Prior Injuries and Preexisting Conditions Unrelated to a Plaintiff's Current Claims Should Be Kept Out at Trial

By Ryan E. Hodge and Elaine F. Winter

I am sure it has happened to all of you, likely on more than one occasion. A week or maybe a few days before trial, you find out that the opposing side intends to make light of your client's unrelated prior injuries and/or preexisting conditions. You are automatically worried about the effect these unrelated instances could have on a jury and what type of light they will shed on your client. Sometimes running with the preexisting injury is a better strategy, but if you want to keep preexisting injuries out, here is a primer.

Although each state and jurisdiction has a slightly different take on this issue, the most common rule appears to be that evidence of prior or subsequent injuries must be causally connected to the plaintiff's condition to be admissible. *Marut v. Costello*, 214 NE.2d 768, (Illinois, 1965); *State v. Wright*, 447 So.2d (La App. 1984); *State v. Clayton*, 514 P.2d 720 (AZ 1973). The following is a brief sampling of statements and holdings from courts across the country on this issue.

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The court in *Caliban v. Patel,* 322 Ill. App.3d 251, 254 (2001), held that evidence of prior or subsequent injuries must be relevant to be found admissible, with relevancy to be established by expert testimony. Likewise in Oklahoma, "to admit evidence of prior injury, a proper foundation must be laid." *Deatherage v. Dyer,* 1974 OK Civ. App. 43. The court in *Deatherage* went on to hold that for any evidence to be admissible, it must be found to be relevant to a central issue in the case. *Id.*

In Missouri, any competent evidence tending to prove or disprove the nature and extent of the alleged injuries received is admissible. *Friese v. Mallon,* 940 S.W.2d 37, 42 (Mo. App. 1997).

In *Snelling v. Gress,* WD 54316 (Mo. App.WD. 1998), the court allowed the introduction of the plaintiff's prior injuries, stating that the "health and physical condition of the injured person both prior and subsequent to the occurrence is material." Because the prior injuries introduced affected the same parts of the plaintiff's body that were injured in the collision, evidence of such prior injuries was admissible. *Id.* However, where a party attempts to introduce *unrelated* medical history, it may be found to be inadmissible as irrelevant and immaterial evidence. *See* generally *Senter v. Ferguson,* 486 S.W.2d 644, 647 (Mo.App. 1972)(emphasis added).

Alternatively, in the early Texas case of *Olivares v. Travelers Ins.,* 442 S.W.2d 793 (Tex.Civ.App. – San Antonio 1969), evidence of prior or subsequent injuries was only admissible to show the extent that such injuries reduces the insurer's liability. Also demonstrating a very limited role for such evidence at trial, courts in Louisiana have held that prior injuries are admissible inasmuch as they bear upon any issue before the court, such as credibility and causal relationships. *Ewell v. Schwegmann Giant Super Mkt.,* 499 So.2d 1192, 1195 (La.App. 5 Cir. 1986); *Brown v. Diamond Shamrock,* 95-1172 (La.App. 3 Cir. 3/20/96); 671 So.2d 1049); and *Ronquillo v. Belle Chase Mar. Transp.,* 629

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So.2d 1359, 1362 (La.App. 4 Cir. 1993).

Since cross-examination is the likely place for this type of evidence to surface, here are a few cases that specifically entail how this evidence should be dealt with in cross-examination.

Cross-examination eliciting evidence of prior injuries is admissible where a causal relationship between the prior injury and the present injury can be shown. *Thompson v. Lee*, 402 N.E.2d 1309, 1314 (Ind.App. 1980). Of course, this evidence concerning prior injuries must be "elicited in good faith; not for the purpose of prejudicing the jury." *Id.*

Similarly in Utah, a plaintiff may be cross-examined as to his or her prior injuries, but only those which are similar to the injury in the present action, for the purpose of proving that his or her present physical condition is actually a result of a earlier accident. *King. v. Barron*, 770 P.2d 975, 978 (Utah 1988). The purpose behind allowing such cross-examination is to ensure that the defendant is not held responsible for the residual effects of a prior injury. *Id.*

Finally, a similar rule exists in Florida as follows:

> [A] plaintiff may properly be cross [-] examined as to his previous injuries, physical condition, claims [,] or actions for injuries similar to that constituting the basis of the present action for the purpose of showing that his present physical condition is not the result of the injury presently sued for but was caused wholly or partially by an earlier injury or pre-existing condition. *State Farm Fire & Cas. Co. v. Pettigrew*, 2D02-3707 (Fla.App. 2 Dist. 2004) citing *Zabner v. Howard Johnson's Inc.*, 227 So.2d 543, 546 (Fla. 4th DCA 1969).

With varying holdings and, in some jurisdictions, limited case law, it is not surprising that courts across the country have struggled with this issue for years. After researching this issue in several jurisdictions, I found that Illinois has a fairly large amount of case law on this issue which is worthy of note and highly persuasive.

Recent case law in Illinois modified the longstanding rule that allowed admission of prior injuries and preexisting conditions involving the same part of the plaintiff's body without evidence of a causal connection. The first case in Illinois which addressed this issue was the *Caley v. Manicke*, 24 Ill 2d 390, 182 NE2d 206 (1962). In that case, defense counsel tried to suggest that the plaintiff was not injured in the accident involving the defendant but in another accident. He asked the plaintiff on cross-examination whether the plaintiff was injured in those accidents, but failed to establish whether the plaintiff was injured in those accidents, much less to connect them to the current injury.

Years following the Illinois Supreme Court decision in *Caley* and following several inconsistent decisions, two appellate court decisions held that evidence relating to a prior injury to the same part of the body was properly excluded because there was no medical testimony to link it to the ailments at issue. In both *Scheck v. Evanston Cab Co.*, 93 Ill.App.2d 220, 236 NE2d 258 (1st D 1968) and *Greim v. Sharpe Motor Lines*, 101 Ill.App.2d 142, 242 NE2d 282 (3d D 1968), the appellate court found that the defendant had to establish a connection between the two injuries, otherwise the relationship between the two would be pure speculation. The *Greim* court found that the prior injury could have no relevance without competent medical proof of a reasonable connection between it and the ailments at issue. *Id.*

Subsequent decisions were also inconsistent, sometimes even within the same district, until the first district established a rule regarding the admissibility of prior injuries in 1981 in *Elberts v. Nussbaum Trucking, Inc.*, 97 Ill.App.3d 381, 422 NE2d 1040 (1st D 1981).

The *Elberts* court held that evidence of a prior injury was admissible when a causal relationship was shown or when it involved the same part of the body. Although it is the first time the "same part of the body" rule was enunciated, the *Elberts* court appeared to be stating a well-established, rather than new, rule.

In 1996, the fifth district of Illinois decided that the "same part of the body" rule needed to be refined. For the first time, in the case of *Brown v. Baker*, 282 Ill.App.3d 401, 672 NE2d 69 (5th D 1996), *appeal denied*, 171 Ill.2d 562, 677 NE2d 963 (1997), the appellate court considered whether the rule was well-reasoned. The court focused on the serious problem created by the "same part of the body" rule, stating: "[w]ithout the benefit of testimony regarding causation in these instances, jury members are invited to speculate on a nexus between the past accident and the present injury." *Id.* The *Brown* court held, therefore, that a prior injury that has long since healed and has no recurring symptoms is inadmissible unless the defendant establishes causation. *Id.*

As for what is necessary to establish causation, the *Brown* court explained that it was holding the defendant to the same standard as the plaintiff on the issue of causation. *Id.* If a plaintiff would need an expert to establish causation under like circumstances, then the defendant would be required to do the same.

Kansas has always held that causation is an issue for experts. The causation question is complex, and case law in Kansas supports a plaintiff's position that expert testimony is required. Expert testimony was required in the following cases: *Watkins v. McAllister*, 30 Kan. App.2d 1255 (2002) (summary judgment was properly granted to defendants because the plaintiff failed to present expert evidence to establish causation); *Sharples v. Roberts*, 249 Kan. 286 (1991) (plaintiff failed to provide evidence of causation necessary to maintain his action); *Bacon*, 243 Kan. 303; *Webb*, 223 Kan. 487; *Collins v. Meeker*, 198 Kan. 390, 424 P.2d 129 (1967); *Heany*, 23 Kan.App.2d 583. Strong reliance must be placed on expert, rather than lay, testimony. *Pope v. Ransdell*, 251 Kan. 112 (1992).

In the post-*Brown* case of *Cancio v. White*, 297 Ill.App.3d 422, 697 NE2d 749 (1st D 1998), *appeal denied*, 181 Ill.2d 568, 706 NE2d 495 (1998), the first district approved of the *Brown* decision. Even though *Cancio* involved a preexisting condition rather than a prior injury, the court stated they were analogous.

The plaintiff in *Cancio* presented medical testimony that he suffered a herniated disk as a result of the accident. *Id.* Although the defendant elicited testimony from the plaintiff's doctor that some of the pressure on

the disk was due to some preexisting arthritis, the doctor apparently did not concede that the arthritis was symptomatic prior to the accident or that the arthritis, rather than the accident at issue, caused the herniated disk or any of the plaintiff's current symptoms. *Id.* The *Cancio* court expressly approved of the *Brown* decision and held that "absent competent and relevant evidence of a causal connection between the preexisting condition and the injury complained of, evidence of the preexisting condition is inadmissible." *Id.*

The Illinois Supreme Court recently made clear that a claim that something other than the defendant's negligence was the cause of the plaintiff's injury is not an affirmative defense but a way of negating the proximate cause element of the plaintiff's case, citing *Caley* in support of this holding. *Caley v. Manicke,* 24 Ill 2d 390, 182 NE2d 206 (1962).

This does not mean that the defendant can introduce a prior injury or preexisting condition without any evidence supporting that claim. That fact is demonstrated by *Caley*, where the court held both that the burden of proof on causation always remains with the plaintiff but that it was error to admit evidence of the plaintiff's other accidents without linking them to the ailments at issue. *Id.* As the *Caley* court reasoned, the defendant must establish the relevance of the evidence he or she seeks to introduce. In other words, although the burden of proof on causation never shifts to the defendant, the defendant does have "the burden of connecting up" evidence of prior injuries or conditions when the relevance is not readily apparent. *Caley,* 29 Ill.App.2d at 327.

Thus, a defendant should not be able to introduce every prior injury or preexisting condition involving the same part of the body under the guise that it undermines the plaintiff's claim that the defendant's negligence caused the plaintiff's ailments. If the injury is long since healed and there are no recurring symptoms, or the preexisting condition was previously asymptomatic, evidence of that injury or condition cannot legitimately undermine the proximate cause element of the plaintiff's claim unless there is evidence connecting it to the ailments at issue. ❖

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