Combating the low-speed impact defense

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Low-speed impacts can cause serious debilitating injuries as demonstrated in this edition's case results. These incidents play a major part in insurance payouts historically. Instead of properly setting reserves and adjusting claims, the insurance companies have been waging a two-front war on low-speed impact claims. The first is over the airwaves in an effort to poison the jury pool. The second is in the courtroom itself with junk science. We regularly encounter this junk science in our cases. This article is for the practitioner who encounters these types of cases.

The low-impact defense is not new. Defense attorneys often exhibit photographs of the vehicles involved in the collision, pointing out to the jury the lack of significant property damage. They then argue that the slight damage shown in the photograph certainly could not have been the cause of the traumatic injuries alleged by the plaintiff. Both federal and state courts have rejected, as being without scientific foundation, the use of photographs of motor-vehicle damage and repair estimates to support any conclusion regarding causation of injuries.[1] As a result, the low-impact defense has become more sophisticated over time.

Defense attorneys now hire biomechanical engineers to scientifically establish that the force of these impacts was not enough to cause these injuries claimed. Courts throughout the country have issued orders barring such testimony, finding that it lacks scientific validity. In California, qualifications to testify as an expert must be properly established on the subject matter to be addressed by the proposed expert's testimony.[2] The competency and qualifications of expert witnesses is within the sound discretion of the trial court to determine.[3]

The courts have a particular disaffection with allowing professional experts to express a point of view that is not consistent with the evidence in a case.[4] Before the expert will be allowed to testify there must be proper foundation for his testimony, based in fact.[5] Most biomechanical expert are neither medical doctors nor licensed to practice medicine. A biomechanical engineer is not qualified to offer a medical opinion, and may only testify as to the biomechanics of an accident and the kinematic forces that the collision

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[1] See *Reali v. Mazda Motor of America, Inc.* (D.Me 2000) 106 F.Supp.2d 75; *Clemente v. Blumenberg* (N.Y. Sup. 1999) 183 Misc.2d 923, 705 N.Y.S.2d 792; *Whiting v. Coultrip* (Ill.App. 2001) 755 N.E.2d 494.

[2] See *People v. Kelly* (1976) 7 Cal.3d 24, 29; Evidence Code §§ 720 (a), 801 (a).

[3] See *Cavers v. Cushman Motor Sales Inc.* (1979) 95 Cal. App.3d 338, 350.

[4] See Kennedy, *California Expert Witness Guide*, § 4. 6.

[5] See *PG & E v. Zuckerman* (1987) 189 Cal. App.3d 1113.

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produced. The biomechanic cannot testify whether the forces were sufficient to cause physical injury to human tissue. Opinions regarding bodily injuries are peculiarly within the domain and expertise of medical science and physicians must provide testimony relevant to causation of injuries.[6]

Studies involving select groups of persons are not predictive of the effects of forces upon any particular person. A federal court considered these variables in *Smelser v. Norfolk Southern Ry. Co.*, [7] a decision addressing biomechanical-engineering testimony in an automobile-accident case. The court excluded the testimony of a biomechanical engineer, Dr. Ronald Huston, finding that biomechanics may not support an opinion with respect to the cause of a specific injury to a particular person, in part, because different persons have different tolerance levels.

In that case, Dr. Huston admitted that biomechanics experts are qualified to determine what injury causation forces are in general and can tell how a hypothetical person's body will respond to those forces, but are not qualified to render medical opinions regarding the precise cause of a specific injury. He acknowledged that each individual person has his own tolerance level, and therefore, admitted he could testify only in general terms, i.e., that "X" forces would generally lead to "Y" injuries and "Y" injuries are consistent with those the plaintiff claims to have suffered.

The goal when the defense uses a biomechanic is to exclude the bulk of that expert's testimony. In order to do this the practitioner should try to demonstrate the gaps in the defense analysis. These include that the expert: (1) is not a medical doctor; (2) cannot diagnose the cause of a specific injury; (3) has not reviewed the entirety of the plaintiff's medical records and films; (4) does not know the exact positioning of the person at the time of impact; (5) does not know whether the person was aware of the imminent crash; (6) does not know the precise stiffness of the seat and seat back; and (7) does not know the precise stiffness, impact zone and movements of the involved vehicles before and after the incident. Successfully attacking these points should keep out the testimony that the defense is trying to introduce—that the forces from the impact are generally inconsistent with the injuries sustained by the plaintiff.

Other courts have rejected similar testimony.[8] Arizona's Insurance Commissioner has gone so far as to adopt rules that specifically prohibit insurance carriers from relying on "biomechanic injury causation" analysis when investigating claims. The commissioner

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[6] See *Salasquevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal. App.3d 379.

[7] (D. Ohio 1997) 105 F.3d 299.

[8] *Tittsworth v. Robinson* (Va. 1996) 475 S.E.2d 261; *Schultz v. Wells* (Colo. App. 2000)13 P.3d 846.

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ruled that biomechanical analysis does not constitute a “reasonable investigation” of a claim.[9]

We believe that every practitioner should fight this junk science—for both the client’s sake and the profession as a whole. This article is a summary of a more extensive brief on the issue that we frequently employ in our mediation packages and as a motion in limine. If you would like a copy of the full brief please contact us and we will email it to you.

[9] State of Arizona Department of Insurance, Circular Letter 2000-2 (January 7, 2000).

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