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Motions in limine: How They Can Work for or against You

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A motion *in limine* (in simple terms, as I'm not a lawyer) is an argument put in front of the court by one party to a legal action. Generally it attempts to place limits on what can get into evidence or what a piece of evidence can be used for. It can also be used to attempt to exclude an expert's testimony; portions of it or all of it. These motions can be crucial to a chiropractic physician's testimony. I'll highlight a few scenarios in which this is the case.

ACRs and Biomechanists

In the past several years, as many who treat motor vehicle crash (MVC) victims have observed, insurance companies and their defense lawyers have increasingly relied upon accident reconstructionists to help mitigate the costs of settling these claims. [*Accident* is now a term that has been abandoned in favor of *crash*, as the former implies a fatalism beyond human reach, when in fact more than 90 percent of MVCs are attributable to human error. Because of this statistic and because there are many different types of crashes (e.g., plane, heavy truck, pedestrian, motorcycle, boat), I prefer the more politically correct and less ambiguous term *auto crash reconstruction* (ACR). A small point, of course.] The most common tactic used by ACRs today is to reconstruct the crash and show that the crash speeds were below those reported to represent injury thresholds, based on a small literature of human subject crash tests. The degree of shenanigans (or cognitive torpor) in pursuit of this Holy Grail of crash speed is often quite humorous.

Biomechanists are other experts commonly called into these cases by defense teams to reduce the defendant's exposure. These experts often do their own reconstructions and make whatever damning comments are possible under the circumstances. However, as in the case of the ACR, their raw data, as it were, is quite limited, forcing them to rely on frail and usually unreliable if not downright fatuous material. For example, the biomechanist might read the plaintiff's deposition transcript for clues. When asked whether their head struck the head restraint, the plaintiff might have replied, "I don't think so." In our own

crash tests, we've found that even volunteers are unable to tell whether this contact occurs in about 30 percent of crashes, and this observation has also been reported by other researchers. Thus, the information should be considered fairly unreliable, especially when obtained from a real-world occupant at deposition perhaps months after the fact. In spite of this, I've seen biomechanists argue that the crash must have been trivial because there was not even sufficient force to cause the head to strike the restraint. And, like ACRs, biomechanists, in my experience, rarely attempt to mix the oil and water of occupant risk-factor analysis (i.e., the clinical and human factors) with the purely mechanical ones.

Flaws inherent in this zealous defense strategy are too numerous to go into here, and my colleagues and I have done so elsewhere in some detail.¹⁻³ Many ACRs and biomechanists are honest and sincere. I'm only picking on the so-called experts who have no business sporting that credential.

Motion *in limine* in Action

A few years back, an attorney who'd been to one of my talks decided to attempt to limit the testimony of one of the most prominent experts of the largest expert witness farms in this country: a doctor who, among other things, has conducted full-scale, low-speed crash tests. The plaintiff's attorney filed a motion *in limine* with the court and argued that the expert should not be allowed to opine on the likelihood or severity or permanence of injuries sustained by his client, since he did not examine this person and was not aware of specific risk factors in the case. In an extremely important decision, the court ruled that the expert would be allowed to testify to the calculated crash parameters (speed change, approximate acceleration, etc.), but would be prohibited from offering any testimony on the probability of injuries, their nature, or the likely outcome.

Since state courts tend to follow one made by other states, this decision had far-reaching effects. In New York state, a law was passed prohibiting ACRs from making assessments concerning injury probabilities. These are fundamentally very important limitations, because juries are otherwise unlikely to be able to draw conclusions about causation based merely on crash speeds and the other limited information ACRs are allowed to provide.

Biomechanists are another factor in these cases in which motions *in limine* can be effective. For example, most doctoral programs in biomechanics in this country concentrate on subjects other than the spine. Sports and bioengineering are among the more popular subjects. Attorneys should study the expert's CV to look for ways to limit his/her testimony. What training, if any, does this expert have in the human spine and in

motor vehicle crash trauma? And, as with the ACRs, the biomechanists rarely interview the plaintiff directly and are generally unaware of their risk factors and their clinical course.

DCs Can Be Presented as Experts

Recently, a colleague of mine in Wisconsin testified in a personal injury case. His patient was awarded a three-figure sum for general and special damages. The insurer, nose bloodied badly by this country doctor, was apparently determined to fight with a vengeance the next case involving the good doctor. They hired a well-known PhD biomechanist who studied the doctor's CV and concluded that the doctor did not have sufficient training in physics and mathematics to be allowed to testify on the subject of biomechanics in general, and occupant kinematics in MVCs in particular. (As an ACR, I can assure readers that ACR is merely an applied science of simple Newtonian physics, algebra, a little trigonometry, and some simple geometry. It is not rocket science, and one need not be fully versed in calculus with analytical geometry, differential equations, or quantum theory.) Nevertheless, the defense attorney filed a motion *in limine* with the court, attempting to so limit the doctor's opinions at trial. Naturally, this would have been extremely beneficial for the defense if the court granted the motion, because it would mean that only the defense expert could go into injury mechanics and opine whether an injury might have actually occurred in this particular crash. (One need not ponder long what that opinion would have been!)

But the good doctor was a scrapper and prepared a document for the plaintiff's attorney to use in arguing against this motion *in limine*, outlining all of the courses involving biomechanics he had taken in chiropractic college, and all of the postgraduate training he'd had in MVC traumatology and low-speed-crash reconstruction.

After reading this document, the judge's comments were as follows:

"Plaintiff's witness presented evidence of his qualifications, which included certificates of attendance at workshops related to his claimed expertise. The Court finds that the testimony and evidence presented on the record are sufficient for the witness to testify as an expert in biomechanics and occupant kinematics and, THEREFORE, the defendant's motion is DENIED."
[Their emphasis.]

I know of another chiropractor who was allowed to testify as an ACR after finishing a course that specialized in low-speed ACR. The defense attorney was clearly not aware of this training and was unable

to prevent her from testifying on the subject of injury causation, crash parameters, and occupant kinematics. This is becoming a more and more frequent occurrence.

Property Damage Photos

Another tactic commonly employed by defense lawyers relies on the intuitive assumption by lay jurors that there must be a direct relationship between vehicle damage and the likelihood for injury one of the biggest and most successful bamboozles in the history of legal medicine. Generally, the defense obtains a photograph of the plaintiff's vehicle depicting little or no property damage, blows it up to the size of a poster, and then attempts to display it to the jury throughout the trial as a subtle persuader. In Delaware, based upon a motion *in limine*, it is now not permissible to show vehicle damage photographs to the jury unless you have an expert there to comment directly on their significance or lack thereof. This, of course, can also be debated by opposing experts if need be.

Tips to Field Practitioners and Attorneys

For ideas on motions *in limine*, anticipate and brace yourself for the "junk science" approach. I can't think of a single trial I've done in the past 15 years or so in which the defense expert didn't rely heavily on one or more samples of a small but popular collection of highly dubious literature. Perhaps the most popular of these are the genre that attempts to show that the typical whiplash exposure is the equivalent of merely, *inter alia*, stepping off a curb or getting hit in a pillow fight, or that crash-test volunteers do not suffer serious or lasting injuries. (See references 2,3 for ideas on how to challenge this very pervasive and popular defense literature.)

Another subject begging for motions *in limine* includes limitations on what can be done with crash photos. Often the photos include only one of the subject vehicles. I'd argue that photos of only one vehicle could be relatively meaningless. Moreover, their prejudicial effect is not likely outweighed by any probative value they may have. It would also help to have the literature demonstrating the lack of correlation between injury risk (or outcome) and property damage, along with the literature which shows that a substantial proportion of injuries occur in crashes with little or no property damage.

Another motion would be to exclude discussions of risk related to vehicle crash speeds since:

1. Reconstruction in these low speed crashes is subject to high random error (which is really a charitable way of saying that in low-speed crash reconstructions, the figures reported, although impressively accurate sounding with their two decimal places, are really no more than plausible guesses); and
2. The threshold for human risk for an individual remains an unknown. Moreover, recent research out of Canada has proven that, just among crash parameters, speed change is not the most important factor for injury risk (ACRs take note: *Delta V is not ACR nirvana*). Anecdotal reliance on human subject crash tests should be disallowed, as they are nonrepresentative of crash conditions and numerous other dubious extrapolations, which are necessary and clearly outside the boundaries of good science. (Again, refer to reference two for a more in-depth discussion of these limitations.)

Conclusions

Clearly, much of the substance for the arguments listed here comes from the medical and engineering literature that is generally the province of the practicing physician not the attorney. It is important to make this information available to the plaintiff's attorney so that thoughtful, accurate and compelling motions can be produced. Very often in these cases, the chiropractic physician is the only expert available to testify on behalf of the plaintiff. It is therefore paramount that the chiropractor's testimony be allowed on the fundamental issues of injury causation, biomechanics, occupant kinematics, and the important risk factors for injury and/or poor outcome. Motions *in limine* can be helpful for excluding unreasonable, misleading, or inaccurate opposing expert testimony, but they can also be used to effectively tie the hands of the plaintiff by gagging his or her only expert, the chiropractic physician. It is often incumbent upon the chiropractic physician as in the case of my colleague above to produce documents that can be used to fight opposing motions designed to limit testimony or evidence.

References

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