articles, publications, software, videos, multimedia materials, training materials, seminar materials, materials and information on the Internet, Intranet, or other electronic, optical, or magnetic storage, pleadings, discovery, depositions, and the records, materials, opinions, and information of other experts and consultants.	

Advances in the Understanding of Rear Impact Collision –

Updating Physics, Biomechanics and Statistics

By John Smith, P.E. and Christina E. Smith

The intent of this article is to update the reader on advances in the understanding of rear impacts. While none of the information in the previous article, "The Physics Biomechanics and Statistics of Automobile Rear Impact Collisions[1]" is incorrect, the last 16 years have seen significant advances in the understanding of how and why people are hurt in rear impacts. This article does not necessarily repeat data from the original but expands upon it as appropriate.

Over the past 16 years, significant research has occurred in the area of rear impact collisions. The direction of the research has tended to follow one of two paths, although overlap does exist. Researchers based the first course of study on applying the principles of engineering and biomechanics to accepted research techniques to understand better what was occurring in rear impacts. The second approach was litigation driven and was often predicated upon pseudo science or actual science distorted[2] to advocate a position. In this paper, the current state of the applicable science regarding an area is addressed followed by a discussion of many of the common errors promulgated in litigation.

Physical Response of the Automobile

Over the last decades significant changes have occurred in automobiles. Sixteen years ago many cars had bumpers equipped with isolators, whereas now most cars have foam core bumper systems. In the past many cars were constructed around a frame, today most cars are unibody construction. While most trucks retain the frame design, many vans are either unibody construction or a hybrid of the two. Although there have been advances in safety devices such as airbags and anti lock brakes, little has been done to protect the occupant in a rear impact[3].

The key to injury in a rear impact is typically energy. Based on the Laws of Physics, the energy into the collision must be accounted for in the elements of the collision. In most rear impacts, the energy into the collision is a function of the speed of the striking vehicle or the kinetic energy (KE) it possesses. This energy is partially transferred to the struck vehicle in the form of acceleration, partially dissipated in the components of the vehicles and partially retained as kinetic energy in the striking vehicle. The effect of each of these uses of the energy is necessary to understand the dynamics of the collision.

Mathematically, the principle can be represented by:

$$KE\ (V1)_{\text{pre-impact}} + KE\ (V2)_{\text{pre-impact}} = KE\ (V1)_{\text{post-impact}} + KE\ (V2)_{\text{post-impact}} + C_{\text{rush}}\ E_{\text{nergy}}\ (V1) + C_{\text{rush}}\ E_{\text{nergy}}\ (V2)$$

The limitation of the above equation is that there is no direct mathematical correlation between the damage to the striking vehicle, the damage to the struck vehicle and the kinetic energy transferred to the struck vehicle. Since crush energy is the visible damage and kinetic energy is the typical source of injury, the lack of a direct mathematical correlation indicates it is not possible to look at a vehicle and prove the accident could not injure the occupant. Similarly, the absence of property damage also does not establish the occupant was not injured. An indirect correlation does exist in that if there is visible damage to the vehicle, there was sufficient energy transferred to cause an injury. As discussed below, the absence or presence of an injury is a medical decision.

For reasons discussed in the biomechanics portion of this paper, it is common in a litigation setting for an expert to underreport the actual speeds of the vehicles. The reason for this error is the misapplication of physics principles in an attempt to imply a speed based on damage. The most common methodological error misapplies Newton's Third Law of Motion,[4] but the number of invalid models is extensive. For additional information, the reader can consult other papers including "Weakness of the Numerical Models Used in Accident Reconstruction Programs."[5]

Figure 1. – Bumper cover with superficial damage.

Figure 2. – Bent bumper reinforcement.

Caution that under ideal conditions, the use of vehicle damage can underestimate the speeds of vehicles by hundreds of percents.[6]

The constraints of the available data further compounds the limitation of looking at a vehicle to determine the energy transferred to the occupant. Among the areas of concern are the bumper system, the vehicle frame/unibody construction and the available photographs and estimates. An additional error source is the use of only one vehicle to determine speeds.

Bumpers. The bumper of a vehicle is not a safety device. As stated by the National Highway Traffic Safety Administration;

> A car bumper is designed to avoid or reduce damage in a low-speed collision. **It is not a safety device to prevent or reduce injuries to people in the car.** Rather, the bumper is designed to protect sheet metal parts of a car, as well as safety-related equipment such as parking lights and headlamps, in low speed collisions.[7]

Bumpers are designed to limit damage to the vehicle. The bumper system temporarily holds energy that could cause damage and releasing it in the form of kinetic energy before the damage occurs. However, this means that energy which could be absorbed by metal and plastic instead transfers in a fashion where it can injure occupants. Effectively, the current design of bumpers increases the potential for injury to the occupant because less energy is absorbed in damaging the bumper.

There exists a common misconception that one can determine the damage to a bumper system by casual visual inspection. A foam core bumper system typically consists of three major components: the bumper cover, a foam core and a reinforcement bar. Figure 1 shows a bumper cover with apparent superficial damage. Figure 2 shows the damaged bumper reinforcement. Without disassembly of the bumper, the damage would not be apparent.

Frame/Unibody. A significant difference between unibody and frame construction is that the unibody transfers energy through more components than a frame does. The unibody construction results in the propagation of an energy pulse through the vehicle. A result of this, in rear impact collisions, is that the first visible damage may occur away from the impact site. It is not uncommon to see distortion to the roof or the hood in a rear impact. For this reason, merely concentrating an inspection on the rear of the vehicle may fail to identify all of the damage in a collision.

A common effect of the energy pulse is that an owner of a vehicle struck from

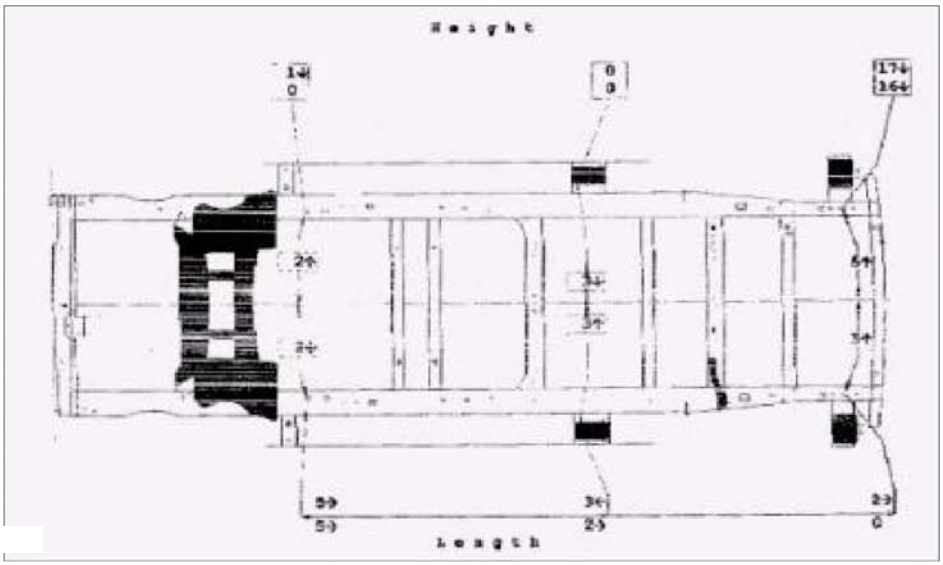


Figure 3. – Precision frame measurement.

Figure 4. – Vehicle with frame/unibody damage.

Figure 5. – Severe collision without significant damage.

behind may notice doors sticking, windows leaking, transmission problems, uneven tire wear and other problems not intuitively associated with the collision. Precision frame/unibody measurements can be obtained from many repair facilities to check for this type of damage. Figure 3 is an example of a precision frame measurement. In this instance, the vehicle has 17 mm of distortion from the rear impact that no repair estimate noted. Research indicates that damage to the unibody typically does not appear until impact speeds of 15 mph or greater.[8] Figure 4 shows a vehicle with significant unibody/frame damage that is not visible in the pictures.

A common error in litigation is to assert that the lack of visible damage to a vehicle implies a low speed. With the design of modern vehicles, in a bumper-to-bumper collision, it is rare to damage to the vehicles in collisions of under 10 mph. Numerous full-scale crash tests have been run at speeds up to, and exceeding 10 mph with no appreciable damage to the vehicles. As merely one example, a series of impacts in Texas with Ford Festivas resulted in no effective damage with vehicles involved in multiple collision up 11 mph.[9] Other full scale tests have also demonstrated this principle.[10]

Further compounding the problem is the significant quantity of energy that can be absorbed by vehicles before the onset of property damage. It is not uncommon for "no-damage" collisions to absorb 7,000, or more, foot-pounds of energy with no visible evidence. Many of the models used by experts in civil litigation routinely calculate energy values of zero to a few hundred foot pounds in collisions where there is damage, demonstrating the fallacy of their approach. Figure 5 shows a vehicle that was involved in a severe collision with effectively no damage. In this multi car collision, this vehicle caused several thousand dollars of damage to the car ahead of it which in turn caused hundreds of dollars of damage to the vehicle ahead of it.

Photographs and Repair Estimates

Another significant source of error is the use of repair estimates to determine velocities. Estimates available to the reconstructionist are often the preliminary estimate which is also known as the "estimate of record." If the vehicle is not repaired, the estimate will often miss damage that is not apparent in a visual inspection. For this reason, it is common for most preliminary estimates to carry a caveat noting that "hidden damage may be present" or a similar disclaimer. The relevant document for a repaired vehicle is the invoice listing the components actually fixed or replaced. Velocity determination based on repair estimates can provide minimum speeds only; actual speeds may be significantly higher.[11]

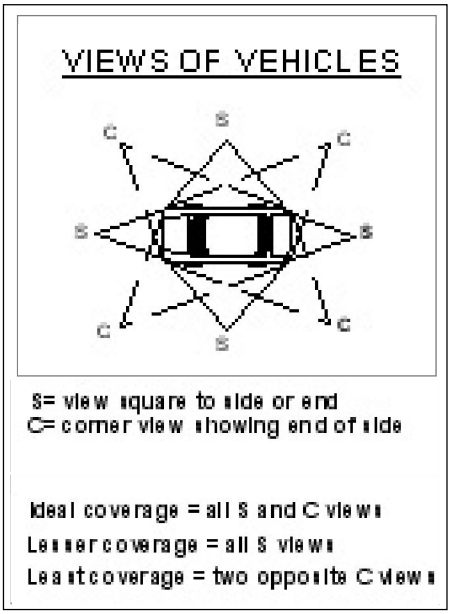


Figure 6. – Recommended views.

Limitations comparable to those found in repair estimates are present in the photographs commonly provided. In any collision, a thorough photographic record should include views of the entire vehicle.[12] Figure 6 shows the minimum set of photographs recommended - even in rear impacts - for several reasons including the issue of unibody distortion discussed above. In addition to these views, obtain close-ups of any damage.

A further limitation of photographs deals with the quality of the images pro-

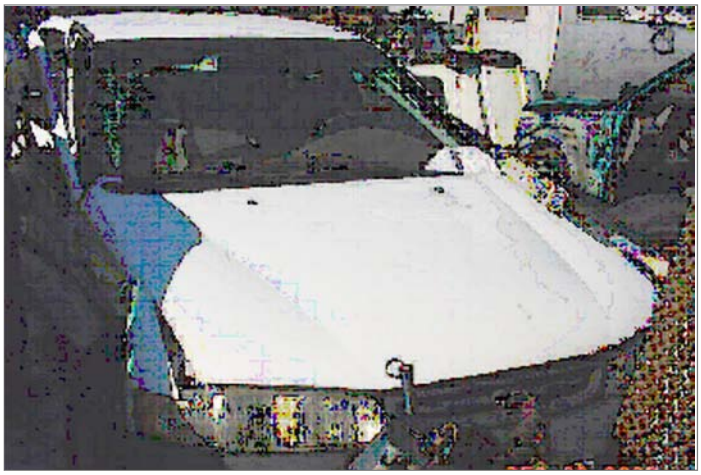


Figure 7. – Vehicle in storage.

Figure 8. – Improved imagery.

vided. Photographs often fail to capture the magnitude of the damage even when provided in color. Black and white versions of the photographs further exacerbate the issue. Figure 7 is a sample of the type of imagery the reconstructionist often receives.[13] Figure 8 is the same vehicle with the imagery taken in a more advantageous manner.

Figures 7 and 8 reveal the limitation of estimating speed based on photographs. While damage that is visible in photographs obviously exists, damage which is not visible in the photographs also often exists. Experts often demonstrate this by comparing the photographs supplied with the repair estimate. Figure 9 is a photograph of a vehicle with several thousand dollars of damage. Velocity estimates based on photographs can provide minimum speeds only; actual speeds may be significantly higher.

Use of one vehicle – It is not unusual for imagery to be available for only one vehicle in a collision. This may provide an incomplete understanding of the impact. Figure 10 shows the vehicle that struck the car shown in Figure 9. It is important to note that the initial collision between the cars was bumper to bumper[14]. The use of only one vehicle can provide minimum speeds only; actual speeds may be significantly higher.

The cumulative effect of these limitations is that in the majority of rear impact collisions, only minimum speeds can be determined. An expert who asserts they have determined the maximum speed typically does so by applying invalid methodology to insufficient data. It is worth noting that reasonable maximums can be determined. If there is actually no damage to either vehicle in a bumper-to-bumper collision, the relative impact speed[15] probably did not exceed 15 mph although documented cases of impacts in excess of 25 mph with no damage do exist. If there is minimal damage to the vehicles, a maximum relative impact speed of 20 to 25 mph is reasonable.

Depending on the goal of the analysis, the determination of impact speeds and changes in velocity may be irrelevant. The next section discusses this further.

It is appropriate at this point to address some other common misperceptions associated with the analysis of the speeds of vehicles.

Use of barrier crash test data is generally inappropriate. The damage in an actual collision is often directly compared to tests where the vehicle impacts a barrier. From the discussion of energy transfer above, the fallacy of this approach is obvious. In a barrier impact the energy is not used in accelerating the barrier or in damaging the barrier. The only place for significant amounts of energy to be absorbed is in damaging the vehicle. For this reason, vehicles without damage in 15 mph bumper-to-bumper collisions can have significant damage in a 5 mph barrier impact.

This explains why large vehicles fare so poorly in the IIHS[16] tests but do so well in an actual collision. The larger the vehicle, the greater the kinetic energy possessed for a given speed. The greater the kinetic energy in a barrier impact, the greater the damage. The empirical data available proves what the Laws of Physics lead one to expect.

The National Highway Traffic Safety Administration (NHTSA) sponsors numerous tests each year on motor vehicles. While most of these tests are barrier impacts, it is possible to find vehicle-to-vehicle crashes. Four tests were obtained using Honda Accords.[17] The vehicle-to-barrier test (VTB) was a frontal impact of a 1982 Honda Accord into a barrier at 34.8 mph. The three vehicle-to-vehicle tests (VTV) used 1984 Honda Accords. These are sisters/clones of the 1982 vehicle.[18]

Table 1 reveals that the average crush decreased in VTV impacts even when the kinetic energy of the vehicle heading into the crash increased by almost threefold. Be aware that there are too many possible impact variations to attempt a precise correlation between a staged test and an actual collision. However, the data in Table 1 does show that an attempt to assert that the damage from a

Figure 9. – Extensive hidden damage in a rear impact.

Figure 10. – Bullet vehicle.

Test Type	Closing Speed in mph	Average Crush in mm	% Average Crush	% Kinetic Energy
VTB	34.8	637	100	100
VTV	60.1	571	90	298
VTV	55.6	567	89	255
VTV	54.9	570	89	249

Table 1. – Damage comparison between VTB and VTV collisions.

barrier test can provide the velocity of the vehicles in car-to-car collisions has significant inherent error. The examples listed in Table 1 are at higher speeds than the authors of the paper implied they were dealing with. However, the design of bumpers is such that the effect of the protection provided by the bumper should be greater at lower speeds. This indicates a greater than four fold increase in energy is required to cause similar damage in the region commonly called "low speed."

Use of Insurance Institute for Highway Safety (IIHS) test data and repair costs underestimates the speeds of the vehicles. It is not uncommon to find individuals attempting to determine the impact speed of a vehicle by comparing the damage or the cost of repairs in an IIHS barrier impact. As demonstrated above, damage cannot be directly correlated. Additionally, the use of cost data for speed determination correlation is invalid. Even accounting for the effects of distortion due to variations in component costs, variations in regional costs throughout the country, variations in costs over time and variations in costs for non-OEM parts, the method still has unacceptably large error rates.

Small variations in impact configuration can result in significant variations in damage, and therefore cost, in collisions occurring at the same speed. Data from Neptune Engineering shows NHTSA tests at virtually identical speeds with significant crush variation. As an example, two tests on a Chevrolet Celebrity at the same speed had a 16% variation in crush depth.[19] Furthermore, two adjacent components can easily have a cost differential measured in thousands of percents.[20]

This leads to a subsequent problem in the approach used by some individuals to determine speeds. The source of the cost data is often IIHS, and it has been reported that the IIHS removes the bumper to check for damage. A damage estimator for an insurance company rarely does this. As discussed above, in many cases, damage is visible only after

the removal of the bumper system. For illustration, when the reinforcement and associated structures on a 2004 Ford Mustang are considered, the repair estimate for the vehicle would more than double when compared with the bumper cover alone.[21]

Biomechanical Response

Before discussing the effect of applied forces on the occupant in a rear impact case, it is useful to ensure the use of common terminology. Mechanics is the branch of physics that deals with the application of forces to an object. Bio means life indicating that biomechanics deals with the application of forces to something that is or was alive. Often biomechanics can be broken into three subspecialties. The first deals with prosthetic devices such as artificial limbs and organs. The second deals with sports and the physical actions of a body in motion such as enhancing the performance of a bicycle rider. The third area deals with traumatic events and the response of a person subject to trauma. This final category is the subject of this paper.

As applied to motor vehicle collisions and use outside of litigation, the biomechanics of trauma deals with how a given event injured a person. The most common application of this is to understand how an injury occurred in order to improve safety and develop methods to protect occupants. Examples include the development of seat belts, airbags, headrests, safety glass, etc. An application typically not found outside of litigation is the attempted use of biomechanics[22] to prove a person was not injured.

In a biomechanical analysis of a motor vehicle collision, there are two important questions. First, were forces applied where the diagnosed injury is located? Secondly, are the injuries reported of the types known to occur in a given class of collisions? As an example, and further discussed below, in a rear impact forces are applied to the cervical region of an occupant and cervical injuries are known to occur in rear impacts. Therefore, a cervical injury in a rear impact is biomechanically consistent with the applied forces. The fallacy of an injury threshold is discussed below.

As discussed above, the key to an induced injury caused by collision forces[23] is energy transferred to the occupant. If the struck vehicle moves in a rear impact, energy transfers to the occupant, forces apply and injury is possible. A common misrepresentation of the applied forces is the use of the misnomer "G-Forces." However, this approach fails to capture the complexity and severity of a rear impact collision. The key to injury in a rear impact is motion, both absolute and differential, not the specific peak or maximum acceleration. The myth of "G-Forces" and the associated canard of daily activities, are demonstrable in many ways, and many courts routinely disallow them. However, since they still appear, a brief discussion is warranted.

A rear impact subjects the occupant of the struck vehicle to hundreds of forces applied in a fraction of a second. These forces cause both absolute and differential motion of the spine and related structures. As an example, in a rear impact the cervical column undergoes a complex motion of both absolute and differential motion. The lower cervical column projects forward while the upper cervical column attempts to remain stationary. This results in the twisting the neck into an "S" shaped curve and the occurrence of differential motion between the vertebrae. It is this motion that is the injury mechanism, not the magnitude of one hypothetical "peak" acceleration. Figure 11 is an image of a cervical region twisted out of its normal lordosis by a rear impact. While it is theoretically possible that one of the hundreds of forces in a rear impact could match an applied force in a daily activity, there is no daily activity that subjects a person to the same myriad of applied forces in a fraction of a second.

An additional limitation of the use of the peak acceleration value is the difficulty in determining this value. Typically, the expert opining about peak acceleration is using a generic rule. Even under laboratory conditions where the many of the dozens of variables can be controlled, significant variations are possible for a particular speed. Freeman[24] showed variations exceeding 800 percent for the same velocity under controlled experimentation (Figure 12). Research has also demonstrated variations of 100 percent in a single individual tested under similar conditions. It is worth noting that the peak acceleration represents only one of the hundreds of forces on the occupant.

In a rear impact, the vehicle undergoes the resultant change in velocity in approximately 1/10 of a second. This applies regardless of the magnitude of the change in velocity until higher speeds are reached.

Since it is the movement of the vehicle that is the source of the injury energy, a reasonable question would be how much movement is necessary to cause injury. Looking at the structure of spinal columns reveals that localized movements of a fraction of an inch can lead to compromise of the spinal cord and even death. However, in reality a vehicle moving a fraction of an inch would not have that pronounced an effect on the occupant. Full scale testing has demonstrated that a movement of a few inches is biomechanically significant. If a vehicle propels forward even half a foot, expect significant occupant motion. This movement would occur with a change in velocity of 3 mph or less. This corresponds to symptoms being reported in published safety optimized test with changes in velocity of 2.5 mph[25] and in unpublished tests safety optimized tests with a change in velocity as low as 1 mph.[26] The issue of injury thresholds is further discussed below.

With an understanding that it is the rapid motion that causes the change in velocity, it is possible to look at the area

Figure 11. – "S" curve.

of injury and understand the reason for the damage. The following paragraphs discuss many of the common areas affected in rear impacts but do not address every injury.

Cervical. The presence of cervical injuries matches the applied forces that occur during the extension/flexion process. During a rear impact, the cervical region naturally pivots at C5-C6. In addition, the impact stresses adjacent areas to different degrees based on the induced rotation of the vehicle or the occupant. For this reason, it is not unusual to also find trauma to the adjacent C3-4, C4-5 and C6-7 regions. Various factors may also injure other portions of the cervical spine. In addition, a rear impact subjects the entire cervical column to tension, compression and shearing. Cervical injuries, including herniated discs, are associated with rear impacts.[27]

Lumbar/Sacroiliac. A rear impact subjects the lumbar region to a variety of forces. There is direct loading as well as differential loading from the seat back across the lordotic curve. Additionally, the torso moves upward during the ramping process. These forces subject the lumbar region to compression, tension and shearing and affect the entire lumbar region, but are higher in the area of L3-L4 due to the lordotic curve. If there is a rotational component to the collision, due to either occupant position or forces that do not pass through the center of mass of the vehicle, there are also angular forces applied. This situation alters the biomechanics of the collision and concentrates forces in the lower lumbar region to include the sacroiliac area. Lumbar injuries are associated with rear impacts.[28]

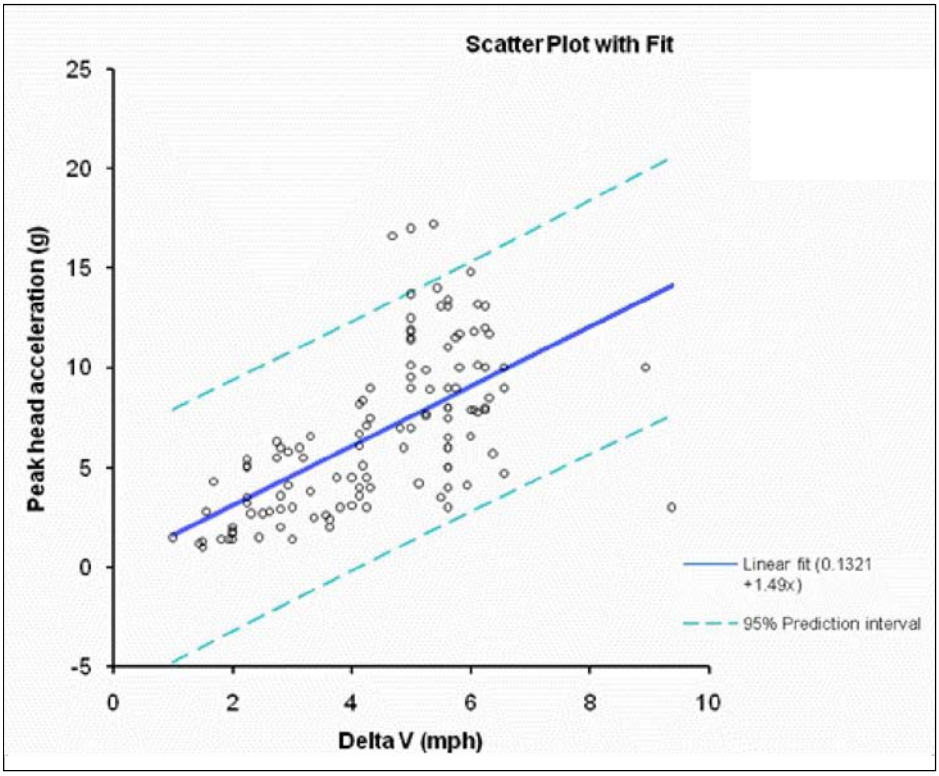


Figure 12. – Variations in peak acceleration.

Thoracic. In a rear impact, the thoracic region is subjected to a variety of forces. There is direct loading from the seat back as well as differential loading from the seat back across the kyphotic curve. Additionally, the torso moves upward during the ramping process. These forces subject the thoracic region to compression, tension and shearing. Thoracic injuries are associated with rear impacts.[29]

Brain/Head. Brain injuries are associated with five mechanisms in rear impacts. The first is direct contact with the headrest, the steering wheel or other portions of the interior of the vehicle. (The occupant may not remember this contact.) The second mechanism involves rotational forces applied during the extension/flexion process. The third involves shearing forces applied during the translation of the skull. The fourth identified mechanism deals with biochemical changes. The final mechanism is associated with vascular effects.

Shoulder. There are three primary mechanisms causing shoulder injuries in rear impacts. The first is direct contact from the seat belt or other portions of the interior of the vehicle such as the steering wheel. The second is differen-

tial loading of the shoulders and thoracic region due to the induced motion of the occupant. The third mechanism is load transference due to bracing on the part of the occupant. Any of these are capable of causing an injury to the shoulder.

Arms/Hands/Wrist. In a rear impact, a driver can apply voluntary muscles to grip the steering wheel. During the initial 100 to 200 milliseconds of the collision, the steering wheel is propelled forward ahead of the body. As the space between the steering wheel and the driver increases, the hands, wrists and arms of the driver are subjected to tension. After the initial movement, the torso of the driver moves forward and the hands, arms and wrists are subjected to compression. Depending on the dynamics of the particular collision, shearing may also occur. While less common, passengers who are projected forward towards the dashboard may also suffer injuries as they attempt to stop their motion. Injuries to the wrists of an occupant struck from behind are consistent with the applied forces.

Temporomandibular Joint (TMJ). The correlation between TMJ injuries and rear impact collisions is established. One possible injury mechanism involves the extension of the head/neck during the first 250 milliseconds of impact. The initial impact during a rear end collision leaves the head stationary and propels the torso forward. This puts the neck in tension. The tension produced by the neck pulls the lower jaw forward differentially with respect to the upper jaw. As full-scale tests reveal, the mouth opens during this part of the collision and the hinge point is the TMJ. Energy and motion cause injury to the TMJ. Full scale testing has also revealed an acceleration spike at the TMJ in rear impacts.

Who will be injured? Not every occupant is injured in every rear impact. Similarly, in a vehicle with multiple injured parties not every injured occupant will have the identical injury.[30] The reason for this is the extreme number of variables and permutations possible in a rear impact. These include, but are not limited to: gender, age, weight, height, neck length, neck circumference, cervical muscle tone, lumbar muscle tone, bumper design, impact angle, seat belt design, awareness, previous injuries, spinal degeneration, orientation of head, orientation of the neck, orientation of the torso, seat belt tightness, seat back design, seat back angle, etc. In calculations of the possible permutations, the value exceeds 1 sextillion. Compare this value with the few hundred total test subjects found in staged, safety optimized motion volunteer tests.[31] For this reason, it is not valid to attempt to infer injury potential from the volunteer studies.

While there is no numerical value for the injury potential of a given collision, numerous factors increase the likelihood of injury in a rear impact.

Occupant Position. An impact which induces occupant motion outside of straightforward and backward movement is more injurious. As the cervical, thoracic and lumbar regions move at an angle, there is a greater degree of stress to them. Angular acceleration or turning the body at the time of impact is an aggravating factor.[32]

Surprise. Published literature and basic engineering principles, reveal that an occupant who is struck by surprise is generally more likely to be injured than one who is braced.[33] Siegmund showed symptomatology at speeds lower than previously reported in staged, safety optimized tests simply by removing awareness of the precise moment of impact.[34]

Gender. Published research clearly reveals that women are more likely to be injured in traffic collisions than men.[35]

Predisposition to Injury. If a region has been previously damaged, injured or has degeneration, it requires less energy to damage the region again.[36] For example, potential preexisting changes to the spine would reduce the forces necessary to injure those regions.

Seatbelt Usage. The use of seat belts has been implicated in numerous injuries, including cervical and lumbar injuries.[37] The use of seat belts, as required by law, has the effect of decreasing the occurrence of fatal injuries. However, the principles of physics require the dissipation of energy. The seat belt concentrates the energy in the areas where it contacts the occupant. This results in an increased injury potential in those areas. Examples of areas stressed by seat belts are the lumbar region, the thoracic region and the shoulder. The seat belt also magnifies the motion in the cervical region and head, resulting in increased forces and increased injury potential on the neck and head, including the jaw.

Misconceptions. It is appropriate at this point to address some common misconceptions associated with the biomechanical response of the occupant.

It is not uncommon for it to be asserted that during a rear-end impact, the occupant of the target vehicle is propelled into his seatback as the vehicle accelerates forward. This is incorrect. The occupant obeys Newton's First Law of Motion[38] and remains stationary until acted upon by an outside force. The seat drives into the occupant. While the distinction may seem minor, it is critical to understanding the injury mechanics. This motion pushes the torso out from under the head and the cervical column undergoing extension. The neck remains in extension until the head overtakes the torso and then moves into flexion. The torso does not experience rebound until interaction with the seatbelt.[39]

The comparison of a rear impact to backing into an object is often promulgated and is incorrect on several levels. Backing into a wall is not biomechanically the same as a rear impact. When a vehicle backs into a wall, the occupant experiences extension and ride-down. There is very little cervical flexion. In a true rear impact, there is significant flexion. A simple analysis of the velocity curves of the vehicles in each case would show that there is no reasonable

reference frame where the curves are the same shape. In a rear impact, the vehicle accelerates significantly and then decelerates significantly. In a barrier impact, the vehicle decelerates significantly and then accelerates minimally. Figures 13 and 14 show the velocity profiles of a vehicle struck from behind and one that impacts a wall. It is obvious that the shapes of the curves are not the same.

Rear Impact Thresholds and Statistics

Threshold. It has never been established that there is a minimum speed change value below which people are not injured in real collisions. To the contrary, Professor Murray Mackay[40] has analyzed more than 2914 actual accidents reported in the U.S. National Accident Sampling System[41] and showed that there is no threshold speed change value for injury in real life (as opposed to staged) collisions. While Mackay concentrated on rear impacts, Kullgren and Kraft support the lack of injury threshold in rear impacts and demonstrated that there is also no injury threshold in frontal impacts.[42] Numerous other resources also support the lack of a threshold.[43]

Figure 15 shows the data from Murray Mackay.

Probability of Injury – The probability of injury does not exist. Freeman[44] has repeatedly discussed the epidemiology of injury. His work, and a basic understanding of probability, demonstrates why the retrospective analysis of the likelihood of an event has no meaning. By definition, once an event has occurred its probability of occurring is 100%. If there is only a 2% chance of injury of a person in a given event, once the person is actually injured, the probability becomes 100%.

Prospectively an attempt to determine the probability an injury will occur can be made. If a test were run with 100,000 people at different speeds and 90 percent were injured in an impact above a given velocity, a projection of the future risk could be made. However, it would not prove that the remaining 10 percent were not injured. The medical treatment of individuals by its nature concentrates on the injured occupants, not the entire set of possible occupants. If there is only a ten percent risk that a given population is injured, it is those ten percent who are expected to seek medical help.

Conclusion

The absence or presence of vehicle damage is not a reliable indicator of injury potential in rear impacts. Damage reports often only include superficial damage, and do not consider that the frame of the car or bumper may have been structurally compromised. Images of the damage may also be misleading, as they frequently are incomplete or of poor quality. Also, references for damage are often from faulty studies and assumptions, such as those which correlate damage from rear impacts with that of barrier impacts.

Based upon the principle of conservation of energy, any energy which does not go into damaging the vehicle must convert into kinetic energy, the source of injuries. Structures such as the bumper may protect the car from damage, but do not protect the occupants, who receive the excess kinetic energy. Also, consider that large amounts of energy may transfer to the occupants before the onset of damage to the vehicle.

Figure 13.

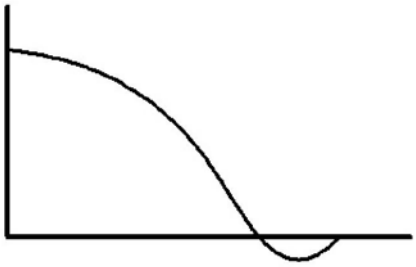
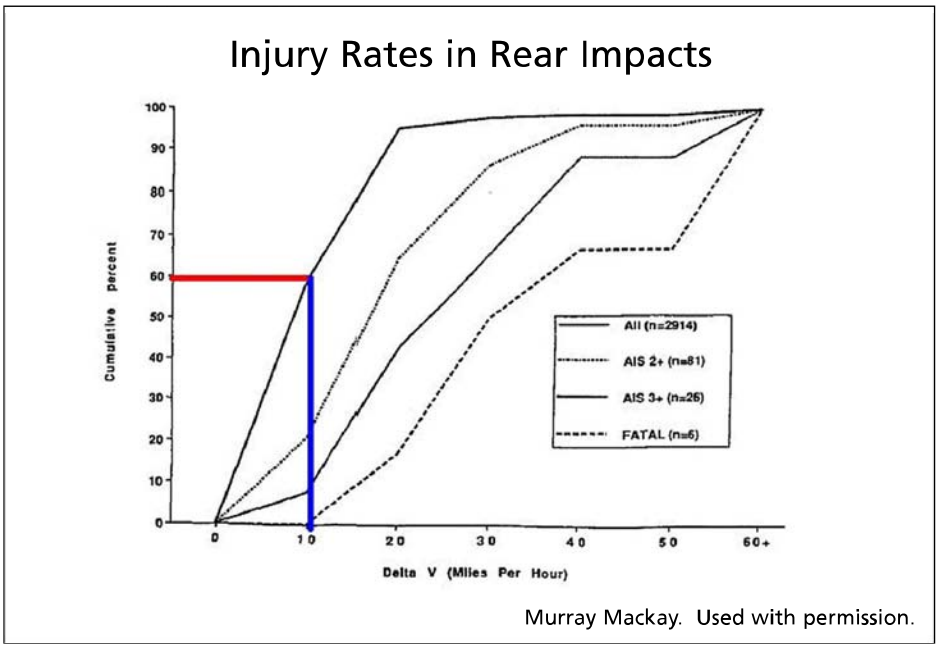


Figure 14.



Murray Mackay. Used with permission.

Figure 15. -- NASS injury rates in rear impacts.

Furthermore, a particular set of injuries is common in rear impacts. Among these are injuries to the neck, head, and back resulting from the initial impact as well as injuries to other parts of the body during rebound. These injuries, while consistent with the type of impact, are dependent upon innumerable variables involving the occupant and impact specifics. As such, it is impossible to determine an injury threshold under which individuals will incur no injury.

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Endnotes

1 John J. Smith, *The Physics, Biomechanics and Statistics of Automobile Rear Impact Collisions*, TRIAL TALK, May, 1993, at 10.

2 ***The most dangerous untruths are truths moderately distorted***. -Georg Christoph Lichtenberg.

3 There have been some improvements in selected headrests and seat back designs. However, none of these can be considered an injury prevention device.

4 Newton, "Philosophiae Naturalis Principia Mathematica" 1687

5 Smith, Weaknesses of the Numerical Models Used in Accident Reconstruction Programs, Proceedings of the 57th Annual Meeting of the American Academy of Forensic Sciences, February 2005

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11 It is not uncommon for a repaired vehicle to exhibit unrepaired unibody/frame damage that the body shop failed to note.

12 In some instances, it may not be physically possible to photograph the entire vehicle. This most commonly occurs in salvage yards where other vehicles block the access to the subject vehicle.

13 This vehicle was not involved in a rear impact but illustrates a principle. It is not uncommon for experts to opine on the amount of crush based on photographs such as this.

14 During mediation in this collision the insurance company provided pictures of the struck vehicle. When the plaintiff produced picture of the striking vehicle the defense dropped the "low speed" argument.

15 Relative impact speed is the difference between the velocities of the vehicles at the moment of impact. If the struck vehicle was stopped, the impact speed equals the relative impact speed.

16 Insurance Institute for Highway Safety, www.highwaysafety.org.

17 DOT 0455, DOT 0812, DOT 0804 & DOT 815

18 Gregory Anderson, *Vehicle Year and Model Interchange List*, Scalia Safety Engineering (2004).

19 Crush Stiffness Coefficients, Neptune Engineering, Inc., Clovis, CA.

20 *2004 Mitchell Collision Estimating & Reference Guide*, Mitchell International, San Diego, CA (October 2004).

21 *Id*.

22 Another term often used in litigation is biodynamics.

23 The startle or stretch response of an occupant, although relevant, is not a subject of this paper.

24 Michael Freeman, graph provided in email September 6, 2008.

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26 Low Speed Rear Impact Collision TOPTEC, SAE, 1994 (available from author).

27 D.R. Larder, et al., *Neck injury to car occupants using seat belts*, 29th ANN. PROC. AM. ASSOC. AUTO. MED., 153-165 (1985); Richard I. Emori & Junji Horiguchi, *Whiplash in Low Speed Vehicle Collision*, SAE 900052 (1990); Mathias Sturzenegger, et al., *Presenting Symptoms and Signs After Whiplash Injury: The influence of accident mechanisms*, NEUROLOGY (April 1994); Tomoyasu Matsushita, *X-Ray Study of the Human Neck Motion Due to Head Inertia Loading*, SAE 942208 (1994); Andrew P. Morris & Pete Thomas, *Neck Injuries in the UK Co-Operative Crash Injury Study*, SAE 962433 (1996); Asad J. Khattak, *Injury Severity in Multi-vehicle Rear End Crashes*, J. OF TRANSP. RESEARCH BD., 01-3466 (Dec. 2000); John Smith, *Analysis of 72 Real World Rear Impacts*, SAE 1999-01-0640 (1999); Roy Minton, et al., *Lower back and Neck Strain Injuries: The Relative Role of Seat Adjustments and Vehicle/Seat Design*, NHTSA Paper Number 98-S6-W-29 (1998); Gunilla Bring, *Whiplash Associated Injuries and Disorders*, The Swedish Nat'l Inst. for Working Life (2000); Claire Laberge-Nadeau,*Neck Injuries Amongst Motor Vehicle Occupants Involved in Collision*, Centre for Research on Transportation, Montreal Canada, (under a grant from AAA Foundation for Traffic Safety) (April 1993); *Sick Leave and Disability Pension Among Passenger Car Occupants Injured in Urban Traffic*, Per-Olof Bylund, RN, & Ulf Bjornstig, MD, SPINE,

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[28] Roy Minton, et al., *Lower Back and Neck Strain Injuries: The Relative Roles of Seat Adjustment and Vehicle/Seat Design*, Paper Number 98-S6-W-29, Transp. Research Lab. (1998); *The association between exposure to rear-end collisions and future health complaints*, Anita Berglund, et al., 54 J. OF CLINICAL EPIDEM 851-856 (2001); Anders Kullgren, et al., *Combining Crash Recorders and Paired Comparison Technique: Injury Risk Functions in Frontal and rear Impacts with Special Reference to Neck Injuries*, Paper no. 404, www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Articles/ESV/PDF/18/Files/18ESV-000404.pdf; Roy Minton, et al., *A study of lower back strain injuries resulting from road accidents*, Transportation Research Laboratory, TRL532 (2002), available at www.trl.co.uk/online_store/reports_publications/trl_reports/cat_vehicle_engineering/report_a_study_of_lower_back_strain_injuries_resulting_from_road_accdents.htm; National Automotive Sampling System (see www.nhtsa.gov/portal/site/nhtsa/template.MAXIMIZE/menuitem.3315a23559ab04dd24ec86e10dba046a0/?javax.portlet.tpst=4670b93a0b088a006bc1d6b760008a0c_ws_MX&javax.portlet.prp_4670b93a0b088a006bc1d6b760008a0c_viewID=detail_view&itemID=a380d6765f9ae010VgnVCM1000002c567798RCRD&overrideViewName=Article); Thomas J. Szabo & Judson B. Welcher, *Human Subject Kinematics and Electromyographic Activity During Low Speed Rear Impacts*, SAE 962432 (1996); Smith & Smith, *supra*, n. 27.

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[30] In over 17 years of experience, the author has never seen two occupants of a vehicle have identical injuries.

[31] Policies and procedures require test subjects to be protected from injury. As a result, special steps are taken to protect the subjects in tests.

[32] C.M. Robinson, et al., *Refractures in Patients at Least Forty-five Years Old. A Prospective Analysis of Twenty-two Thousand and Sixty Patients*, J. BONE & JOINT SURG. (Sept. 2002); J. Dolonis, *Risk Factors for Whiplash in Drivers: a Cohort Study of Rear-end Traffic Crashes*, INJURY (April 1997); Minton, et al., *supra*, n. 28.

[33] Sturzenegger, et al., *supra* n. 27; Szabo & Wechler, *supra* n. 28; Smith, *supra* n 27.

[34] Gunter Siegmund, et al., *Head/neck Kinematic Response of Human Subjects in Low-Speed, Rear-End Collisions*, SAE 973341 (1997); Gunter Siegmund, et al. "Clinical Response of Human Subjects to Rear-End Automobile Collision." ARCH. OF PHYS. MED. & REHAB. (January 1998).

[35] *Human Tolerance to Impact Conditions as Related to Motor Vehicle Design*, Human Biomech & Simulation Steering Comm.,SAE J885 (July 1986); Rosenquist & John J. Smith, *The Effect of Head Rotation on Pain Location in Delayed Recovery Subjects*, 29th International Workshop on Human Subjects for Biomechanical Research (2001); Sturzenegger, et al., *supra* n. 27; Larder, et al., *supra* n. 27; *Females More Vulnerable than Males in Road Accidents,* SAE 905122 (1990) (available from author); Narayan Yoganandan, *Clinical and Bioengineering Aspects of Whiplash Injury*, Proceedings of the 2005 International Whiplash Trauma Congress (February 2005); John DeRosia, et al., *Small Female and Large Male Responses in Rear Impact*, annual pro-

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36 C.M. Robinson et al., *supra* n. 32; NAT'L COUNCIL OF EXAM'RS FOR ENG'G & SURVEYING, FUNDAMENTALS OF ENG'G REF. HANDBOOK (1995); Dolonis, *supra* n. 32; Minton, et al., *supra*, n. 28.

37 Dainius J. Dalmotas, *Mechanisms of Injury to Vehicle Occupants Restrained by Three-Point Seat Belts*, SAE 830462 (1983); J. Smith, *Engineering Report on Impact Tests*, ATT'Y MED. SERVS (July 1997); F.P.D. Navin & D.P. Romilly, *An Investigation into Vehicle and Occupant Response Subjected to Low Speed Rear Impacts*, Proceedings of the Multidisc. Road Safety Conf. VI (June 1989); NAT'L TRANSP. SAFETY BOARD, PERFORMANCE OF LAP/SHOULDER BELTS IN 167 MOTOR VEHICLE CRASHES, Vol. 1 & 2, NTSB/SS-88/03, PB88-917003; Daniel Blower & Kenneth Campbell, C*omparison of Occupant Restraints Based on Injury-Producing Contact Rates*, SAE 942219 (1994); Sturzenegger, et al., *supra* n. 27; D. Otte et al., *Variations of Injury Patterns of Seat-Belt Users*, SAE 870226 (1987); J. R. Hill et al., Chest and Abdominal Injuries Caused by Seat Belt Loading, 26 Accid. Anal. & Prev., 11-26 (Feb.1994); Laberge, et al., s*upra* n. 27; Larder, et al., *supra* n. 27; Morris & Thomas, *supra* n. 27.

38 Isaac Newton, *Philosophiae Naturalis Principia Mathematica* (1687).

39 Smith, *supra* n. 37.

40 Low Speed Rear Impact Collision, *supra*, n. 26.

41 A warning regarding the NASS is that it only captures injuries diagnosed immediately. As an example, herniations detected with an MRI later will not make it into the database even though they are associated with the collision.

42 Kullgren, et al., *supra*, n. 28.

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A Modest Observation: Empowering Yourself by Reality-Testing Yourself, Your Client and Your Case

By Larry D. Lee, Esq.

Introduction

Preparing for settlement and mediation is a process and it takes time. The beginning of the process is at the initial intake session with your new client. The conclusion of the process is signing off on paperwork months or years later.

Components to Empowerment

There are various components to the process and to empowerment:

- Know thy self
- Know thy client
- Know thy case

Know thy-self:

You must be yourself. Do not fear being yourself. Find out who you are, and let yourself be known. Are you aggressive or conservative? Do you try cases? Do you settle all your cases? Are you prepared?

Know thy client:

We all think we know our clients – after all, we did the initial interview and we have reviewed the traffic accident report or incident report and the various medical records. However, you may wish to have someone else interview your client. Another person can interview your client and get a different "take" from the experience.[1] Many lawyers are talkers when they should be listeners. It is the client's case so listen to the client. Spend time with the client to find out what the client's goals are.

Know thy case:

Knowing your case involves investigation and planning well ahead of the filing period. Mary Ryan, an expert jury consultant, recommends "reverse planning." By this, she means start with the verdict form – the real one, not the one that is a form in the book. Then build the jury instructions – the real ones, not just the outlines in the book – around the "real" verdict form. You should be able to find the facts, witnesses, documents and exhibits necessary to support the elements found in the jury instructions.

Attorney Phil Miller recommends that you start with the defense case, not the plaintiff's case. Indeed, he spends substantial time developing and building the defense case and then, and only then, does he prepare the rebuttal. It is after he has done the defense case and the rebuttal that he prepares the plaintiff's case-in-chief.

There is a huge difference between the mechanical application of facts to law that allows a plaintiff to survive motions practice and the storytelling that persuades a jury. Lawyers need to use checklists to assist them in the practice of law. David Ball's sample opening statement and sample closing arguments are great checklists. Jim Leventhal's "landmines" are another checklist.[2] There are outlines of how to do a settlement demand, and those outlines typically include important checklist items.[3] Rule 16(b) of the probate procedure gives a nice checklist. And while you are at it, consider the defense case's good points, as well as its bad points. If the defendant is a war hero, you might want to know that fact.

But storytelling is the key to empowering your plaintiff and persuading a jury. Storytelling requires that you know how to find the story. There are various ways to find the story: brainstorming with your family and friends, developing a ten-word telegram, trying to put together the case as if it were a film (with the appropriate selection of scenes), using focus groups and/or using a psychodrama to ferret out the details of the story.

It is only after you find the story that you can find the themes. It makes no sense to apply the theme of "profit before people" in a rear-end automobile case, and it makes no sense to talk about

"safety first" in a contract case. You must find the story and allow the theme to reveal itself.

Caring

Neither your clients nor your jurors will care much about what you know unless they know first how much you care. As Bill Moore, founder of Moore Real Estate, used to say, "They will never care how much you know until they know how much you care." That saying was on the wall of the reception at his office. And he was talking about real estate. Consider how much more important that slogan is when you are talking about injury clients before the jury. And "caring" is contagious.

If you know yourself, know the client, and know your case, once you have found the story your client will follow your lead.

Getting it Right

"Getting it right" is not enough. There are practical considerations with regard to settlement and mediation. When we enter the world of settlement, we enter the world of decision-making[4] with its uncertainties, human foibles and documents.

Uncertainties

Of course, there are uncertainties such as:

- Which evidence comes in and in what order? Which evidence stays out?
- How will the judge rule on this or that issue, or motion?
- What kind of jury will we get?
- And a thousand more.

Uncertainties require that we do a risk analysis using business judgment. We try to minimize uncertainties but there will always be uncertainties. We try to assess risk and control events. Indeed, "uncertainties" are what causes cases to settle.

Human Foibles

Human foibles play a part in any decision-making process. Common human foibles in decision-making include:

- Anchoring
- Over-confidence
- Sunk costs
- Confirming-evidence bias
- Groupthink

Anchoring

We all know the importance of anchoring before a jury. We try to establish an initial dollar amount around which jury negotiations will take place. In the right circumstances, the first person to put a price on the table establishes a psychological anchor point around which subsequent discussions revolve.

However, anchoring can creep into decision-making to our disadvantage. We may be the ones who set the initial dollar demand but ironically manipulate our own thinking with this initial set of numbers. We must do our homework on the issue and form our correct thoughts even if we are using numbers that may be a little high. Similarly, we must recognize that our adversaries may try to manipulate our thinking by using an initial set of low numbers. We should be resistant to someone else's anchor. We should challenge both our own number and others' numbers and approach it as a hypothesis: How did you arrive at this number? What are the assumptions? What is the logical case for this position?

Over-confidence

Trial lawyers typically don't lack confidence. But overconfidence in one's capabilities to forecast the future, assess risk, control events and anticipate others' actions may be a decision-making foible. Is our optimism delusional? Do we believe that things will turn out as we wish rather than what the warning signs portend? Extreme overconfidence is a danger. When you find yourself being overconfident, examine each assumption, belief, and piece of evidence underpinning that confidence.

Sunk costs

Sunk costs are an investment of time or money that you cannot recover. Sunk costs are about the past, but people may allow sunk costs to influence decisions about the future. Typically, you cannot recoup sunk costs. It is often difficult to take the loss and move on because moving on reflects badly on the initial decision. Lawyers are typically confronting the costs that they have put into their case. The only way for a trial lawyer to recover costs already expended on the case is to try the case. However, when confronting settlement and mediation, it is important to recognize whether you are allowing your sunk costs to influence current decision-making. If sunk costs were a mistake, don't allow those mistakes to influence or cause another.

Confirming-evidence bias

If you find yourself seeking evidence to support your point of view, while discounting or dismissing contrary evidence, you are exhibiting the confirming-evidence bias. In a recent deposition of an expert accident reconstructionist, it became obvious that the expert only selected facts which supported the view espoused by his principal. This expert ignored facts that were contrary to the opinion you requested. This expert gathered evidence to support a view, and discarded any information that conflicted or contradicted that view. This is an example of confirming-evidence bias. The antidote to this bias is self-awareness. Make it your job to find and consider the opposing view. Make it your job to gather and present all relevant facts – and divide those facts into those that support your position and those that do not.

Groupthink

Groupthink is a mode of thinking found in cohesive in-groups. Groupthink fosters unanimity rather than a

realistic appraisal of alternative viewpoints or actions. Groupthink stems from strong team identity. Unfortunately, objectivity drives groupthink less than social or psychological pressures. Symptoms of groupthink include:

- A sense of invulnerability;
- Insulation from contradictory evidence;
- Confirming evidence bias;
- Refusal to consider alternatives;
- Lack of appreciation for outside criticisms.

Some law firms practice groupthink to their detriment. Insurance company "round tables" may be guilty of groupthink. The antidote to groupthink is to welcome a diversity of ideas, and to foster the role of devil's advocate.

Documentation is Important

Documentation is important. The Plaintiff's lawyer has a fee agreement (or letter of engagement), a disclosure statement, a settlement demand packet, and concluding documents such as an accounting statement. What does a lawyer do who fails to document his recommendations to his client and then has an adverse result? Is he left saying: "I know I told them loser pays costs." Or "I know I explained the concept of statutory offer to settle." A document in the file is worth any number of later explanations.

Norms are societal expectations. Norms are how the jury and our client see the world. Some norms about lawyers would include that lawyers are careful, that they dot their "i's" and cross their "t's" and that they document what is important. Clients expect these norms – that is why letters with typographical errors don't cut it. Clients know that legal documents contain "fine print." They expect lawyers to know how to read fine print; they expect fine print from their own lawyers. Clients expect to sign documents and/or to receive confirming letters.

Take the lawyer who tries the injury case, loses it, and then finds the Defendant obtaining a cost judgment against his client. Does the client remember when the lawyer told her: "Loser pays costs" or "You can win but still lose – by winning the case but not winning more than the statutory offer to settle?" Not likely. A document in the file is appropriate.

Empower Your Client

You can empower your client, and yourself, with knowledge and leadership. You have to reveal yourself, let the client know what you are doing, let the client know how the process works, what the issues are, how you are going to handle landmines, what the practical considerations are, what the law is, how you intend to prove the case, and how you will rebut defenses. Working with the client on a proof checklist can be quite revealing to a client. Ask the client what the client wants to accomplish. While you are working with a client, you might want to keep track of what you are doing with confirming letters to the client. You might want to be sure that you have sent the following to your client:

- Settlement demand packet
- Letter outlining the pros and cons of the case
- A written consent to settle or
- A written consent to try the case
- Letter explaining that loser pays costs and that the plaintiff "can win but still lose" if she does not beat the defendant's statutory offer to settle
- Explanation of concepts such as structured settlements, Medicare set-aside trusts, other trusts and the potential need for financial advice.

What do you do if your client is "not up to all this?" Most clients welcome interaction with the attorney to work on the case. They recognize the attorney's care and concern for them, and they reciprocate. Listen to your client to find out what the client wants to accomplish. If you listen, you will know whether the client is anxious about the process, nervous about going to court, etc. Does the client want to go to trial? Or settle? However, in the rare instance when the client is "not up to all this" then get help. You can get help from family, friends, a physician, guardian ad litem, or someone else. But know that your client's goals must direct you.

Conclusion

It is not enough to know yourself, your client and your case; you must also know your client's goal based on a realistic assessment of the case. If you listen to your client and if you put your case through some reality testing, you will know how to proceed.

Larry Lee has been on CTLA's Board of Directors for 15 years. He has been recognized as a Super Lawyer for four years running. He was board certified in 1996 by the National Board of Trial Advocacy. He is a Diplomat of the National College of Advocacy (AAJ). Larry practices in Boulder, CO.

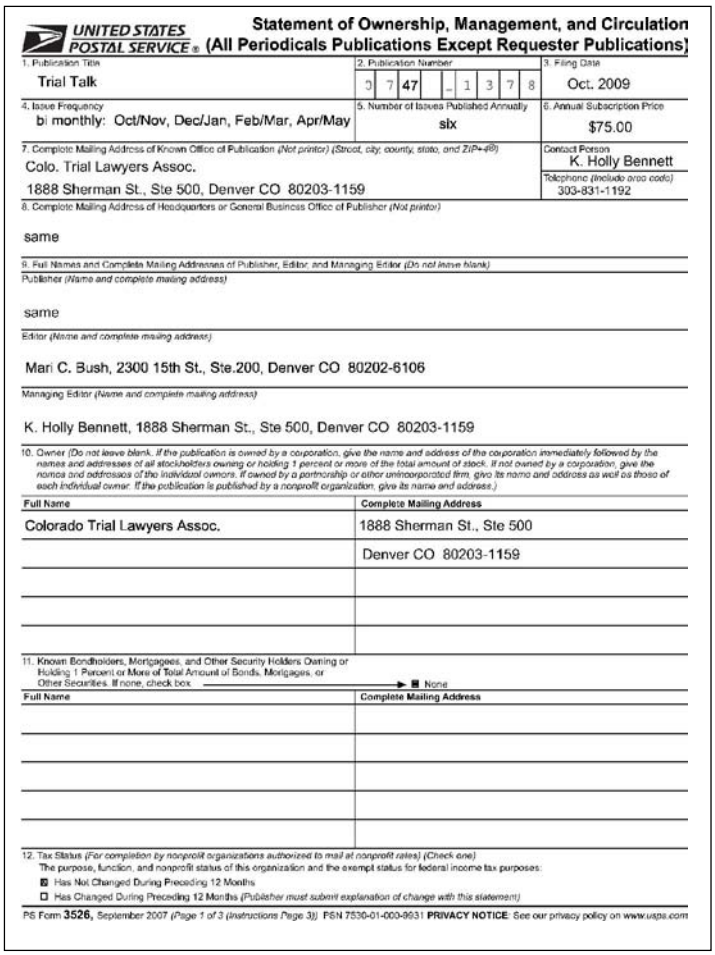
Endnotes

[1] This is a tip from John Taussig, Esq., and Bill Freas, Esq.

[2] Landmines: causation, apportionment of liability (comparative negligence, non-parties at fault), pre-existing injuries, speculative damages, costs, smoking, drugs, arrests, venue, judge, defense attorneys, overweight, religion and bias.

[3] A settlement demand should address the following: parties, court, case information, insurance information, how the incident occurred, what the witnesses will say, an assessment of defenses, a profile of the plaintiff, a summary of diagnoses, a medical chronology, a listing of studies (x-ray, MRI, CT, etc.), the result of any IME, an analysis of subsequent injuries with apportionment, an impairment rating, scarring, duties under duress, medical expenses, wage loss, mileage, liens, claims of subrogation, property damages with photos, work restrictions, future costs and wage losses, loss of earnings capacity, non-economic damages, interest, venue, life expectancy, causation (how this event caused these injuries and losses together with an assessment of pre-existing conditions and post-incident injuries) with a dollar demand.

[4] HARVARD BUSINESS SCHOOL PRESS, HARVARD BUSINESS ESSENTIALS, DECISION MAKING: 5 STEPS TO BETTER RESULTS (2006). The portion related to uncertainty, human foibles and groupthink come from *Decision Making*, pp.77-120.



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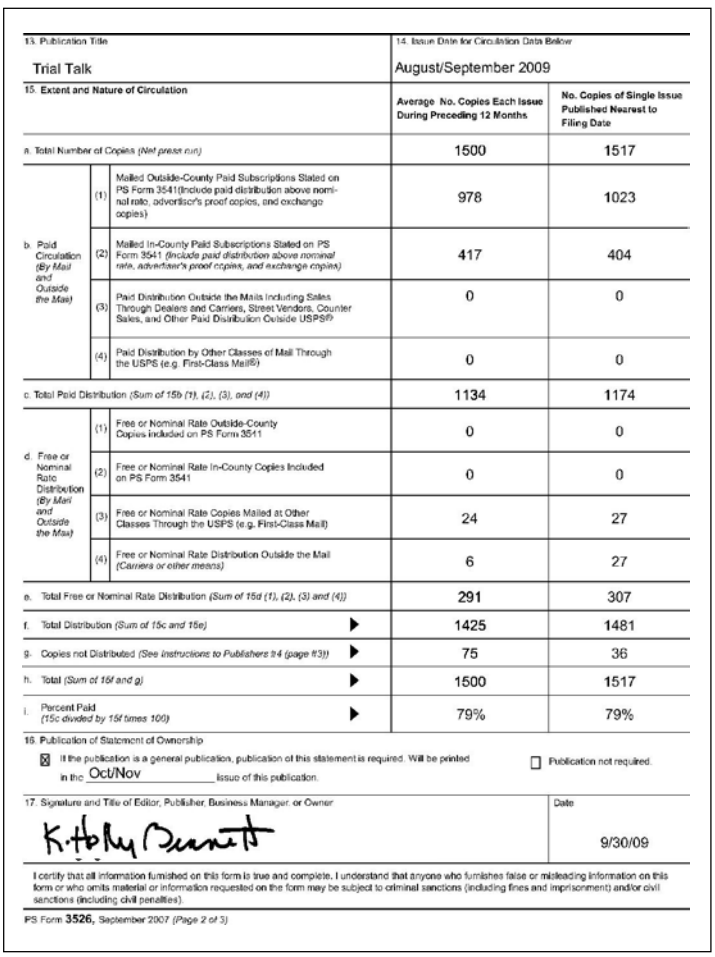

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PS Form **3526**, September 2007 (Page 2 of 3)

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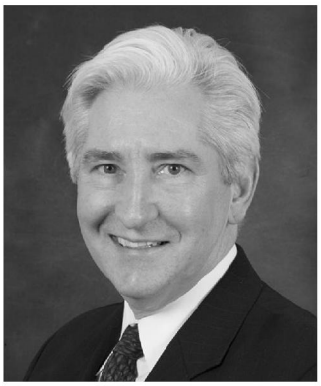


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Top Ten Reasons Why Lawyers Don't Do Focus Groups (Part 2)

By: Carrie Frank, J.D., M.S.S.W.

During the years that I have been running focus groups, I have consistently heard reasons why attorneys are not conducting them in their own cases. The reasons are remarkably consistent no matter who I am talking to. The last issue of *Trial Talk*® gave numbers 6-10 of my top ten. Here are the rest, the top five reasons:

5. "I Have the "Smoking Gun" and a Great Case"

Too often, I have heard focus group participants ask for specific testimony or documents that they believe they need to determine the case or award significant damages and the lawyers do not have it. Why? Because they waited until discovery was closed before running a focus group. Focus groups conducted during the pretrial phase provide the opportunity to send discovery requests to the opposing side, obtain the documents and information that is important to the jury's decision and ask the right questions at deposition. Further, sometimes the jury is not as impressed with the "smoking gun" as we are. Even worse, some cases look great when we take them but will not be successful at trial. Focus groups will always tell you exactly what they need to see or hear in order for your client to be successful and just as important; they will let you know when you should be aiming toward settlement.

4. "I Know My Case Better than Anyone"

Except maybe the opposing counsel, because they are running focus groups. The fact is, you don't know what you don't know. During recent focus groups, the lawyer told me that he learned more about his case in the two focus groups with me than he had with his experts during the entire pretrial phase**.** Focus group participants say some amazing things and every time, it is a surprise to find out what they think. Issues that we think are important or that we expect to handle easily at trial may not be so clear to the focus group. Discussions of things we think are irrelevant (alcohol usage, or lack of, involving a car crash case is one example) often are raised within minutes of the focus group deliberations. Questions or assumptions about routine documents like a police report are not so routine to focus group members. We spend much of the pretrial phase trying to obtain and learn the information in possession of the other side. We send interrogatories, we take depositions and we review and analyze documents. Why would we then fail to conduct focus groups and allow the other side to be the only one with the knowledge? To create a level playing field, you must learn what the other side knows, and the other side knows to run focus groups.

3. "That Evidence Will Never Come In"

Maybe, and may not. But sometimes you find out you want it to come in so you can explain it to the jury, as opposed to having the jury make up an answer you do not like. In a recent case, the lawyer wanted to exclude facts concerning why the client was in prison. The lawyer clearly could keep out this evidence. But we found out that the "juror" reasons for him being in jail were a lot worse than the real reasons. When the focus group heard with the real reasons, they were less harsh on the plaintiff. In fact, some felt sorry for him. You need to know how to handle these issues and the other points that you think will never come into evidence but the jury wants to know about it. Questions left unanswered are problems for you.

2. "I've Been Doing It This Way for Years"

Times change. What worked ten years ago does not work today. Jurors have biases and attitudes, including personal responsibility, anti-plaintiff, suspicion, stuff happens and anti-lawyer. We need to use focus groups to find out how use these biases and attitudes in our favor, not have them used against us. Psychology plays a major role in decision-making. By hearing the psychology of the focus group "juror," we can structure and sequence our case for the real juror.

1. "Focus Groups Are Too Expensive"

Often, people say they cannot afford to run focus groups. And everyone is tightening his or her belt. But you spend money on experts, exhibits and on other aspects of the case, yet you won't spend money on what is likely the most critical information regarding the presentation, framing and sequencing, and ultimately, the success of your case. Focus groups can be much more cost

effective than you think. If you have a small case, consider working with several other attorneys with similar cases and share the expenses. Different trial consultants also my charge differently and you may get different services for the fee. If you consider a cost benefit analysis, focus groups are one of the best investments you can make.

Conclusion

The bottom line is that you should conduct focus groups so that you know the best way to present your case to the people who really matter the most - the jury. In large, expensive cases, you can run focus groups to determine whether you should accept the case and pursue it. You can run focus groups before you start discovery - or after the close of discovery - and before you structure your trial presentation. That way you will know whom the jury wants to hear from, what they want to see and what the juror proof is. Only then are you ready to win in today's climate.

Carrie R. Frank She is currently a partner with Klein | Frank, P.C. in Boulder where her practice focuses on cases involving defective products including medical devices, drugs and toys and serious auto crashes and other personal injury matters and bad faith cases. In practice for over 20 years, she was rated one on the top 3000 Plaintiff's Lawyers by Law-Dragon in 2006 and was a finalist in 2009. She was a SuperLawyer in 2009. Carrie is a past chair of the American Association for Justice (AAJ) Products Liability section and is an officer in the Colorado Trial Lawyers Association. Carrie also has a Master's degree in social work which is valuable for her work as a trial consultant and in running focus groups. Carrie also teaches and speaks throughout the country at both national and state programs and is a member of the National College of Advocacy Board of Trustees, the education arm of AAJ. You can reach Carrie at 303-448-8884 or carrie@klein-law-firm.com.

Colorado's Dram Shop Law – A Vehicle for Social Change

By Maj. Mark Willingham

[Editor's Note: C.R.S. 12-47-801 provides exclusively for the liability of alcohol vendors in Colorado. The liability is limited to when a licensee "willfully and knowingly" sells or serves any alcohol beverage to a person under twenty-one years of age or who is visibly intoxicated. There is a one-year statute of limitation on such actions. The person to whom the alcohol was sold or served may not maintain a civil action. There is a cap on such actions, which, after adjustment for inflation, is $280,810.00. The statute similarly limits actions against social hosts and requires that the social host "knowingly" served alcohol to persons under twenty-one or persons visibly intoxicated.]

A foreseeable and preventable tragedy unfolds many times a year. An impaired driver with devastating results hits a Colorado family traveling home from an outing. Over 200 people are killed and thousands more are seriously injured in impaired driving crashes in Colorado each year. Even more shocking is that half of these deaths and injuries can be attributed to drivers who were coming **directly** from a beverage license premises where they were over-served or allowed to over-consume alcohol.

Beverage alcohol is the only universally available consumer product that, when used as directed, causes changes in the consumer's emotional state, his or her cognitive ability and gross and fine motor skills. It also diminishes the drinker's ability to make rational decisions. Beverage alcohol is widely sold and consumed in businesses that are primarily accessible through the use of personally operated vehicles creating a reasonable expectation that many customers will also drive those vehicles away from the bar or restaurant. Many will be under the influence of the intoxicating effect of the product and unable to safely operate those vehicles. Drivers with a BAC over .08 make at least 80 million trips annually in the United States.

The business model under which the alcoholic beverage industry operates can be antithetical to the elements of responsible retailing. In many cases tips; a significant part of servers' income, come from "good service" which often equates to heavy pours of alcohol, frequent replenishment, and a wink and a nod at increasing intoxication levels. Beverage retailers often utilize questionable promotions, two for one or all you can drink specials, for example, to gain a competitive advantage or to maintain marketing parity with other retailers. The choices bar owners and bartenders make in over-serving their guests often eliminate the choices their guests might have in moderating their drinking behavior.

No one will argue that the impaired driver in an alcohol related crash is blameless. The decision to have the first, second or perhaps the third drink rests solely with the drinker. At a certain point, however, the drinker loses his or her ability to make rational decisions about further alcohol consumption. Alcohol diminishes the drinker's ability to engage in appropriate behavior and make rational decisions. It is a truism worthy of a scientific designation; the more alcohol one consumes, the lower one's ability to assess their own intoxication and assess their own ability to operate a motor vehicle safely. This most certainly creates a "Catch 22" logic model in which the person the retailer often believes responsible for determining whether their faculties are impaired becomes more and more impaired with each drink the retailer serves.

A beverage license is a privilege issued by the government. Its issue and retention is conditioned on the licensee's agreement to act in the public's interest. **Responsible retailers** provide an inviting and enjoyable hospitality experience with alcohol service as an adjunct to that experience. A responsible retailer's obligation under that mantle is to prevent patron intoxication. Unfortunately, not all beverage retailers act in a responsible manner. Not all beverage retailers serve alcoholic beverages with the goal of providing hospitality while preventing patron intoxication.

As in most states in the United States, once a drinker in Colorado reaches the point where he or she becomes intoxicated and therefore loses the ability to

make rational decisions, responsibility for insuring the safety of those the drinker may harm, shifts to the retailer. Under Colorado's Dram Shop law, the retailer becomes his brother's keeper.

As a public policy, Colorado allows an injured party or survivor to bring a civil law suit, a dram shop action, against a beverage retailer for the death or injury caused by serving an intoxicated patron or serving a patron who was under the age of 21. Most of these cases involve a vehicle crash, however, causes of action also relate to homicide, sexual assault, and other incidents where the intoxicated patron loses the ability of self-regulation.

The phase "dram shop" is based on a unit of measure popular in Victorian times; approximately one eighth of an ounce in our vernacular, and has become synonymous with a prohibition on the over-service of beverage alcohol to a patron or guest. The principal purpose of Colorado's dram shop law is to protect the public from the over-service or over-consumption of beverage alcohol and from the service of alcohol to persons under the age of 21 years. This law calls upon beverage licensees and their employees to play a significant role in the enforcement of this important public policy. No other business type comes to mind where the holder of a government license; by acceptance of that license, is required to act as an agent of the state in taking affirmative action to monitor and intercede in the behavior of a citizen/business invitee.

Responsible retailing involves the development and implementation of effective alcohol service policies, practices, employee training and management systems. These elements are the keys to responsible retailing and the prevention of acts and situations leading to a dram shop lawsuit. Conversely, irresponsible beverage retailers do not employ these elements or they have developed ineffective policies, practices, training and management systems that fall below a reasonable standard of care.

Dram shop cases involve an examination of two elements; the fact situation involving the alleged service to an intoxicated patron or service to a minor and an examination of the premise's alcohol service practices, polices, training and management systems, which allowed the beverage service to occur. In fact, findings related to the insufficiency of practices, policies, training and management also serve as the basis for punitive damages in many states. Beverage retailers simply cannot ignore the dangerous nature of these products and sell them as though the danger did not exist.

Examination of the fact situation can demonstrate that the retailer served an intoxicated patron or a minor. The drinker's self-admission and/or witnesses describing the condition of the patron at the time of alcohol service can be illustrative. Over-service of alcoholic beverages can also be determined through receipts, credit card charge slips and extrapolation of the drinker's BAC based on his or her personal characteristics such as gender, weight, and the elapsed time. Elapsed time can be determined through witnesses, charge slips, crash reports and even triangulation of the drinker's cell phone position.

Examination of the business policies, practices, employee training and management systems can support the testimony of the fact witnesses. It can also illustrate the businesses' alcohol service pattern and practice serving to support a finding of benign neglect or intent. An expert can assess written policies and training curriculum, examine depositions of current and past employees and observe current business practices.

Beverage retailers should have written policies that address (at a minimum):

- The prevention of the sale of alcoholic beverages to persons under the age of 21, including an apparent age that triggers an ID request,
- Acceptable forms of identification, and how to properly examine and verify an ID; and
- Policies to prevent over-service and service to an intoxicated patron including identification of an intoxicated patron, identification of a patron habitually addicted to alcohol, discontinuance of alcohol service and the provision of alternate transportation.

When a beverage retailer does not have written policies, application of responsible retailing practices will be inconsistent and will be subject to the interpretation of the individual employees. Servers and bartenders will have no point of consistent reference guiding their actions and behavior. In fact, their interpretation may even vary from day to day without the consistency provided by a written policy. The lack of written policies also limits the licensee's ability to provide effective and consistent oversight and employee training.

Bars and restaurants should design their business practices to mitigate the risks presented by the business model, clientele, location and environment. Beverage licensees have an obligation to prevent law violations regardless of the size of their establishment or their success. For example, happy hour and other gender, price, time, or quantity based drink specials and promotions are legal, however, they contribute significantly to the probability of patron over-service and service to minors. The court will look at these practices to determine if the beverage retailer appropriately scaled their intervention and prevention practices in response to the risks at their business. While many beverage retailers will seek to explain that they were unable to adequately control consumption by minors or over-consumption in their establishment because they had 1000 patrons going to 5 internal bars, dram shop liability does not diminish simply because the business is financially successful. Responsible retailing practices are scalable to meet the risks, if the retailer chooses to utilize them.

A responsible retailer will provide appropriate training to his or her employees and will ensure that the

employees understand what they are taught and can apply the information. Training is not a one-time practice. It is unreasonable for a beverage retailer to believe that an hour or two of instruction on responsible retailing practices on the employee's first day will serve that employee well for the next 10 or 15 or 20 years. Training must be ongoing. At the very least, beverage retailers should provide a structured training program to employees two or three times a year and provide mini-courses or shift reminders on a daily basis.

It is critical that bartenders and servers be trained using objective standards to determine if a patron is 30 years of age or under and to determine signs of intoxication. Beverage retailers often tell an employee to check the ID of anyone who appears under 30 and yet does not provide that 21-year-old server with any tips or clues to help him or her identify whether someone is under 30. Beverage retailers will instruct their bartenders and servers not to serve alcohol to an intoxicated patron and then provide the server with outrageous examples of behavior to use as a guide, behaviors that would only emerge when a person's BAC was already twice the legal limit. Even when the retailers tells the server to watch what they serve the patrons, the licensee will not provide the employees with BAC calculators or BAC charts or even information about standard drink units to help the bartender or server determine the maximum amount of alcohol that could be safely served to that employee in a given period.

Training should include role-play exercises so that servers and bartenders become accustomed to interacting with patrons and asking questions to help them determine whether the patron is of legal age or becoming intoxicated. Unfortunately, many bars and restaurants, including national casual dining chains, invest extensive resources and time in training their employees about menu items and the alcoholic beverages available for purchase and almost no time training a bartender or server to be a responsible alcohol server. Many retailers operate under the false economy that "telling" is easier and less expensive than training.

Management systems may in fact be the most important aspect of responsible retailing. Without active and knowledgeable management, a beverage premises may be nothing more than a collection of independent contractors serving alcoholic beverages. Servers and bartenders stress those things they perceive to be important to management. If management believes that responsible retailing is important and continually stresses compliance with the law prohibiting service to a minor or service to an intoxicated patron, the servers will stress this as well through their actions. Conversely, if this is not important to management, it will not be important to the servers, regardless of potential criminal penalties.

How can the jury determine if a beverage licensee acted in good faith and exercised the appropriate standards of care to ensure safe service and consumption of alcohol? The jury will look at many issues concerning the operation of the business in making their determination. Did the business utilize appropriate policies, practices and training? Did the manager overrule a server's assessment of intoxication and subsequently require the server to provide alcohol to intoxicated patrons? Did the manager downplay the importance of appropriate service standards? Did the business value repeat customer visits and high alcohol sales over responsible alcohol service?

The jury will look to see if the business attempted to comply with the law. Did the beverage licensee simply tell his or her employees not to violate the law or did they provide encouragement, knowledge and tools to empower compliance? Did the beverage licensee provide ID checking guides and BAC calculators to assist the bartenders and servers in doing their job? Did the beverage licensee or manager quiz the employees daily to ensure that they knew the date of birth that evidences 21 or older? Did the beverage licensee remind his or her employees what to look for to determine the subtle signs of intoxication before the person was a risk to themselves or others? Did the licensee employ mystery-shopping programs and video surveillance systems to ensure the bartenders and servers were not providing alcohol to minors, were not overpouring alcohol and were not ignoring signs of obvious and visible intoxication? These, and many more practices are indicative of responsible alcoholic beverage service.

Dram shop laws provide greater benefits than simply being the basis for civil lawsuits. Dram shop laws contribute to responsible retailing in a way that criminal and administrative penalties prohibiting over-serve and service to minors cannot. It is an unfortunate fact that many beverage retailers look at misdemeanor criminal charges brought against their servers and administrative

action brought against their alcoholic beverage license as a cost of doing business. To many, it is a cost benefit-risk analysis. In fact, these penalties are generally quite modest when the state actually imposes them. Criminal and administrative laws against over-serving, when they even exist, are among the most disregarded laws in the country. Even though the bars and restaurants that over-serve and usher their intoxicated patrons out the door and into vehicles represent fewer than 10% of the beverage premises in any community, law enforcement and regulatory agencies either do not have the resources to adequately investigate and prevent these occurrences or do not give over-serving sufficient priority.

One large national beverage retailer has determined that their bottom line is better served by settling four wrongful death lawsuits per year than by implementing effective alcohol policies and employee training which may offend some patrons and cause those patrons not to return. This bean-counter approach to the sale and service of alcoholic beverages is reminiscent of Ford Motor Co.'s decision to weigh the cost of correcting deficient fuel tanks in Ford Pintos against the cost of wrongful death lawsuits. Ford valued each potential death at $200,000 and determined that settlements would cost less than investing $11 to correct each deficiency. It is unfortunate that some members of the hospitality industry have the same perspective and value repeat and happy customers over responsible service practices.

Civil judgments can be significant and can cause change in the way in which sellers provide alcoholic beverages both by the beverage retailer against whom the suit was filed and against other beverage retailers in the community. Their appreciation of the financial risk they face from engaging in irresponsible alcoholic beverage service, in many cases, will have an affect on the policies and practices they employ. Evidence indicates that the utilization of a civil dram shop law can significantly affect impaired driving crash deaths and injuries. Texas experienced a 6.5% decrease in single vehicle nighttime crashes resulting in injury after a liability case was filed and publicized.

The use of dram shop laws and the civil justice system increases awareness of the negative consequences of over-service and over-consumption of alcohol because of the publicity that about dram shop cases and their verdicts. Studies show that states that have a high level of dram shop liability have more publicity about the impact of liability resulting from these cases and have more servers and managers who are aware of the liability.

Dram shop laws decrease excessive and illegal alcohol consumption by both adults and underage persons. Studies also have found that states with high dram shop liability also had fewer lower-price drink promotions (like "happy hours") that encourage excessive consumption in a limited amount of time and are attractive to underage drinkers.

In states with dram shop liability, alcohol servers also more thoroughly check identification. This means that fewer underage drinkers are able to drink illegally in beverage-licensed premises.

Finally, dram shop laws do not decrease personal responsibility since more responsibility shifts to beverage retailers. Creating a cause of action against an establishment that engages in over-service of alcohol does not mean that the law does not also hold the individual responsible. Rather, punitive damages for both drinking drivers and serving establishments serve similar purposes – to show that penalties come with these actions and to cause the retailer and server to rethink their practices leading to over-service, over-consumption and alcohol consumption by underage persons.

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Trine's Tales

By Bill Trine, Esq.

An English barrister advised an American lawyer that a trial in England begins when the jury is accepted by counsel and sworn to try the case. The American lawyer replied, "Hell, in the United States the trial is all over by that time." - Author unknown

After more than one hundred jury trials, you would think that I would have some profound statement or wisdom to pass on about jurors and jury selection. If not a magic bullet, then at least some sound advice. After all, look at all of the mistakes that I made in jury selection over the last 50 years. Surely those mistakes taught me something, didn't they? Well, I certainly learned that I could lose a case because of an inadequate voir dire examination of the jurors, no matter how well I then tried the case. I learned that fights and arguments among jurors during their deliberations can create unanticipated results, and I learned that leaving an attractive female on the jury just because she was friendly and smiled sweetly could be a terrible mistake. But these experiences and many others I could relate, although interesting or even entertaining, tell us more about the trial lawyer than they do about jurors and jury selection. So, before relating some of these experiences, let me first tell you some of the things I've learned about jurors and jury selection.

I know that more cases are lost than won in the jury selection process, better described as a "de-selection" process of getting rid of your worst jurors. I know that creating a scientific profile of the "ideal juror" for your case - as well as the "worst juror" - is of little value when the factors used in the profile do not fit the jurors seated in the courtroom. I know that most jurors are uncomfortable with the invasion of privacy that voir dire entails, and will resist reporting behaviors that are personally embarrassing or perceived as socially undesirable. I know that a lawyer must listen carefully and "connect" with each prospective juror during voir dire and if the lawyer talks more than 20% of the time, it is too much.

But the most important lesson I have learned is that juror's own life events and experiences will always influence, if not control, a juror's response to the "trial stories" and the issues presented at trial. A juror may not be aware that the source of his or her "feelings" about a case results from that juror's own life events. When there is a subconscious connection, a juror may be unable to identify the source of that feeling and therefore remain silent when questioned during voir dire. When there is a conscious connection to the juror's life experiences, the juror may more readily identify and express the feelings he or she has about trial issues, but counsel may not adequately explore the depth of those feelings to determine whether they will control the juror's decisions in the case.

So what can we do on voir dire not only to elicit the strong feelings a juror may have about the important issues in the case, but also to discover the life experiences that create the feelings the juror expresses. The first step is to identify those issues. Then the lawyer must honestly reveal his or her own feelings about the issue and the source of the lawyer's feeling. The more the lawyer is willing to share of himself or herself, the more the jurors are willing to share with the lawyer and other jurors. If a lawyer shares at a superficial level, jurors will generally do likewise. If one shares at a deeper level, the jurors' are more inclined to share their important life experiences at a deeper level.[1]

This therefore requires the trial lawyer to understand the origin of his or her feelings about the critical issues in the case, in order to reveal them to the jury.

So, let me give you an example of a juror whose strong feelings, as well as the origin of those feelings, I might easily have identified, but did not detect because of an inadequate voir dire examination. My client suffered injuries in a railroad crossing accident in the 1960's, and I filed a lawsuit against the railroad resulting in a jury trial in Boulder. In representing the injured plaintiff, I carefully prepared what I thought was a thorough list of questions for my voir dire examination of the prospective jurors. I designed questions to detect jurors who might favor the railroad.

The parties selected a jury, and then I presented a very strong case on liability. After the jury deliberated for several hours, the foreperson ("foreman" in those days) announced that the jurors were unable to arrive at a unanimous verdict and further deliberations would be useless. The court discharged the jury and told them they were free to discuss the case with counsel. Several gathered around me and complained that a fellow juror, who had immediately left the courtroom, favored the railroad from the beginning of deliberations. The other jurors could not persuade him to discuss the facts or the court's instructions. They told me that he stubbornly defended the railroad in an irrational way.

The following day I received a telephone call from the juror who had caused the mistrial, and he politely requested to meet with me at my office. He arrived dressed in railroad coveralls and wearing a cap that prominently displayed a Union Pacific Railroad insignia. He was a robust, middle-aged man. With a friendly smile and in a condescending way, he explained that had I understood the historical importance of the railroad in the development of the West, I would never have sued the railroad. After giving me an animated historical overview, he invited me to his home to see what he described as an entire basement filled with model trains and miniature train stations, electrically operated crossings and tiny villages serviced by the trains. I politely declined.

You see, on voir dire I had asked every question I could think of that could establish a jurors friendly attitude towards the railroad, but my questions were too specific and not sufficiently open-ended. They did not invite an open discussion and were without consideration to possible "railroad buffs" who build model railroads and trains. I probably did most of the talking and not enough listening. This is also an example of the well-recognized adage that good cases can be lost in jury selection before opening statements and the presentation of evidence.

It was later, perhaps in the 1970's, that I learned another lesson. I had not been evaluating how the potential jurors, if selected, might interact with one another during deliberations. Instead, I had been evaluating jurors in their individual capacity during voir dire, without regard to how each might fit into the group counsel was selecting.

In the 1970's, I tried an automobile collision case in Boulder to a jury of five women and one man. The liability and injuries were not strongly disputed - only the amount of damages to be assessed - so I was surprised as jury deliberations dragged on for several hours. The foreperson, one of the women, finally announced a verdict for the plaintiff, and the court discharged the jury. The male juror bolted the courtroom looking angry, and the five female jurors gathered around me to explain that the male juror made offensive remarks to them at each recess during the trial. Then, when they commenced deliberations, the male sat at the head of the table and announced that he was the only one with previous jury experience so he should serve as foreman. One of the woman responded that the judge had instructed them to elect a foreperson. She nominated another woman, who they then elected by a vote of 5 to 1.

When the foreperson then suggested that the defendant was negligent, all but the male agreed. After much argument he reluctantly conceded, but stated that they should award very little damages. Upon hearing that statement, the foreperson asked each juror to write an amount on a slip of paper and then, in unison display the amount, to see how far apart they might be. She explained that she thought that $35,000 would be fair, but knowing the male juror's attitude, she wrote $75,000. Another female juror did the same thing. Both explained that they did this, independently of one another, for bargaining purposes with the male juror who, not surprisingly wrote $1500. After several hours of angry argument, the jury reached a verdict for $25,000. I will never know what amount the jury would have awarded, absent the male's offensive remarks during trial and his anger in failing to be elected foreperson.

In the 1960's, lawyers learned how to conduct a voir dire examination of prospective jurors by trial and error. Law schools, seminars and CLE courses did not teach it. Most lawyers doing trial work were sole practitioners without a mentor or the only lawyer in a small firm doing the trial work. Judges asked very few questions, and the lawyers asked the demographic type questions that judges now routinely ask. It was common for a judge to prohibit questions of individual jurors that could be asked of the panel as a whole, and they "encouraged" lawyers to frame questions that would call for a "yes" or "no" answer. To learn, a young lawyer would attend trials and watch other lawyers perform. Courts did not prohibit jurors from discussing their verdict and deliberations with trial counsel, and many judges encouraged jurors to do so.

Then some judges began using a board containing a list of all of the demographic type questions, asking each juror to address items like family, occupations, prior jury service, etc. Eventually judges stopped asking counsel to estimate the time needed for voir dire, and began to impose time restrictions. As the courts began taking over more of the voir dire examination, they also made it more difficult for counsel to interview jurors following the verdict. Judges, in their comments when dismissing the jury, often discouraged jurors from discussing their deliberations with counsel. Some judges would meet with the jurors in private following the verdict, to thank them and discuss their verdict, without inviting counsel to participate. Trial lawyers found it more difficult to learn by "trial and error" and develop the skills necessary to conduct a proper voir dire examination. This leads me to my final story of the 1960's.

In preparation for a jury trial in Boulder, I received and reviewed the list of jurors in advance of the trial date and marked several as a "must excuse." One was the wife of a prominent Boulder businessman whom I previously sued, although I had never met his wife. To my dismay, the bailiff called her name, and seated her as a prospective juror. She was a very attractive and charming person, and during the voir dire examination, she frequently responded to my questions with a warm and friendly smile (much to my surprise) and appeared somewhat hostile to defense counsel. Hmm, I thought, "perhaps she and her husband are separated or estranged. Maybe she was pleased that I sued him. She seems to like my client and me. With her education and charm, she could be the foreperson. Didn't she look over and wink? I think I'll keep her!"

As the trial progressed, I was no longer the recipient of warm smiles. She was the foreperson. Following a defense verdict, she approached me and, with some hostility, stated that when she went home after the first day in trial, she learned that I was the lawyer who had sued her husband. "Why in the world did you leave me on the jury, she asked? I don't remember my response, but I should have said, "Because I am inexperienced and stupid!"

Well, much has happened since my early trial experiences in the 1960's. The fear of unwittingly seating a juror who will sabotage a winnable case has caused trial lawyers to search for new methods of gathering information to better prepare for the voir dire examination and jury selection. Thus, the 1970's gave birth to the use of focus groups, jury questionnaires, community surveys and a new industry of jury and trial consultants.

Lawyers began using the internet to investigate prospective jurors before and during the voir dire examination.[2] Although sometimes helpful, the information counsel receives using these innovative techniques can often be misleading as well as very expensive. Further, what good is the information if the lawyer is not trained to use it in voir dire to discover the life experiences and feelings of the jurors that relate to the critical issues of the case?

What caused trial lawyers to begin searching for new methods of gathering information about prospective jurors? Why wasn't the voir dire examination by counsel sufficient to obtain the necessary information? Was it because the voir dire examinations by counsel were often limited or not permitted by the court, or performed without the skill necessary to elicit the needed information? If so, wouldn't it be cheaper and more productive to learn how to obtain the necessary information skillfully in a well-prepared and unlimited voir dire examination?

So, is all of this pre-trial information about prospective jurors necessary, or only occasionally helpful? Can you select a fair and impartial without utilizing some of these expensive methods of gathering information? How much of the gathered information is generic and not that useful when applied to the subject case and client? How often does counsel gather pre-trial information to identify the type of juror who will be favorable (or unfavorable) to plaintiff's case, only to find that the types identified are not present in the courtroom at time of trial? How much of the acquired information is useful if the court does not permit the lawyer to conduct a voir dire examination, and the judge will not entertain suggested questions from counsel or permit the use of jury questionnaires? How much of the generic information received through these information gathering methods could have been discovered by a thoughtful lawyer using common sense and spending the time necessary to understand the weakness's and strengths of the client's case and preparing a voir dire examination to address the problems and weaknesses?

Certainly, the expense of gathering pre-trial information about prospective jurors is not warranted in every case, even if the information could be helpful. The expense of using the civil justice system is destroying it. No wonder that jury trials have been on the decline in the state and federal courts since the 1970's. The costs of litigation have sky rocketed.

I like to compare the decision a lawyer must make in deciding whether to participate fully in the madness of incurring substantial litigation expenses in every case to an illustration from the medical profession. When a patient presents for removal of an unsightly mole, are second opinions, hospitalization, MRI studies and referral to a general surgeon necessary? Of course not. Similarly, not every lawsuit warrants the use of focus groups, taking depositions of expert witnesses, an accident reconstruction expert, jury consultants, etc.

So the trial lawyer must decide how much time and money to spend on obtaining pre-trial information for the jury selection process, with recognition that once a jury is sworn, the rest of the trial may be just "window dressing."[3]

Bill Trine has been a successful trial lawyer for nearly 50 years, and has logged over 150 trials throughout his storied career. A Past President of CTLA, he also founded and served as President of Public Justice (formerly Trial Lawyers for Public Justice), a Washington DC based public interest law firm.

Endnotes

[1] The success of this technique has been demonstrated in hundred's of voir dire examinations by lawyers working on their cases at the Trial Lawyers College in Wyoming and in jury trials across America when it is properly utilized. However, like all trial skills, there is a learning curve and you must first understand it, practice it then use it in the courtroom. I highly recommend attending a Trial Lawyer College seminar on voir dire.

[2] In some jurisdictions a jury list is available to counsel before trial. However, it is time consuming and expensive to do an Internet

search of all prospective jurors, ie, using MySpace, etc. Some lawyers have computer experts performing searches as the bailiff calls jurors to the jury box in the courtroom. They can also accomplish this remotely from nearby offices by transmitting names from the courtroom to those ready to commence a search and report the results back to the courtroom.

[3] The importance of Voir Dire is summed up by Clarence Darrow's comment, quoted in the book by Iris Noble, *Clarence Darrow: Defense Attorney*.

> Arthur Garfield Hays was sitting at the defense table. He had agreed to join in the case with Darrow. Now he marveled at the tremendous grasp of history his colleague was displaying, and also his understanding of the psychology of men. Darrow was taking an ordinarily routine matter - the questioning, rejecting and accepting of men for jury duty -and turning it into a schoolroom for social ideas. When the twelve men were finally chosen, Darrow and Hays agreed: '*The case is won or lost now. The rest is window dressing*.'

The Hidden Power of Preponderance

By Jessica Hoffman, Esq.

Think back to the cases you have lost. How many of those would you have won had the jurors truly based their decisions on a preponderance of the evidence? Preponderance is one of the strongest parts of your case, but for it to be effective, you must use it correctly.

Most attorneys (not you, of course) talk to jurors about preponderance in voir dire and in opening, but then fail to mention it again until closing. By this time, jurors have forgotten what preponderance means or how or when it applies. Jurors have thus heard the entire case and weighed all the evidence based on a much higher standard similar to "beyond reasonable doubt" because that's a standard they are more familiar with. People do not generally make important decisions in life based on a 51% "more likely than not" decision point. It is counter-intuitive for them to make a decision on someone's future based on a standard that requires they believe you are only slightly more right than wrong. Without constant reminder of preponderance and how or when it applies, jurors are going to judge your case on the wrong standard of proof. Reminding jurors of preponderance at the end of trial during closing is not enough. The human brain cannot think backwards. It is impossible. If I gave you the book *Goldilocks and the Three Bears*, told you to read it, and then asked you at the end how many times the author typed out Goldilocks' name, you would have no idea. You would have just read the entire story, but you did not know what you were looking for. If I told you before you read the book that I was going to ask you how many times the author wrote "Goldilocks," you would be able to provide a correct answer. Jurors are no different. They cannot go back through the entire case mentally and re-evaluate the evidence based on a different standard. When you explain it in voir dire and opening, most jurors forget it or pay no attention. It needs to be a primary theme in your case so that jurors view the evidence through a preponderance lens from beginning to end.

Preponderance applies to every aspect of your case – including damages. Throughout trial, remind jurors of the standard "more likely right than wrong" and show them with your hands (place one hand about an inch above the other and show that you are weighing something). Do **not**, however, limit yourself to preponderance. Tell the jurors that you intend to show much more than more likely right than wrong, but in the end, that is all you are required to show.

So how does this work? Start in voir dire. Ask jurors about their problems in deciding a case based on a 51% standard: "Folks, in cases like these, jurors make their decision on the basis of 'are we more likely right than wrong' (show them your hands, almost level), just a little more likely right than wrong. Some folks think that this (show your hands again) is not quite fair because it makes it a little too easy on my side and a little too hard on the defense. Some people feel it is a little unfair because we do not have to prove anything and some feel it is okay the way it is. All I am asking is, do you think you're a little closer to those who say it's a little unfair that we don't have to prove anything or a little closer to those who think it is okay?" Follow up by asking jurors to tell you more about their answers.

In opening, use preponderance when explaining to what each witness will testify. For example, "Dr. X will be here and he will explain that because of X, Y and Z, he believes A, B and C. He will

testify that he is more likely right than wrong and beyond that, he's sure." Every time you say "more likely right than wrong," place your hands, palms up, close together and almost level to one another. Whenever you say "and beyond that, he is sure," place one hand much higher than the other to show you are weighing one item that is much heavier than the other is.

When you talk to witnesses, say "Mrs. X, when you say the light was red, are you more likely right than wrong or more likely wrong than right? And beyond that, are you sure?" Remember to use your hands to demonstrate. Do this with every witness with every key point. In closing, arm them to fight for you based on preponderance. Tell them, "So folks, if over the course of deliberations, someone says they're just not sure of A, B, or C, remind them that we only have to show slightly more right than wrong." Again, use your hands to show the slight deviation in weight of the evidence.

Preponderance is a foreign concept to jurors. Do not trust them to be able to apply it to your case if you only mention it in voir dire or opening and then dismiss it until closing. If you make "more likely right than wrong" a major theme for every aspect of your case, you can turn a weak case into a winner simply by effectively lowering the standard.

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National Perspective

Robert S. Peck, Esq., and James E. Rooks, Jr., Esq.

This month, National Perspective highlights a Maryland Court of Appeals decision that recognizes a cause of action for failure to obtain informed consent in non-battery medical negligence cases. There is a Washington State Supreme Court decision allowing proof by circumstantial evidence in dram shop cases and a Montana Supreme Court decision requiring a mistrial where a medical malpractice defendant assisted an ill juror during trial.

Maryland's Highest State Court Recognizes Informed-Consent Liability in Absence of Battery. In a decision that may cast new light on birth-related "cerebral palsy" cases, the Maryland Court of Appeals (the state's highest court) held, in *McQuitty v. Spangler*[1] that a health-care provider may be liable on an "informed consent" theory for failure to offer a pregnant woman alternative treatment that might have avoided the harm to her child. In so doing, the court abrogated earlier precedents that appeared to require proof of a physical battery (as in unconsented surgery) in informed-consent cases.

In May 1995, plaintiff Dylan McQuitty was born with severe cerebral palsy. Her mother, Peggy McQuitty, sued her obstetrician, Dr. Donald Spangler, his medical group partners, and the hospital where Dylan was delivered, alleging both professional negligence and failure to secure her informed consent to treatment. She alleged that, when she was 28-weeks-pregnant, she suffered from a partial placental abruption - a catastrophic condition in which the lining of the placenta separates prematurely from the mother's uterus, placing both the fetus and the mother at risk of death. Dr. Spangler hospitalized McQuitty for the condition and made a plan to wait to deliver the baby by Caesarian section when she reached 36 weeks gestational age. In so doing, he was attempting to balance the risks of further placental separation (which could lead to the death of the fetus, and possibly that of the mother) against the risks of premature delivery (with the possibility of fetal lung immaturity). Ms. McQuitty alleged that Spangler did not advise her of the risks of material changes in her pregnancy (like a further placental abruption, intrauterine growth restriction or a low level of amniotic fluid, all of which she experienced) or offer her the option of having an immediate Caesarian section. In fact, Ms. McQuitty experienced a complete placental abruption while waiting in the hospital, and Dylan, delivered by emergency Caesarian immediately after physicians discovered the abruption, was born with severe disabilities.

A jury trial led to a verdict of more than $13 million for the McQuittys on their informed consent claim, and Dr. Spangler moved for judgment notwithstanding the verdict. He argued that, under Maryland law, liability for failure to secure informed consent required proof of a battery, specifically a violation of the patient's bodily integrity (usually via surgery or injection). The trial court granted the JNOV motion, and the intermediate court of special appeals affirmed. The plaintiffs appealed to the court of appeals, arguing that Maryland's informed consent doctrine should not employ "artificial restriction[s] borrowed from the law of battery." The court of appeals agreed and acknowledged that an earlier decision that seemed to suggest otherwise "deviated from our common law roots." The court cited a 1767 Kings Bench decision that illustrated that actions for lack of consent in that day could be brought on a theory of "trespass on the case," the forerunner of the modern negligence cause of action. It noted that the 242-year-old decision was a part of Maryland's common law pursuant to Article V of the Maryland Constitution's Declaration of Rights, which provides that Marylanders "are entitled to the Common Law of England." Thus did a colonial-era British court provide the rule of decision for a modern American

court faced with a complex legal and factual situation.

In Dram Shop Case, Washington Supreme Court Allows Proof of Intoxication by Circumstantial Evidence. In a decision that appears to liberalize proofs against commercial sellers of alcoholic beverages, the Washington Supreme Court held, in *Faust v. Albertson*,[2] that proof that a drunk driver was "apparently under the influence of alcohol" could be either direct or circumstantial.

Hawkeye Kinkaid allegedly downed 21 beers in three hours at the Loyal Order of Moose Lodge in Bellingham, Washington, before attempting to drive home. On his way, he crossed the centerline of a highway and struck another car, injuring its occupants (leaving one a paraplegic) and killing himself. The owner of the other car sued Hawkeye's estate, the Moose Lodge and the waitress who served Kinkaid - who also happened to be his girlfriend.

Although it was clear from the forensic evidence that Kinkaid had been intoxicated at the time of the collision, the question for purposes of dram shop liability was whether he "appeared" to be intoxicated when he was served. The girlfriend-waitress testified that Kinkaid "had been drinking for a prolonged period of time," was "belligerent and argumentative" with her, and was "so drunk that . . . she had to cut him off." The jury returned a verdict of $14 million, and the trial court denied a defense motion for judgment as a matter of law, but the court of appeals reversed, finding no "direct, point-in-time evidence" that the decedent appeared drunk when he was served.

On appeal to the state supreme court, the plaintiff and several amici argued that the court should lower the evidentiary burden in dram shop cases to allow proof of apparent intoxication by post-accident observation, expert testimony and blood-alcohol content testing. However, Washington courts historically required time-of-service evidence because not all drinkers appear intoxicated after imbibing the same amount. The Washington Supreme Court declined to ease the evidentiary burden. However, the court held that the waitress's testimony as to his actions and appearance left open the possibility that she could tell he was drunk when she last served him, and the results of the decedent's blood-alcohol test could corroborate her observations, supporting an inference that he appeared intoxicated when she served him. Under those circumstances, the court held, the court of appeals erred in vacating the verdict for the plaintiffs.

Montana Supreme Court Holds that Malpractice Defendant's Assistance to Ill Juror Required Mistrial. In a decision that might discourage graphic argument by trial lawyers, the Montana Supreme Court held, in *Heidt v. Argani*,[3] that a trial court should have granted a mistrial when a defendant physician assisted a juror who became ill during trial.

Amy Heidt sued Dr. Faranak Argani, alleging that she was responsible for the death of Heidt's husband. During trial, Heidt's attorney delivered his closing argument in the form of a first-person narrative by the decedent - as if "channeling" the decedent's thoughts and feelings. He recounted events that allegedly caused the husband's death - and even described his autopsy - as if he were the husband and could describe what happened, even after his death. His remarks included the husband's growing appreciation that he was dying, his sorrow at not being able to see his children grow up, and "a description of being cut open."

The intensity of the closing argument, as Chief Justice Mike McGrath tersely put it, "got to be more than some could bear." One of the jurors announced that she thought she was going to pass out and attempted to leave the jury box. The court called a recess, and both the defendant and plaintiff's co-counsel (an M.D.-J.D.) assisted the ill juror, aided by three jurors who were nurses. Paramedics eventually took the sick juror to a hospital after the defendant attended for 15-20 minutes. Heidt moved for a mistrial, and the court conceded that there had been an "irregularity in the proceedings." However, after asking the jurors if they could reach a verdict based solely on the evidence, and instructing them not to allow the incident to affect their deliberations, the court seated an alternative juror, and the jury returned a verdict for the defendant. Some weeks later, the court found that there had been a fair trial and formally denied the motion for mistrial.

On Heidt's appeal, the Montana Supreme Court observed at the outset that events of this kind "are unique to medical malpractice claims and appear to be rare occurrences," but noted that, in the few cases in which comparable incidents had occurred, courts "held that the event adversely affected the right of the opposing party to a fair trial . . . ." In particular, the court cited decisions from the Illinois Supreme Court and the New York State Supreme Court's Appellate Division in which defendant doctors resuscitated jurors who had collapsed in the courtroom. The courts in those cases concluded that the jurors could not help but see the defendants in a favorable light. Although "[a]ll involved reacted admirably," the court stated, "[t]he effect of this on the jury is immeasurable, whether or not individual jurors admit it or even consciously know it," and the trial court should have granted a mistrial or a new trial after the verdict.

Robert S. Peck is President of the Center for Constitutional Litigation, P.C., and James E. Rooks, Jr., is litigation counsel.

Endnotes

[1] *McQuitty v. Spangler*, 976 A.2d 1020 (Md. 2009).

[2] *Faust v. Albertson*, 211 P.3d 400 (Wash. 2009).

[3] *Heidt v. Argani*, 2009 WL 2481022 (Mont. 2009).

Who Are We?

By Sommer Luther, Esq.

[Editor's Note: Charley Welton is editor of this section, "Who's Out There? Our Stories" in *Trial Talk*®. Send him your story! Welton@CharlesWelton.com]

As I sit down to write 'my story' I realize that 'my story' is continuing and evolving even today. I believe that the combination of my past experiences helps shape my future experiences and hopefully the culmination makes me a better wife, mother and advocate for my clients.

My story starts in my childhood. My brother and I were born and raised in South Florida. I believe my parents tried to expose us to as many things as possible, but, for the most part we were very similar to the other families in the neighborhood. Looking back my life was very insulated and safe. Like most of the families in my neighborhood both of my parents worked full-time. My brother and I always had someone watching us afterschool or attended some type of after-school program. My memories of growing up include weekend family outings, playing with the kids in the neighborhood, sibling fighting and fairly regular visits with my aunt, uncle and grandparents who lived in New York.

Education and independence were very important focuses in my house as a child. When I was young my father went back to school to obtain a Masters degree and came close to obtaining a Ph.D. I believe that it was also an assumption in my house that after high school my brother and I would attend college somewhere. Our family always taught us to make our own decisions and live with whatever consequences stemmed from them – good or bad.

Somewhere along the way – and, I am still not able to really pinpoint the time – I decided that I was going to be a lawyer. I can't recall the inspiration. I do not have any family members who are attorneys and my family did not have any friends who were attorneys. However, I know that my idea of "becoming an attorney" at that stage was much different than my life is now as an attorney. Throughout my childhood and even moving into college I was always quiet and shy. My early ideas of becoming an attorney were ideas of working as a 'corporate' attorney where there would be no need for me to appear in a courtroom.

These ideas of becoming an attorney and attending law school carried with me throughout my four years of undergraduate work at the University of Florida. I obtained a degree in business and finance – still planning on becoming a 'corporate' attorney. For a brief time I played with the idea of practicing some sort of international law.

After graduating I attended law school at the University of Denver. I took my first real independent step by leaving my family in Florida and moving to Colorado where I did not know one person. On the first day of orientation at the University of Denver, I told the orientation group that I was planning on pursuing a career in 'corporate' law. However, once I started school my plans changed quickly and dramatically.

At the end of my first year of law school I was encouraged by a friend to visit with the Student Law Office. After brief interviews and meetings I made the decision to participate in the Civil Litigation Clinic in the Student Law Office. From the first day I walked into the Student Law Office I never looked back. I knew immediately that this quiet, shy girl was going to be a litigator. In the Student Law Office I worked on cases involving landlord/tenant disputes, predatory lending and collection issues. I appeared in front of judges and fought hard for my clients. I enjoyed the fast-pace of litigation and looked forward to (most of) my court appearances. However, I was moved more by my exposure to the vast injustices and inequalities on all levels that occur around us everyday. Prior to this experience, I was not naïve to believe these injustices and inequalities did not exist, but suddenly I had the tools to combat them. For almost two years I worked closely with the largest housing advocacy group in the country and entertained the idea of moving to Washington D.C. or California to work on housing issues for low income persons.

Ultimately, I made the decision to pursue a career in private practice representing the rights of those who were injured. And, now the current phase of my story is underway. I am a wife, mother and partner of a law practice that is less than two years old. I believe today that the rights of our clients are being taken away and the access to our court system is being severally limited. Everyday I try to use the tools that I have to combat these injustices. My days involve advocating for my clients to the best of my ability and working hard to teach my children right from wrong, understanding, compassion and recognition that the world around us is larger than our home, our community and our country.

Sommer D. Luther is a partner of Buxton & Luther, P.C. Ms. Luther serves as a Co-Chair for the CTLA New Lawyers Committee and on the CTLA Board. Ms. Luther focuses her practice on the representation of injured persons in cases involving automobile collisions, medical malpractice and product liability.

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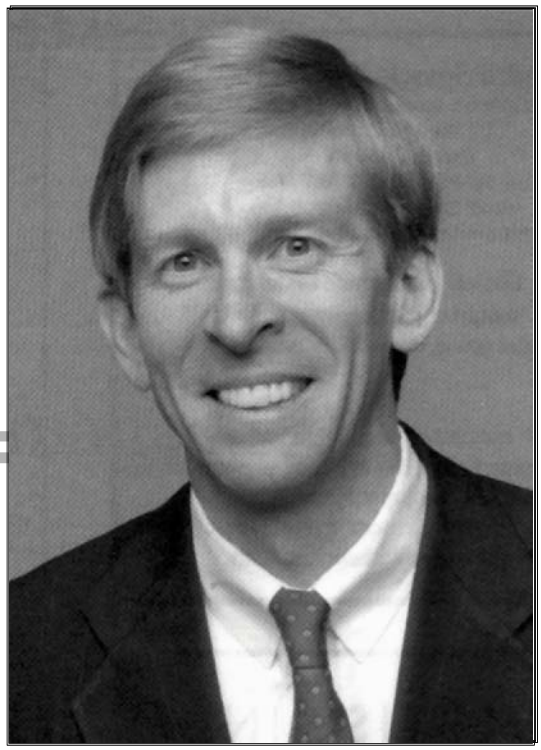

"[T]he skills needed for effective appellate advocacy are not always found – indeed, perhaps, are rarely found – in good trial lawyers. . . . Appellate advocacy is, in short, a specialty all to itself."

— The Honorable Laurence H. Silberman,
United States Court of Appeals for
the District of Columbia Circuit

Walter Sargent is an appellate advocate, and an effective one. In the Colorado appellate courts, he has achieved excellent results representing plaintiffs and defendants, appellants and appellees, in matters as diverse as personal injury, lender liability, municipal law, breach of trust, corporate governance, real estate brokerage, secured transactions, common-law contracts, and school law. In the federal appellate courts, he has successfully represented individuals and entities in high-profile matters in the Third, Sixth, Ninth, and Tenth Circuits, and has successfully represented both petitioners and respondents in the Supreme Court of the United States.

In January 1996, after eight years at a large Denver-based firm, Mr. Sargent left to open his own appellate shop. The new firm was founded on a simple set of premises: that appellate practice is a specialty all to itself, that there is a need for appellate specialists in Colorado, and that – freed from the encumbrances and constraints of a larger firm – a first-rate appellate practice can offer cost-effective services to a wide range of clients. With the flexibility to provide appellate services through a variety of fee structures – from traditional hourly rate structures to contingent fees – the firm seeks to arrive at working relationships that are economically and professionally satisfying to all involved. If you are interested in finding out more about the firm's services, please call or write Mr. Sargent at his office in Colorado Springs.

Walter Sargent is a graduate of the Massachusetts Institute of Technology, where he received degrees in philosophy and computer science, and Harvard Law School, where he was a John M. Olin Fellow of Law and Economics, winner of the Olin Prize for outstanding writing in the field of law and economics, and articles editor for The Harvard Journal of Law & Public Policy. Mr. Sargent cofounded the Colorado Bar Association's subcommittee on appellate practice and, in 1998, was selected to chair the 850-member Appellate Practice Committee of the American Bar Association's Section of Litigation.