

Effective Techniques for Handling Bodily Injury Claims

By

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DEFENDING AUTOMOBILE LIABILITY CLAIMS

I. INTRODUCTION

Defending automobile claims may seem like an easy task, but the success of how you defend those claims depends upon the work you are willing to put in to be effective in your defense. These materials are intended to provide a rudimentary guide for the automobile defense attorney in steering through basic issues encountered in the personal injury automobile arena.

Medical and legal practitioners on both sides agree that automobile claims can be difficult and frustrating because of competing interests, issues of secondary gain, and the undercurrent of fraud that has pervaded the system. Statistically speaking, the United States has by far the largest volume of litigated automobile claims, and Minnesota certainly has seen no shortage in its share of personal injury claims attributed to the prevalence of litigation, and the relative ease with which our tort threshold is surpassed.

Because many soft tissue automobile cases are largely subjective, a good personal injury plaintiff's lawyer is looking to match the plaintiff's complaints with an objective injury. Conversely, the good defense lawyer will disprove the objective injury, while establishing credible explanations, other than the accident, as the true cause for the subjective complaints. Both sides face an equally tough uphill battle. Plaintiff seeks to prove a positive (objective findings), while the defense seeks to disprove a negative (subjective complaints).

Success in defending automobile claims requires defense counsel to develop a solid working knowledge of the claimed injury, a full comprehensive investigation into plaintiff's medical, social, employment, and vocational history, familiarity with medical providers and other players in the system. Keep in mind that a successful defense does not always translate into a zero or nominal award or settlement. Success may also mean that your efforts have rooted out the meritorious claim. Part of your job requires you to furnish information, and make appropriate recommendations to your client, and his/her insurer. The insurer needs to make decisions based on the information and recommendations you provide. Your role is to do so effectively and efficiently so that you allow the insurer to resolve or proceed to defend the claim appropriately. The following outline is intended to provide some guidance toward effectively increasing the chances of successfully defending automobile claims.

II. EVALUATION OF THE CLAIM

When preparing and evaluating plaintiff's personal injury claim, you need to sit down and obtain a broad overview of the claimed injuries and damages at the outset so you can decide where it is the case is headed. While some cases will require extensive pre-trial

work-up and investigation, others may merit fast track disposition by way of settlement, ADR (Alternative Dispute Resolution) techniques, or possible procedural disposition.

A. Summons and Complaint

Often the first notice and documentary proof of the claim the defense attorney sees is the Summons and Complaint. Not all complaints will outline the injuries, but some do, and those that do give you a good indication of the nature and type of injury and damages you are dealing with. For example, claims of permanent injuries, lost wages or future loss of earning capacity give you some sense of the damages plaintiff will need to prove. This is a starting point to develop your overview of the case.

1. Sorting Out Claimed Injuries and Damages

The insurance company claim file often is the next piece of the puzzle sent to the defense lawyer to evaluate the claim. The defense lawyer should have a good sense of where the case is headed after reviewing the claim file. If the plaintiff's lawyer has been engaged in settlement discussions with the insurer, prior to commencement of suit, the claim file will often contain investigation materials, accident records/reports, photographs, medical records, statements, and correspondence from the plaintiff's attorney setting forth his/her best view of their case. When the plaintiff's attorney presents a demand package to the insurer, he/she often includes itemizations of the claimed medical and wage loss expenses, supporting opinions from the treating doctors, and/or vocational experts, a brief background of plaintiff prior to the injury, and his/her valuation of the claim. All of these items should be reviewed and considered by defense counsel when setting the track of the case.

2. Damages Elements and Proof

As with all personal injury cases, the essential elements of damages in an automobile personal injury claim include compensation for losses sustained by the plaintiff as a *direct result* of the accident and include past and future pain and disability, embarrassment, emotional distress, past and future medical expense, and past and future disability, wage loss, and loss of earning capacity.

Burden of proof standards also remain the same – plaintiff has the burden of proving damages based on a preponderance of the evidence. Damages must be reasonably certain, and not merely speculative, or based on conjecture.

3. Filing the Summons and Complaint with the District Court

In Minnesota, a case is commenced when the Summons and Complaint is served. The lawsuit may then be litigated without any court supervision for one year. But the Summons and Complaint must be filed with the district court within one year of commencement against any party or else the suit will be deemed dismissed with prejudice by operation of Rule 5.04 of the Minnesota Rules of Civil Procedure. The Minnesota Supreme Court recently determined relief is available under Rule 60.02 to a dismissal under Rule 5.04. *Gams v. Houghton*, ___ N.W.2d ___, A14-1747 (Minn. 2016). In order to establish relief at the district court level, the moving party must establish a debatably meritorious claim, a reasonable excuse for failing to act, must act with due diligence after learning of the failed filing, and must not result in prejudice to the non-moving party. *Id.* at *14; see also, *Finden v. Klaas*, 268 Minn. 268, 128 N.W.2d 748 (Minn. 1964).

Although the insurance company usually is in the position of defending a law suit, it needs to be aware of this for several reasons. The company will protect its insured by be aware that a case may be dismissed with prejudice if the Plaintiff fails to file within one year. This is also a useful tactic for settling a case after the Plaintiff has failed to file within this one-year deadline. And if the Defendant in a suit serves a Third-Party Complaint or even serves a Counterclaim, then those pleadings will likely also be subject to the rule's mandate to file with the district court within one year.

B. Answer

Your answer is due 20 days from the date of proper service of the summons and complaint. You must immediately determine when service was properly effected to determine when your answer is due, and to also ensure the defendant is not deficient in his/her answer. If the answer is late, you will want to immediately confirm no default motion was undertaken by plaintiff's counsel.

If an extension to answer is obtained, confirm with plaintiff's counsel in writing that the case has not been filed with the court, and will not be filed with the court unless you are promptly notified. If it has been, you must answer, and file your certificate of representation and prepare an Informational Statement for the court.

Keep your Rules of Civil Procedure handy and review Rule 12 when preparing your answers for affirmative defenses.

1. Venue, Jurisdiction and Service of Process

Review the Summons and Complaint closely for possible venue, jurisdictional or pleading problems. Venue is appropriate in the county where the accident occurs or where defendant resides.

If you did not receive a copy of the affidavit of service, request that promptly from the plaintiff's lawyer to be sure service of process was properly effected. Confirm with your client the date, time and method by which they were served to be sure the Affidavit of Service is accurate. If not, those items should be promptly addressed in the answer as an affirmative defense, or by motion.

2. Optional Defenses

There are many possible optional defenses in a personal injury action. Some possibilities include:

- If Plaintiff suffered injuries and damages as alleged in Plaintiff's Complaint or otherwise, then said alleged injuries were the result of an unavoidable accident for which no party bears legal responsibility.
- Plaintiff's claim is barred in whole or part by the Doctrine of Complicity.
- Plaintiff's Complaint is barred by the applicable statute of limitations, Minnesota Statute:
 - §340A.802, subd. 2 (dram shop)
 - §541.05 (negligence; strict liability)
 - §336.2-725 (warranty)
 - §573.02 (wrongful death)
 - §541.07 (intentional tort)
- Part or all of Plaintiffs' claim is barred by the Minnesota No-Fault Act, Minn. Stat. §65B.45, et. seq.
- Plaintiffs' Complaint fails to state a claim against this answering Defendant upon which relief may be granted.
- This Court lacks jurisdiction over the person of Defendant.

- Service of process upon Defendant was inadequate and/or insufficient.
- Plaintiff is not a proper party Plaintiff to bring this action.
- _____ County District Court, _____ Judicial District, is not the proper venue for this action and further alleges that Plaintiff's Complaint is improperly venued.
- This Court does not have jurisdiction over the subject matter of this action.
- Plaintiff has failed to join an indispensable party to this litigation.
- Plaintiff is not the real party in interest entitled to assert a valid cause of action against this answering Defendant.
- If Plaintiffs injuries and/or damages as alleged in Plaintiffs' Complaint or otherwise, then Plaintiffs claims are barred by _____ assumption of the risk of his accident and injuries by his knowledge of conditions, risks and circumstances that were open and obvious to him.
- Plaintiff's claim is barred in whole or in part by the doctrine of accord and satisfaction.
- Plaintiff's claim is barred in whole or in part by the doctrine of arbitration and award.
- Plaintiff's claim is barred in whole or in part by discharge of rights and/or obligation in bankruptcy.
- Plaintiff's claim is barred in whole or in part by the doctrine of estoppel.
- Plaintiff's claim is barred in whole or in part by fraud.
- Plaintiff's claim is barred in whole or in part by illegality.
- Plaintiff's claim is barred in whole or in part by the equitable doctrine of laches.
- Plaintiff's claim is barred in whole or in part by payment and/or release.

- Plaintiff's claim is barred in whole or in part by the doctrines of res judicata and/or collateral estoppel.
- Plaintiff's claim is barred in whole or in part by the doctrine of waiver.

C. Setting the Case Track

Consultation with the defense insurance representative, and review of the claim file usually sets the initial track of the case. For purposes of these materials, we are only dealing with the damages aspect of the personal injury case. Liability issues warrant other considerations. Sometimes the insurance company simply needs further information in order to evaluate the case and make decisions concerning settlement or litigation. Sometimes, plaintiff's proof is there, and it simply doesn't measure up. Sometimes, the insurance company and the plaintiff's lawyer agree on the injury, but not on the valuation.

Setting the case track at the outset does not mean the case can't change tracks or deviate from its course. However, if there is simply additional information that needs to be gathered in order to make recommendations to the insurer, a full blown litigation track may not be warranted. If the injury is not disputed, but the value is, perhaps early neutral evaluation or mediation may be in order, particularly if the bulk of the damage information has already been gathered. Perhaps procedural options are in order to dispose of nonmeritorious claims, legal issues, or coverage disputes which warrant a different fast track altogether.

III. DISCOVERY

The use of discovery techniques seems to be a matter of some routine on most personal injury cases. However, how and when those techniques are used may determine the success or failure of the defense. Stay on top of discovery requests and deadlines.

A. Interrogatories

Most of us use standard sets of written discovery on personal injury cases to flesh out the injuries and damages being claimed. Do not fall into the trap of limiting yourself to rote discovery. We often overlook tangential issues when we see the same types of injury claims over and over, but interesting issues do pop up on these sorts of claims which merit not only further written discovery, but also lead to new avenues of investigation.

For example, consider incorporating specific questions into your standard discovery on chronic pain claims that inquire about use of medication, substance

abuse, or addictive behaviors. Questions about prior medical and psychological history are a must on these types of claims. Social backgrounds must be explored including areas such as divorce, abuse, cultural concerns, prior litigation, secondary gain motives, and financial status. Occupational issues, employment history, and other vocational aspirations should also be addressed. Refer to Section D for other possible ideas and areas to inquire when deposing the plaintiff.

B. Requests for Production of Documents and Statements

Requests for Production of Documents and Statements are pretty standard, but in personal injury claims should include requests for vehicle photographs and damage estimates in automobile accident cases (to address issues of minimal damage/mechanism of injury), accident reports, statements, employment records, income tax returns, and a complete set of executed authorizations from the plaintiff to include, among other things, access to all insurance claim files (pre and post-accident from this and other claims), employment, income tax, schools, welfare (State of Minnesota and plaintiff's home county), medical assistance (Department of Human Services), police/accident, worker's compensation (Department of Labor and Industry), unemployment (Department of Economic Security), social security (Social Security Administration), other insurance (no-fault, disability, health, auto, work. comp. or other possible collateral sources), military, and criminal records (such as the BCA (Bureau of Criminal Apprehension)).

C. Request for Production of Medical Records, Reports and Authorizations

Requests for Production of Medical Records, Reports and Authorizations are crucial in defending personal injury automobile claims. In addition to the authorizations requested as part of the Request for Production of Documents and Statements above, the request for medical information should include unlimited authorizations for all prior medical, hospital, psychological, psychiatric, chemical dependency, counseling, diagnostic, spiritual, or other forms of treatment sought by plaintiff, and should also request prescription records.

D. Request for Expert Disclosure

Know who it is plaintiff intends to rely upon as an expert up front. Are you dealing with a chiropractor who simply renders the opinion that plaintiff's injuries are a never ending source of pain for which he/she will need ongoing chiropractic care for the next ten years? Or, are you dealing with a medical expert from a neurological or orthopaedic clinic, or perhaps a chronic pain program, or behavior specialist, who can likely convey his/her opinions more effectively to a jury and objectify a normally subjective injury. Remember the goal of the plaintiff's

personal injury lawyer is to convince you and the jury that pain complaints are really an objective medical injury which warrants an award of damages. The sooner you identify the expert plaintiff intends to rely upon, the better equipped you will be when hiring your own expert, and gathering rebuttal evidence.

Be sure to include a request for the experts resume/curriculum vitae. Foundational considerations can then be addressed by way of motion, and/or during discussions or depositions with your own expert to combat plaintiff's expert's qualifications.

In state district court, many scheduling and pretrial orders from the court will mandate specific dates and deadlines for disclosure of experts from both sides. But not all judges include those deadlines. If the court so orders the disclosure, and that date is missed by plaintiff's counsel, defense counsel can move to exclude any undisclosed expert opinions at trial. Moreover, a request that goes unanswered goes further toward convincing the judge to exclude the testimony.

E. Depositions

Be prepared and be thorough when deposing the plaintiff. From a practical standpoint, the plaintiff's deposition should take place after you have received written discovery, and after you have gathered the bulk of plaintiff's records including medical, psychological, employment, governmental agency, income tax, and other claim or insurance sources.

A thorough deposition will cover the following areas:

- Social background
- Marital history
- Spouse's employment
- Children (support)
- Relationships/extended family
- Educational/vocational background
- Living situation
- Length of residency (stable vs. drifter)
- Criminal record
- Bankruptcy
- Welfare
- Medical Assistance
- Social Security
- Unemployment
- Worker's Compensation
- Armed Forces (disciplinary/discharge)
- Current Work History
include duties

- supervisor
 - length of employment
 - co-workers
 - work injuries
 - Change in duties pre & post accident
- Prior Work History
 - Previous supervisors
 - Duties
 - Reasons for leaving
- Prior Medical History
 - all prior medical providers (include family doctors, work/physical exams)
 - past accidents (auto, home, slip & fall, premises, work, disability, etc.)past injuries
 - prior treating doctors/hospitals
 - prior medical illnesses
 - lingering effects
 - disabilities
 - chronic ailments
 - prior serious illnesses
 - surgeries/operations/hospitalizations
 - psychiatric treatment
 - psychological treatment
 - counseling
 - alcohol, chemical dependency, addiction issues or treatment
- Prior Claims
 - past lawsuits
 - past claims
 - work comp
 - social security
 - insurance collections
 - past denials life/disability insurance
- Post-Accident Medical History
 - identify every injury claimed
 - how hurt
 - bruises, marks, scars
 - injuries that still trouble
 - hospitalizations
 - all treating physicians
 - specialists/referrals
 - Other IMEs/exams.
 - diagnostic tests
 - course of treatment
 - type of treatment

- complaints
- current treatment
- anticipated future appointments
- drugs/medication
- anticipated future treatment
- exercises
- health club
- injuries/illnesses post accident
- other treatment post accident
- Collateral Sources
 - Bills paid and by whom
 - Liens/subrogation interests
- Disability from Injuries
 - Injuries cured
 - Injuries still problematic
 - Effect on activities
 - Activities cannot now that used to do
 - Activities that are more difficult since accident
 - Activities still do
 - Extent of recreational activities
 - Extent of work activities
 - Extent of home activities
- Internet/Social Media
- Trips (where, when, what)
- Other family members with claims (injury related)

IV. INVESTIGATION

Your investigation should focus on establishing the cause of the plaintiff's pain complaints. Consider the large volume of soft tissue injury claims that have developed in the United States because personal injury cases are litigated, whereas other nonlitigious countries recognize no such injury. Never underestimate the value of preparation and documentation. There are times when the claims all begin to look alike, but when you peel back the layers, and start digging into the documents, you find subtle and in some cases substantial differences. One of the most important aspects in the defense of any claim for personal injury is gathering records.

Oftentimes it feels like you are doing plaintiff's counsel's job, but in reality, you are preparing the most crucial aspect of your case.

From the defense perspective, documentation is vital to the successful handling of the claim as well as to success in trial. Medical and employment records may reveal additional factual defenses and identify additional sources for exploration and investigation. Conversely, a failure to disclose information may be used effectively

against the plaintiff at trial. Defense counsel's request should not be viewed as unreasonable or invasive, because the information sought is nothing more than that which the plaintiff will need to present at trial to prove up the claim. When a plaintiff fails or refuses to provide proper documentation, it is often assumed by the insurer and defense counsel alike that the claim is not meritorious. Such failures can often feed one of the most obvious defense arguments: plaintiff has failed to prove the compensability of his or her claim, and the claim lacks merit.

A. Photographs/Damage Estimates/Appraisals

Pictures really do speak a thousand words when it comes to disproving a soft tissue claim. When a jury is asked to believe that a plaintiff has been permanently left with pain complaints as a result of an accident that left no more than scuffed bumpers to the cars involved, the pictures communicate volumes. Establishing the nature and mildness of the impact is very important when defending the personal injury or soft tissue claim.

Photographic evidence should be bolstered by damage estimates and appraisals. Be sure to separate and emphasize parts and labor charges when explaining repair costs to the jury so they can clearly see the cost of the part, or new paint is nominal.

B. Depositions/Statements

Depositions from those involved in the accident (your client and witnesses) showing the impact was minor go a long way toward showing plaintiff's exaggeration of a nominal event.

Plaintiff's deposition is often the primary source of impeachment at trial. Many plaintiff and defense practitioners alike use the "three strikes and you're out rule" to determine whether a plaintiff will be believed by the jury. The rule holds that a plaintiff who lies or forgets a prior incident once gets the benefit of the doubt; twice and the wounds are open; and three times – plaintiff's credibility is out for the count in the mind of the jury. Your goal as a defense lawyer is to watch for those untruths, and to uncover them by way of investigation and gathering corroborating evidence. Then impeach away at trial. Consider the plaintiff who is less than truthful about prior symptoms of the same nature alleged in the accident. The candid plaintiff will own up, and acknowledge the prior symptoms. The plaintiff with the ulterior motive will minimize, deny, or simply avoid disclosure altogether. Find the records and start counting the strikes.

C. Medical Records

When assessing and evaluating records, defense counsel should be looking for opinions regarding permanent injury, causation of the injury, and apportionment of injuries between other accidents/injuries and/or other prior conditions. There are many non-accident related medical conditions that cause pain. The defense lawyer must scour plaintiff's medical records pre and post-accident to find other sources and viable explanations for pain. Your job is to prove to the jury that there is a reasonable and plausible alternative explanation for plaintiff's pain which has nothing to do with the accident. Reviewing medical records and understanding the terminology is crucial to being a successful defense lawyer.

Invest early in a good reputable medical dictionary, and anatomy book. Doctors and experts talk and write using medical terminology much like we lawyers use legalese. Know the medical terms, and understand the anatomy, and you will find yourself unraveling chronic conditions and quickly sorting out the questionable claims from the legitimate injuries.

Look for other injuries or sources of pain, such as work related injuries, and repetitive trauma or stress events. Watch for references to other accidents, slips and falls, fights, and home injuries. Pay particular attention to disease processes, and demyelinating conditions that cause chronic pain. Is there a positive family history for rheumatoid arthritis, for example, or perhaps diabetes. Are there immune disorders, diseases of the nervous system present, metabolic or endocrine disorders present in the plaintiff's records. In older plaintiff's, healing is often slowed by aging, bone, muscle and tissue degeneration. All of these can lead to chronic pain complaints and are plausible explanations for pain other than the accident. If in doubt about a medical disorder or condition that appears in plaintiff's records, look it up, and get on the internet or tap into one of the local libraries to find articles on the condition. There are an amazing number of conditions that tie into chronic pain complaints.

Watch for nonanatomical pain distribution which is inconsistent with either neurological or orthopaedic examination findings or diagnostic testing. Reports of pain, tingling and numbness which does not comport with examination findings or diagnostic testing should immediately raise red flags. A surprising number of chronic pain claims arise from a minor accident, and injuries, complaints, and symptoms seem far out of proportion to the actual accident.

D. Medical Scans

Obtain scans and make them available to your experts. Question age related changes, and if appropriate have them read by a radiologist of your own. Question herniations or bulges without cord compression and impingement.

Then, use medical studies to cross-examine plaintiff's expert who simply relies on a questionable positive finding such as a herniation on the scan.

E. Psychological/Counseling Records

Psychiatric disorders can increase the proclivity of pain complaints, and can lead to a higher perception of pain without organic basis. Review closely records of psychological disorders, counseling, psychiatric, and chemical dependency, or addictive behavior records. For example, there is a large volume of medical literature supporting smoking as a cause for slow healing responses. Psychiatric and psychological conditions including depression, stress, somatization disorders, addictive and dependent personality behaviors are all indicators of persons prone to chronic pain complaints which stem from conditions other than the accident. There is vast medical evidence showing certain personality factors that contribute to pain disorders and can lead to the development of, or make a person more prone to, chronic pain complaints.

F. Employment Records

Employment histories that show a tendency to bounce from job to job trigger red flags. Obtain complete copies of all employment records for at least seven years prior to the accident in question. Watch for reasons why the plaintiff quit the employment, look for references to work injuries, chronic tardiness or attendance problems, issues with health or disability insurance, and physical examinations. With the advent of drug screening, issues with toxicological studies and testing may reveal a person with addictive or chemical dependency issues, and you may also see anger management disorders, chronic absenteeism, or other explanations especially in cases involving chronic pain complaints. These records also provide great impeachment evidence at trial, when plaintiff portrays him/herself as a reliable dependable employee, and you can show the difficulties he/she had with attendance prior to the subject accident.

Always be sure to obtain a job description from each employer, to help establish those plausible other explanations for chronic pain complaints that may stem from the plaintiff's work, such as chronic neck pain for computer, key board, and repetitive use occupations. These types of records and descriptions should be provided to your expert, the independent medical examiner, so he/she is fully prepared to aid you in your theory of the case and other plausible explanations for plaintiff's chronic pain complaints.

G. Income Tax Records

Another great source of research. Certainly tax records are essential to proving or disproving wage loss claims, particularly in the case of the self-employed

plaintiff, but do not overlook the other tax schedules as a further investigatory tool. For example, those plaintiffs who are less than forthcoming during the course of written discovery and deposition may have forgotten the quantity of itemized medical expense deductions they took two years before the subject accident. Perhaps the plaintiff holds rental property that you can now show he/she has been performing all the upkeep, maintenance, and repairs on after the accident, unbeknownst to his/her treating doctor. Perhaps there are other disabilities, insurance, or payments being collected by plaintiff which he/she failed to disclose.

H. Criminal Records

Many counties will run criminal record checks without authorization and through a written request. Most require nominal fees. The Minnesota Bureau of Criminal Apprehension (BCA) will run a state-wide criminal search (beware not all agencies report) with a signed, and notarized authorization from the plaintiff for a fee. When you have a plaintiff who has moved around or lived in various counties, the BCA is a good tool to track down sources of impeachment evidence.

I. Worker's Compensation Records

Nearly every personal injury automobile case that involves a working adult should include a request for worker's compensation records to the Department of Labor & Industry. Records are archived going back, in some cases, more than 20 years. A surprising number of chronic pain plaintiffs forget about that episode of neck or back pain which necessitated time off work ten years before your accident, and the year or more they were off work. While serving as another source of impeachment evidence, these records also lead to other undisclosed medical, insurance, and claim records that you might otherwise have remained totally unaware of.

Overlapping claims also may arise which could lead to issues of priority disputes in the no-fault arena (worker's compensation is primary), or perhaps contribution or subrogation claims if plaintiff had a prior work related injury which has allegedly been aggravated by your accident.

J. Social Security Records

Social security records may reveal past or current claims for disability benefits, or supplemental security income which will mitigate the losses being claimed by the plaintiff. There are a surprising number of chronic pain plaintiffs who have in the past or simultaneously with the pending claim, collected social security disability benefits for depression, chemical dependency issues, and systemic diseases.

Motivational and financial factors clearly play a role in continued pain complaints, and ongoing allegations of an inability to work.

K. Unemployment Records

Obtaining unemployment records should also be a must on every claim. Plaintiffs must certify they are ready and able (physically) to work in order to collect unemployment compensation, with some exceptions. Thus, the plaintiff who testifies in his deposition that he was in so much pain he is unable to work, yet files an unemployment compensation claim and represents to the Department of Economic Security that he is ready and physically able to work has committed himself to a lie to one or the other claim. Either he is untruthful in your case, or he has been untruthful to the unemployment office in which case he may end up paying back those erroneous benefits he collected, or his recovery in your case could be reduced by the amount of benefits he collected.

In addition, ongoing claims for unemployment benefits show up often in the case of seasonal employment situations, and may lead to mitigation of damage evidence which will allow the defense to establish a less favorable pattern of employment for the plaintiff prior to the accident.

L. Other Claim or Insurance Records

Watch for payments made by health insurers. Some health insurers are contractually subrogated to the claimant's right to medical expense benefits. If this is the case, the health insurer may have the exclusive right to recover medical expense benefits. Issues of collateral source deductions will come into play, and/or lien rights may arise. Determine who the carrier is, the form of payment, and type of plan (private, ERISA, auto, disability, health, etc.).

Look for other insurers that may show up for issues of disability, pension, or injury claims. Health insurance records and records from the Minnesota Department of Human Services (or the local county welfare agency) are a great source for undisclosed medical providers. A plaintiff who is on medical assistance may neglect to mention a doctor to which medical assistance made payments. Gathering those records will turn up those undisclosed providers.

Look for other IMEs if one was done by another insurer, for example a worker's compensation or no-fault IME might bolster your defense of no objective findings particularly when done soon after the injury rather than a couple of years later when the chronic pain bodily injury claim reaches fruition.

M. Other Types of Records

Consider requests for military records on those chronic pain plaintiffs who served in the armed forces. Prior injuries, disciplinary problems, and prior chemical dependency issues often appear. School records are another source of impeachment evidence, for example, if a plaintiff seems to represent him/herself as having memory or performance difficulties. They may also be a source that leads to other avenues of exploration and investigation.

N. Social Media and Electronic Data

With the age of social media, cell phones, cell towers, satellites, drones, blogs, Facebook, Twitter, and any number of different modes of communication, this too can be a goldmine when investigating a claim. Looking at court websites, asking about social media, types of social media used, checking the internet and any links or cites to a person's name or experiences can be invaluable. It is often one of the first places we look in defending a case, before a savvy claimant decides to privatize or shut down his/her social media cite. Do the same for your own client so you know what's out there, and can advise of the importance of not putting things out in the public domain that may be harmful or impact the case.

Do not be content to just assume when you request someone cell phone records that they were not on the phone or not texting to rule out distracted driving. A person may be looking at an app, or doing something else with technology that is not readily traceable.

V. EXPERTS

A. Your Expert and Independent Medical Examinations

Avoid examiners that are generally reputed to be less than impartial in their evaluations. Select an examiner who is objective, makes a good appearance, and can convincingly explain in layman's terms the basis for his/her opinion. A jury is likely to give little or no weight to the opinion of a doctor viewed as a "defense" practitioner or "hired gun." You want someone who is credible and perceived as being objective, not biased. Re-examine which doctors are hired in future based upon feedback from defense counsel.

The same holds true for plaintiffs. A plaintiff is best to choose more neutral, and less "plaintiff" orientated practitioners or "personal injury mills" to bolster their claims. We all know certain medical practitioner's opinions have the same lack of impact on the jury, and/or insurer or defense counsel when evaluating a claim for settlement because of a perceived bias. Choosing a more neutral practitioner from

a plaintiff's perspective can affect the view toward settlement, and may increase the likelihood of resolution short of trial.

If you know your doctor, will rely on certain articles as learned treatises, your doctor is likely to gain credibility if the jury hears plaintiff's doctor agree the treatises publishing these articles are a reliable authority.

Consider published authoritative, scientific medical journals such as the *New England Journal of Medicine*, *Spine*, *Journal of Bone and Joint Surgery* as possible learned treatises to use with your experts. All have published extensive studies on subjective complaints and the lack of objective findings.

B. Cross-Examination of Plaintiff's Doctors

Cross-examining plaintiff's doctor is your chance to discredit the opinions expressed by the expert, while establishing your theory of the case and furthering the likelihood that there are other plausible and credible explanations for plaintiff's chronic pain complaints. Remember, the doctor must be able to base his/her medical opinion upon more than just plaintiff's own history of what happened. The doctor must establish by independent means his/her opinion that plaintiff sustained an injury causally related to the accident in question. Without benefit of plaintiff's prior medical records, the doctor's opinions are often subject to attack.

When cross-examining the chronic pain plaintiff's medical expert, consider the following:

Bring out the points that help your case.

Review the doctor's file before the deposition (assure yourself that the doctor does not have plaintiff's prior records, scan reports, employment records or job descriptions).

Get out the concessions you know the expert is willing to make, and do so early.

Since plaintiff's attorney will usually only point out the abnormal or positive findings, you should point out all tests that are negative or normal, for example:

X-rays, EMGs, MRIs, etc.
Straight leg raising tests, and palpation
Orthopaedic, neurological testing

Point out if plaintiff did not have any visible signs of injury (eg. bruises, cuts, or contusions).

Go through plaintiff's records with the doctor and see whether normal findings are consistent from one visit to the next. Generally positive findings should remain consistent until recovery. If plaintiff's pain changes (eg. right to left, upper to lower) question the legitimacy of the pain complaint.

Question the legitimacy of pain complaints with the doctor by confirming with the doctor that he/she needs to keep records of his/her visits with the patient. Confirm with the doctor that those records are used by him to accurately set forth the progress of his/her patient from visit to visit. Confirm that the doctor tries to record everything that is important in his/her records for the patient, such as diagnosis, progress, and findings, and that such records would have been kept in the case of the plaintiff in issue. Confirm with the doctor whether there is any reason to believe in this case that the doctor didn't follow his/her usual practice and procedure in attempting to put everything that he/she thought was important into plaintiff's records. Finally, ask the doctor whether there is any reason to believe that the records he/she kept in this case are incorrect.

Address *objective v. subjective findings* by explaining that subjective symptoms are those the patient says he has, and objective symptoms are those that the doctor can feel or see. Confirm that in making his/her diagnosis of the plaintiff the doctor had to rely on what the plaintiff told him/her. Most importantly in chronic pain claims, confirm the doctor determined where his/her patient, the plaintiff, was experiencing pain by asking questions. For example:

The doctor cannot say whether wincing or complaints of pain are voluntary or involuntary.

The doctor cannot see tenderness with his/her eyes.

The doctor cannot say with certainty whether wincing or complaints of pain are greatly exaggerated.

The doctor cannot say whether wincing or complaints of pain are voluntary or involuntary.

The doctor would then arguably agree that pain is not an objective symptom in the sense that you cannot see it.

Address the same issues with respect to *muscle spasm*. If the doctor testifies on direct that plaintiff exhibited spasm on palpation, ask the doctor to agree that palpation can cause a muscle spasm, and that simply

by pressing on a muscle with your fingers or thumb the doctor can cause a muscle spasm.

Establish early the fact that plaintiff's expert did not see or treat the plaintiff before. If plaintiff had a regular family doctor and is now seeing a neurologist, simply because plaintiff needed a "hired gun" to bolster his claim.

If appropriate, establish the expert's clinic as a plaintiff's "personal injury mill," or perhaps questionable treatment or billing practices.

Counteract "subjective" tests, such as *restricted range of motion*, by confirming with the doctor that people have different "normal" ranges of motion. If the doctor says no, ask the doctor to agree that if all of the jurors were to go through the same range of motion tests he/she administered to the plaintiff whether we should expect them all to come out exactly the same. The doctor should admit *there are truly "ranges" of motion that are "normal."* The doctor will then be asked to admit that he/she cannot say what a person's normal range of motion is.

Establish the symptoms plaintiff presented with and whether they remained consistent. The severity of symptoms should taper rather than worsen over time. Recovery is part of the normal healing process, and some healing is the expected outcome of all trauma.

Confirm the history plaintiff gave to the doctor about the accident. For example, plaintiff told the orthopaedist he had been rear ended by a vehicle traveling 30 m.p.h. while at a dead stop. Six months later plaintiff tells the doctor his right shoulder is sore, and the doctor diagnoses a tear of the glenoid labrum and does surgery.

Once you've confirmed this history with the doctor, point out to the doctor all the things plaintiff did not tell him about his pain complaints. Preface each point by stating "Doctor plaintiff didn't tell you. . .he golfs, works construction or does repetitive work with his upper extremities, carries heavy items at work, (confirm the doctor has ever seen plaintiff's job description), had no specific shoulder complaints for six months, had no direct trauma on impact to his shoulder, was not seated in an abnormal fashion in the vehicle, did not strike the shoulder on any part of the vehicle or fixed object, did not brace himself or grip the steering wheel on impact (you should be able to show the plaintiff's deposition testimony confirming this), had less than \$450.00 damage to his truck (your client's car had a scratch to the bumper). . . ."

“Doctor, plaintiff didn’t tell you any of this when he presented to you for treatment, and you remained unaware of it when you rendered your opinion.”

By pointing out incomplete or inconsistent facts the treating doctor relied on in making his/her decision and rendering a diagnoses of plaintiff’s injury/condition, you can then ask the doctor:

“If the facts of this case were different, would your opinion be different.”

This opens the door to argue during closing that the doctor admitted a change in facts could change his/her opinion, and further that the doctor admitted he/she was not aware of all the facts.

Consider posing a hypothetical question, but be certain about your question. Avoid the possibility the doctor may testify that the change in facts does not change his/her opinion.

VI. MOTIONS

The Rules of Civil Procedure, specifically Rules 26 and 37, do require parties with discovery issues to meet and try to resolve issues before running to the judge on a motion. Some judges have gone so far as to put that requirement into the scheduling order. However, failure to comply with discovery, depositions, or providing appropriate medical documentation does warrant a motion and it is important to be prepared to do battle on issues of importance to the defense of your claim. The goal is to focus on what is important, and to pick your battles. Not every item warrants a motion, and most plaintiff’s lawyers I deal with are very agreeable. We each respect we have a job to do and usually if I explain my reasons for wanting the item of discovery, plaintiff’s counsel will agree. It may be medical records from a past provider that we need to learn about possible contributing factors to plaintiff’s injuries. Discovering a piece of information or evidence is not an automatic guarantee to admissibility, and if appropriate you should agree with opposing counsel on discovery issues, and fight about admissibility at trial if the item is important to your case. You may find that the discoverable item turns out not to be that big of a deal to your case, and it is not worth embarrassing the plaintiff about unimportant issues. Pick your battles, know when to work out an agreement with your opponent, stipulate to items you can possibly agree upon, and then your motions will take on greater importance as they will focus in on key areas of the case.

The primary areas of pre-trial motion practice in the automobile arena these days deal with discovery of medical records, no-fault records, other insurance files, and IMEs (yours or perhaps another insurers). Motion practice requires a good understanding of the Rules of Civil Procedure. Be efficient with discovery so that you do not run afoul of a scheduling order deadline. By keeping on top of discovery, you will be able to determine

in a timely manner (not on the eve of trial) whether a discovery motion is necessary and what items you are in need of.

Motion practice requires a separate seminar in and of itself, so I will defer to other materials for further details.

A. Photographic Evidence

We have seen some motion practice increase in the last few years concerning photographic evidence in low impact cases. Some plaintiff's lawyers have moved to exclude vehicle photos, particularly those that show little or no damage. Should it matter if the defendant has admitted liability, for example, in a rear end accident situation? Do such photographs allow the jury to speculate about cause and extent of injuries claimed by the plaintiff? Are these types of photographs unduly prejudicial? These are just some of the issues raised in motions on both sides.

In motions to exclude photographic evidence, parties have relied on the Delaware Supreme Court case of *Davis v. Maute*, 770 A.2d 36 (Del. 2001). In *Davis*, the Delaware Supreme Court held that photographs showing minimal damage to plaintiff's car were inadmissible absent expert testimony or limiting instruction. However, the court said expert testimony could establish the link that minimal damage translates into minimal or no injury.

In motions to admit photographic evidence, parties rely upon *Mason v. Lynch*, 151 Md. App. 17, 822 A.2d 1281 (Md.App. 2003). The Maryland Court of Special Appeals limited *Davis v. Maute* because in *Davis*, the defendant had admitted liability, whereas in *Mason* the defendant did not admit liability. The court also held that a limiting instruction to the jury that there is no evidence of a correlation between damage shown in photos and the severity of plaintiff's injury was appropriate.

Minnesota courts generally have held that photographs are relevant to the question of damages. Photographs are admissible as competent evidence if they:

- accurately portray anything a competent witness can describe in words
- are helpful to aid a verbal description of objects or conditions
- are relevant to some material issue
- are not rendered inadmissible merely because they arouse passion or prejudice

State v. Dezeler, 230 Minn. 39, 41 N.W.2d 313 (1950)

Photographs are relevant evidence. Minn. R.Evid. 401 defines relevant evidence as that which makes existence of fact more or less likely. Under Minn. R.Evid. 402, all relevant evidence is generally admissible. Relevant evidence means evidence having any tendency to make the existence of any consequential fact more or less probable. Relevant evidence is that which tends to prove or disprove a material fact in issue.

The courts must apply a balancing test in accordance with Minn. R.Evid. 403, which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

When opposing a motions to exclude photographs (or any other evidence for that matter), it is important to point out that the party seeking to exclude the evidence must show unfair prejudice. *Baltus v. Lippe*, 293 Minn. 99, 196 N.W.2d 922 (1972). In *Baltus*, the Minnesota Supreme Court said in order to show unfair prejudice, it is not enough that the evidence is “highly damaging” to the other party’s case. Rather it must provide an unfair advantage which is highly persuasive by illegitimate means. *State v. Cermak*, 365 N.W.2d 243 (Minn. 1985)

B. Discovery of “Other” Medical Conditions

Minn. R.Civ.P. 26.02(b) provides that parties may discover:

- any matter
- not privileged
- relevant to the subject matter
- whether it relates to claim or defense

The parties must also comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, and the importance of the discovery in resolving the issues. Essentially, discovery must balance the amount of time and money necessary to secure the information sought to be discovered with what the parties are disputed. The court will not allow the parties to spend large amounts of money where the amount in controversy is minimal, or if the information sought to be discovered would be minimally relevant.

The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence. Minn. R. Civ. P. 26.02(b). This has become less of a problem it seems, but there are still concerns about the practice of redacting of medical authorizations or limiting the scope of authorizations. There are also concerns about potential causes of action under HIPAA ("Health Insurance Portability and Accountability Act"), and/or Minnesota's own privacy statute, Minn. Stat. §144.335 dealing with the unauthorized release of medical records. Arguments have been raised that obtaining an authorization from plaintiff to obtain copies of their records for use in litigation does not necessarily allow the defense attorney or insurer to re-release records to its expert or a 3rd party.

Minn. Stat. § 144.335, subd. 3a(e) provides that a patient may have a private right of action against a person or entity who receives medical records from a medical provider who then releases those records to another person. Is providing records to an expert witness and/or IME physician violative of this provision?

We recommend that every practitioner incorporate a re-disclosure provision into their medical authorizations to avoid a lawsuit for violation of patient privacy data. Include language that allows the release or re-release of medical records to medical experts for purposes of underlying personal injury litigation.

HIPAA, 45 C.F.R. 164.512(e)(1)-(e)1(ii), does allow an expert physician to disclose protected health information under some circumstances, such as:

- In the course of a judicial proceeding
- By court order
- In response to court or administrative subpoena
- Court sanctioned discovery request
- Other lawful court process if provider has satisfactory assurances that person seeking information has made reasonable efforts to protect the health data

Some plaintiff's lawyers for a time took to limiting authorizations to certain areas of the body. This practice seems to have abated. In light of HIPAA and Minn. Stat. §144.335, most providers will not "pick" through records to find only those pertaining to certain areas of the body. Motions to the district courts have come down on both sides.

Minn. R.Civ.P. 26.02 deals with what a party may discover:

- Discovery regarding any matter, not privileged
- Relevant to the subject matter
- Relates to claim or defense

Additionally, Minn. R. Civ. P. 35.03 provides as follows:

If at any stage of an action a party voluntarily places in controversy the physical, mental, or blood condition of that party, a decedent, or a person under that party's control, such party thereby waives any privilege that party may have in that action regarding the testimony of every person who has examined or may thereafter examine that party or the person under that party's control with respect to the same physical, mental, or blood condition.

Minn. R.Civ.P. 35.04 provides when a party has waived medical privilege pursuant to Rule 35.03 (eg. put their medical condition in issue), they must within 10 days of a written request by any other party, furnish the requesting party copies of all medical reports previously or thereafter made by any treating or examining medical expert, and they must also provide written authority to permit inspection of all hospital and other medical records concerning physical, mental, or blood condition of such party as to which privilege has been waived.

If a party still claims they have a legitimate reason for withholding or refusing to disclose the information, Minn. R.Civ.P. 26.02(f)(1) provides that when a party withholds information otherwise discoverable by claiming privilege that party must make the claim expressly, and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Under Minn. R. Civ. P. 26.02(f)(2), If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Minnesota courts favor unrestricted access, and many district court judges in responding to motions in limine on this issue grant unrestricted medical authorizations, particularly where other conditions might impact a plaintiff's claims of injury, wage loss, or lost earning capacity. In more than one district court decision, a judge has upheld Rule 35 noting that a person who places their medical condition in issue, forfeits claims of privilege.

C. Discovery of Expert Opinions

Motions to limit the scope or number of independent medical examinations have also been a continued source of discovery haggling. The purpose is to limit the use of “other” insurers examinations of the plaintiff. Plaintiff’s counsel wants to avoid a “double-team” approach, and avoid the “adverse” impact of multiple opinions.

Minn. R.Civ.P. 35.01 provides that in an action in which the physical or mental condition of a party is in controversy, the court in which the action is pending may order the party to submit to examination by a physician. The order may be made only on motion for good cause shown. Rule 35 does not expressly impose a limit on number of examinations.

What if the other side wants to depose your medical expert, or use your expert’s opinion at trial when you don’t intend to use it because it is unfavorable? Minn. R.Civ.P. 26.02(e)(2) provides that “A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.”

Minn. R.Civ.P. 35.02 (a) provides that “[i]f requested. . .the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examination setting out the examiner’s findings and conclusion, together with like reports of all earlier examinations of the same condition. . . . If the examiner fails or refuses to make such a report, the court may exclude the examiner’s testimony if offered at trial.”

What if the other side wants to take your expert doctor’s deposition? Minn. R.Civ.P. 35.02 does not address the right of the Plaintiff to call the IME physician as a witness when the IME physician issues a favorable opinion. Rule 35.02 also does not allow the taking of an examining doctor’s deposition. Rule 26.02(e)(2) provides for discovery of facts known and opinions held by experts that are otherwise discoverable under 26.02(b). Hence, a report is allowed, but not a deposition.

Minn. R.Civ.P. 26.02(e)(2) deals with trial preparation and experts. Rule 26.02(e)(2) provides:

“A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of

litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Hence, only upon a showing of exceptional circumstances, and only with a court order would a deposition be allowed. The advisory notes to Rule 35.04 expressly provide that the purpose for the limitation is to insure that depositions of medical experts will be taken only upon court order.

VII. TRIAL

A. Submission of Trial Documents

Keep in mind that submission of trial documents now for practitioners in State District Court is typically governed by the case specific scheduling order, trial order or pre-trial order issued by the court. Most orders will specify when the judge wants trial documents submitted, and most require the parties to exchange trial documents and agree upon what they can in advance of filing those with the court. Trial documents will usually be discussed the morning of trial, but some judges may set a pre-trial/settlement conference in close proximity to the trial for purposes of attempting settlement, narrowing issues for trial, and to go over trial documents. Those items that can be agreed upon will be moved to the front of the list, and those items that the parties cannot agree upon the judge will make appropriate rulings on and may or may not ask for additional submissions or some form of stipulation from the parties. Trial documents typically will include the following, again subject to a specific judge's request for particular documents.

1. Jury Instructions

The trial court in nearly every personal injury case will require that each party submit a set of proposed jury instructions. Unless the trial order specifies otherwise, it is sufficient to include the JIG number and title only (not the text of the JIG itself). Most judges will have their clerks prepare the final set of instructions from CIVJIG 4 and 4a on the computer, and will include the full text of the instruction in the final set of jury instructions compiled for the jury.

If there is a special jury instruction you want the judge to include in your case, you must submit it to the other side for approval, and also must type it out and submit it in its entirety to the judge. Most judges want any deviation from the CIVJIGs to be submitted in full text so they can review

it, along with any pertinent statutory or case law, to be prepared to address objections from the other side or possible errors of law.

Think through your jury instructions before submitting them. It is better to err on the side of being cautious in giving an instruction than not. Jury instructions can and do often form the basis for post-trial motions and appeals, and you need to anticipate potential perils before they occur. Many a practitioner has found themselves in a difficult position arguing about a jury instruction having gone to the jury when they themselves asked for it in pre-trial submissions, or failed to object to it and preserve a record for appeal. The jury instruction guides are fairly comprehensive and have been honed to avoid pitfalls on appeal, but they are not perfect, and a good practitioner will make the trial judge aware of potential problems and make a record for appeal.

a. Jury Instructions for Aggravation Cases

A hot topic among the automobile litigators in recent past has been what instruction to give in aggravation of pre-existing injury cases. The appellate courts have held that the new JIG, 4A Minnesota Practice, CIVJIG 91.40, improperly shifts the burden of proof to the defense to disprove an aggravation, rather than to have the plaintiff prove an aggravation. The guidelines now established by the Supreme Court in *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154 (Minn. 2002), *reversing* 632 N.W.2d 268 (Minn. Ct. App. 2001), seem to suggest that unless one party argues an aggravation theory, CIVJIG 91.40 should not be used. The Supreme Court found it was improper for the district court to have given CIVJIG 91.40 as an instruction to the jury since neither parties' theory of the case was based on aggravation.

The appellate courts direct that in aggravation cases, JIG 163 should be used. *See Heine v. Simon*, 674 N.W.2d 411 (Minn. Ct. App. 2004), *rev'd in part on other grounds*, 702 N.W.2d 752 (Minn. 2005). In *Heine*, the Court of Appeals rejected Plaintiff's contention that this instruction erroneously shifted the burden of proof to plaintiff. Generally, the plaintiff in any civil case bears the burden of proving damages by a preponderance of the evidence. *Id.* at 417, *citing Canada by Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997). If there is a pre-existing injury that is aggravated by the negligence of another, plaintiff still has the burden of proving not only the injuries directly caused by the defendant, but also proving the extent to which plaintiff's

condition was caused by the defendant's conduct. *Id.*, citing *Leubner v. Sterner*, 493 N.W.2d 119, 122 (Minn. 1997).

Plaintiff's recovery is limited to the additional injury caused by the aggravation, over and above the condition that existed because of the pre-existing condition. *Id.*, citing *Nelson v. Twin City Motor Bus Co.*, 239 Minn. 276, 280, 58 N.W.2d 561, 563 (1953). "Put another way, damages for aggravation of a pre-existing condition are simply a means to assure that the defendant pays only for the harm [the defendant] causes, not the harm plaintiff already had." *Id.*, citing *Leubner*, 493 N.W.2d at 122. "But when two or more person through consecutive, independent acts of negligence 'closely related in point of time' cause a single indivisible injury that is incapable of apportionment, the negligent actors are jointly and severally liable for damages incurred." *Id.* at 418, citing *Mathews v. Mills*, 288 Minn. 16, 23, 178 N.W.2d 841, 844 (1970). Whether the single-indivisible-injury rule applies is a question of law. *Id.*, citing *Canada*, 567 N.W.2d at 507-08. In *Heine*, the aggravation of plaintiff's pre-existing injury was not an apportionable cause giving rise to joint and several liability, because there were two distinct accidents separated by months, and the contention was that the second accident aggravated injuries from the first – not that it produced a single indivisible injury.

In *Rowe v. Munye*, 702 N.W.2d 729 (Minn. 2005), *aff'g*. 674 N.W.2d 761 (Minn. Ct. App. 2004), the Supreme Court indicated that CIVJIG 91.40 misstates the law in Minnesota and is improperly given in cases of aggravation. The court followed precedent in *Blatz v. Allina Health Sys.*, 622 N.W.2d 376 (Minn. Ct. App. 2001), *review denied* (Minn. May 16, 2001), *Morlock v. St. Paul Guardian Ins. Co.*, 632 N.W.2d 268, 271-72 (Minn. Ct. App. 2001), *rev'd*. 650 N.W.2d 154 (Minn. 2002) holding the previous aggravation of damages instruction found in CIVJIG 163 taken from 4 *Minnesota Practice* 163 (1986) properly follows prior Minnesota common law precedent and is the proper instruction to be given to the jury in certain cases because it does not hold a defendant liable for harm which he did not cause. *See Nelson Twin City Motor Bus Co.*, 239 Minn. 276, 58 N.W.2d 561 (1953); *Schore v. Mueller*, 290 Minn. 186, 186 N.W.2d 699 (1970); *Leubner v. Sterner*, 493 N.W.2d 119, 122 (Minn. 1992). The Court further expounded on burden of proof issues created by 91.40 which impermissibly shifts the burden of proof to the defendant to show he did not cause the portion of plaintiff's damages attributable to the pre-existing condition.

2. Special Verdict Forms

Again most practitioners use the proposed Special Verdict form found in Minnesota Practice, Volumes 4 & 4A of the 4th Edition of *Jury Instruction Guides*. These are available on CD ROM or DVD and are easy to access for the judge and the parties. The typical automobile personal injury special verdict form is found at CIVSVF 65.90 No-Fault Automobile Insurance. Variations of this form are used to address specific issues, but the primary elements of negligence, causation, damages and collateral source concerns are contained within the form.

3. Witness Lists

Witness lists are a must, and should be all inclusive. You are always better to include a tangential witness even if you think it highly unlikely you would ever call this person, than to find out at trial this person is crucial and you forgot to include him/her on your list. Witness lists also let each side know ahead of time what witnesses they are likely to anticipate at trial for purposes of preparing cross-examination. If you find a witness on your opponent's list you have not heard from before, call opposing counsel and find out who that person is and what they are expected to be called to testify about. You want to know what is coming and avoid surprises at trial. This will also put you in the position of being able to call a rebuttal witness should one be necessary.

Some judges will require that the witness list include not only the name and address of the witness, but also a summary of the anticipated testimony of the witness. Should this be required in your case, be thorough, without being elaborate. Key areas should be included, but an entire summary of testimony should not.

4. Exhibit Lists

For the same reasons that a witness list are important, the exhibit list is equally necessary to identify all possible exhibits or evidence each side intends to utilize at trial. Many judges now require a stipulated set of exhibits be submitted together. Exhibits that either side objects to can then be addressed separately by the trial court. Most judges still utilize a separate exhibit numbering system for plaintiff and defendants. The trial order will typically specify the numbering system, and copies the court requires. Exhibits must be exchanged among the parties.

5. Trial Brief

Trial briefs have become less the norm, and seem to be requested now only in cases involving issues that are out of the ordinary. However, some judges still prefer the lawyers commit their respective views of the case to paper. The trial brief should provide the judge with a good overall view of the case, issues of liability, negligence, damages, causation, and proof. Evidentiary concerns should not be included in the trial brief, but should be addressed in a motion in limine.

6. Motions in Limine

Issues concerning the admissibility of or preclusion of evidence at trial should be addressed with the court in the form of a motion in limine. Timing of such motions are usually subject to the trial court's scheduling either at pre-trial or the morning of trial. Motions in Limine are the means by which the court controls the admissibility or exclusion of evidence. Motions in Limine should be succinct, and focus in very directly on the item of evidence in issue.

7. Deposition Objections

When offering depositions with objections in them, some trial court judges want the objections outlined and the basis for the objection clearly spelled out so rulings can be quickly and easily made. We have found from a practical standpoint that going through the transcript in advance and citing the page and line number of the objection for the judge in a memorandum format makes it much quicker and easier to dispose of those rulings in advance. Also, based upon other rulings of the court, or a limiting of issues by the court or stipulation, the parties are able to resolve many of the deposition objections.

B. Post-Trial Motions and Collateral Sources

1. Joint and Several Liability

Be aware of the changes in apportionment of damages under the Joint and Several Liability Statute, Minn. Stat. §604.02 after August 1, 2003 (for all claims arising on or after August 1, 2003). Joint and several liability will not attach unless the fault of a defendant exceeds fifty percent (50%), two or more persons act in a common scheme or plan, a person commits an intentional tort, or unless the tortfeasor violates various environmental statutes. Minn. Stat. § 604.02, Subd. 1. Absent one of these specific instances, contributions to awards shall be in proportion to the percentage

of fault attributable to each person. *Id.* The “Four Times Fifteen Percent Rule” still applies for all claims arising before August 1, 2003.

Uncollectible amounts of debt may be reallocated to another party. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment. Minn. Stat. § 604.02, Subd. 2.

When a party is severally liable under Minn. Stat. § 604.02, Subd. 1, that party cannot be required to contribute more than that party's equitable share of the total damages award through the reallocation-of-damages provision in Minn. Stat. § 604.02, Subd. 2. *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713 (Minn. 2014) (*Staab II*).

2. Collateral Source Deductions

A motion to deduct collateral source no-fault benefits, just like any other collateral sources, must be commenced within 10 days from the date verdict is entered. *Lee v. Hunt*, 642 N.W.2d 57 (Minn. Ct. App. 2002).

Minn. Stat. §548.251, subd. 2 provides:

In a civil action, whether based on contract or tort, when liability is admitted or is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. If the motion is filed, the parties shall submit written evidence of, and the court shall determine:

(1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted; and

(2) amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff's immediate family for the two- year period immediately before the accrual of

the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.

Minn. Stat. §548.251, subd. 3(a) provides that The court shall reduce the award by the amounts determined under subdivision 2. Minn. Stat. §65B.51, subd. 1, which mandates the court *shall* make the necessary offset deductions, and says nothing about the necessity of a motion:

With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by sections 65B.41 to 65B.71, *the court shall deduct from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any deductible.*

3. Specific Collateral Sources

"Collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

(1) a federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;

(2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;

(3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or

(4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.

A negotiated discount of medical expenses is a collateral source for purposes of the collateral-source statute. *Swanson v. Brewster*, 784

N.W.2d 264 (Minn. 2010). A negotiated discount is the “amounts a plaintiff is billed by a medical provider but does not pay because the plaintiff’s insurance provider negotiated a discount on the plaintiff’s behalf.” *Id.* at 282. This means, for example, if a plaintiff has \$100,000.00 in medical bills but his insurance company buys those bills for \$60,000.00, then the defendant is entitled to a collateral-source offset in the amount of \$40,000.00.

In 2016, the Minnesota Court of Appeals endorsed the holding in *Swanson v. Brewster* in *Auers v. Progressive Direct Ins. Co.*, 878 N.W.2d 350 (Minn. Ct. App. 2016) which dealt with whether the claimant could make an underinsured motorist claim. In *Auers*, the decedent’s insurer purchased approximately \$158,000.00 of remaining past medical bills for approximately \$72,000.00 and asserted a lien for \$72,000.00. *Id.* at 352 (\$20,000.00 of the medical bills had been paid by no-fault). The decedent then settled her liability claim against the tortfeasor for the tortfeasor’s liability limits of \$100,000.00. *Id.* In order for the decedent to prevail on her UIM claim, she had to establish that the recoverable damages were greater than her tortfeasor’s liability limit. *Id.* at 354. To determine this, the court “must first reduce the damages award by the collateral-source benefits received by the injured person before the verdict or settlement.” *Id.*; see also Minn. Stat. § 548.251. “If the amount of recoverable medical expenses, after offsets, is less than [the liability limits], then [claimant] has been fully compensated by the earlier tort settlement and [is] not entitled to UIM benefits.” *Id.* at 354. Because the decedent’s insurer asserted a lien in the amount of \$72,000.00, the amount that was negotiated (approximately \$85,000.00) was a negotiated discount and subject to offset under the collateral-source statute pursuant to *Swanson v. Brewster*. *Id.* at 356. The insurer could not assert a lien for the negotiated discount because it did not pay for that amount. *Id.* The subrogation amount was limited to what the insurer paid and the amount that was discounted was a collateral source offset. *Id.* 356-57.

Thus, in *Auers*, the decedent had total past medical bills in the amount of \$178,000.00. There was a negotiated discount of \$85,000.00 and PIP payments totaling \$20,000.00. As a result, the total amount of recoverable damages was \$73,000.00 (the amount of the insurer lien). And because \$73,000.00 was less than the \$100,000.00 liability limits for the tortfeasor, the decedent was not entitled recover uninsured motorist benefits.

Finally, Medicare negotiated discounts are excepted from the collateral-source statute and is not an offset to reduce the plaintiff’s damages award. *Renswick v. Wenzel*, 819 N.W.2d 198, 211 (Minn. Ct. App. 2012).

4. Tort Threshold Issues

A person may recover future medical expense and future income loss awarded by the jury even though they did not satisfy any of the tort thresholds. In *Kyute v. Auslund*, 668 N.W.2d 698 (Minn. Ct. App. 2003), *review denied*, (Nov. 25, 2003), the jury determined the plaintiff failed to breach a tort threshold, but nonetheless, awarded future medical expenses of \$6,000 and future loss of earning capacity of \$6,000. Defendant maintained that he did not have to pay the awarded amounts for future damages because plaintiff had not met a tort threshold. The Court of Appeals disagreed stating the tort thresholds apply only to “non-economic detriment” and not “economic loss.” The Court noted that the term “economic loss” is not defined in the statute, however, the term “loss” is defined as “economic detriment” which does include medical expenses and income loss. There is no distinction in those categories of damages between past or future benefits. Thus, the Court held “future medical expense and loss of future income are not subject to the tort threshold requirements.”

Also, in *Pemberton v. Theis*, 668 N.W.2d 692 (Minn. Ct. App. 2003), plaintiff commenced a bodily injury suit against the defendant for injuries from a low-speed, rear-end motor vehicle accident. The jury found plaintiff 20% at fault, determined she did not meet a tort threshold, but awarded \$5,000 for future medical expense. Plaintiff had already settled her no-fault claim on a full, final and complete basis with the no-fault insurer for \$2,331. The district court deducted the no-fault settlement of \$2,331 from the \$5,000 award for future medical expense, and then applied the 20% deduction for fault to the remaining damages for future medical expense. Defendant argued the \$2,331 no-fault settlement should preclude plaintiff’s claims for future medical expense. But the Court of Appeals rejected this argument noting that the no-fault release expressly reserved plaintiff’s right to pursue liability as well as underinsured motorist benefits. The Court reasoned that since defendant in the tort case was not a party to the no-fault settlement, and since nothing in the release suggested plaintiff intended to give up her tort/bodily injury claims against the at-fault party, plaintiff was entitled to seek future medical expense. Additionally, the Court found the underlying factual record in the case was not fully developed enough to determine whether the offset of \$2,331 from the verdict for future medical expenses was actually intended to be payment for future medical expenses. Nonetheless, the Court determined the district court did not error in deducting the no-fault settlement of \$2,331 from the \$5,000 award for future medical expense. The Court did not fully address the issue of deducting what is “payable” in a situation involving a No-Fault settlement.