IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHERYL SLOAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 00C-03-176-JRS
	)	
ANDREW M. CLEMMONS,	)	
	)	
Defendant.	)	

Submitted: December 13, 2001
Decided : December 17, 2001
Amended & Corrected: December 19, 2001

MEMORANDUM OPINION

Vincent A. Bifferato, Jr., Esquire, of BIFFERATO, BIFFERATO & GENTILOTTI, Wilmington, Delaware. Attorney for the Plaintiff.

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SLIGHTS, J.

I. INTRODUCTION

Plaintiff, Cheryl Sloan, has filed a motion *in limine* to call the question implicitly raised but not decided by the Supreme Court's decision in *Davis v. Maute*[1]: what expert foundation is required to support the admission of photographs of vehicles and other evidence offered to prove the force of impact of a motor vehicle collision and the extent of the resulting injuries to the vehicles' occupants? The defendant, Andrew Clemmons, intends to offer as evidence at trial photographs of both vehicles involved in the accident and repair estimates for the vehicle damage. He also plans to elicit lay testimony regarding the speed of the vehicle at impact and the force of impact generated by the collision. Defendant proposes to admit this evidence through his medical expert, an orthopaedic surgeon, who purportedly relied upon the photographs and related evidence when formulating his medical opinions for trial. Plaintiff has moved *in limine* to exclude all evidence relating to force of impact and vehicle damage on the ground that defendant has failed to lay the foundation for admission of this evidence with competent expert testimony. For the reasons that follow, the motion is **GRANTED in part and DENIED in part.**

[1]Del. Supr., 770 A.2d 36 (2001).

II. FACTS

The motor vehicle accident at issue occurred on March 25, 1998. Plaintiff's vehicle was "stopped for traffic" at the intersection of West Avenue and 8th Avenue in Wilmington when it was struck from behind by the vehicle operated by defendant, Andrew Clemmons.[2] The parties do not dispute that Mr. Clemmons was at fault for the accident. They do, however, dispute the speed of the Clemmons vehicle at the time of impact. Plaintiff allegedly has told some of her health care providers that the Clemmons vehicle was traveling approximately thirty miles per hour at impact. Mr. Clemmons estimated his speed at impact to be three-to-five miles per hour. Photographs of the vehicles were taken after the accident. As best as the Court can discern from the record, the photographs depict minor damage to both vehicles.[3]

[2]Complaint, ¶4.

[3]The photographs have not been supplied to the Court.

Defendant retained Stacey Berner, M.D. to conduct an independent medical evaluation of the plaintiff and thereafter engaged him as a trial witness. Dr. Berner is a board certified, fellowship-trained orthopaedic surgeon. He has no training or experience in any field of engineering, including biomechanical engineering,[4] except for a three hour course on impact-to-injury analysis taught by a trauma surgeon at the University of Maryland. Dr. Berner's description of this course suggests that it involved a survey of medical issues relating to automobile accidents as opposed to a scientific explanation of the biomechanical implications of high or low impact injuries. It is also quite clear that neither the University of Maryland course nor any other aspect of Dr. Berner's training addressed the correlation between vehicle damage and force of impact.

In the course of forming his opinions for trial, Dr. Berner reviewed, *inter alia,* plaintiff's medical records, the Uniform Traffic Collision Report prepared by the police officer who investigated the accident, and the photographs of the vehicles. He also relied upon statements made to him by the plaintiff during the course of his examination of her. Dr. Berner explained that he relied upon the photographs generally to assess the extent of the impact between the vehicles.[5] With respect to the

[4]Biomechanical engineers study "the mechanics of biological [or body] activity, especially muscular activity." *Webster's Collegiate Dictionary* (10th Ed. 1996).

[5]Specifically, he stated: "It [the photo] gives you some sense, although I can't necessarily draw a scientific conclusion from looking at a picture of a vehicle in two dimensions as to what the

Uniform Traffic Collision Report, Dr. Berner took note that the investigating officer reported only minor damage to both vehicles and no injuries to the occupants. This

person within the passenger compartment or driver's seat might have experienced, but it gives one a sense as to whether or not you think you are dealing with a low velocity or low impact trauma versus a high velocity or high impact trauma." Berner Trial Depo. at 17.

information further supported both his general sense that the accident was a "low impact accident" and his diagnosis of the injury as a "low trauma injury."

Dr. Berner also relied upon Ms. Sloan's statement during his examination of her to the effect that her vehicle had sustained $400 in damage in the accident, although the vehicle's air bag did not deploy. Ms. Sloan's statements regarding the force of impact and extent of vehicle damage apparently were significant to Dr. Berner more for the questions they raised regarding her credibility than for the insight they provided regarding her accident-related injuries.

III. DISCUSSION

A. MIST Cases Before *Davis v. Maute*[6]

[6]MIST is an acronym adopted by the trial bar to characterize "Minor Impact Soft Tissue [Injury]" cases.

There was a time when photographs of the vehicles involved in an accident (or, at least, plaintiffs' vehicle) were front and center in almost every MIST case tried in this Court.[7] The defendant would display the photographs of the vehicles (usually enlarged) depicting minor damage and would urge the jury to rely upon their common sense to conclude that the occupants of the plaintiffs' vehicle could not have sustained serious injury or, in some instances, any injury as a result of the accident. The court would admit the photographs in evidence based on the notion that they depicted what happened in the accident as clearly, if not more clearly, than any witness could. When the court would admit the photographs in evidence, it would do so without expert foundation. Again, the rationale was that jurors were capable of drawing lay inferences regarding the extent of impact from photographs depicting vehicle damage.

In addition to presenting photographs, both parties routinely were permitted to describe the accident, including the force of impact.[8] And, in some instances, the

[7] *E.g. Hayes v. Bartoli*, Del. Super., C.A. No. 99C-03-299 SCD, Slights, J. (Feb. 27, 2001)(Letter Op. at 7)(noting minor nature of impact as depicted in photographs of the vehicles supported a "zero damages" jury verdict); *Jackson v. Rotach*, Del. Super., C.A. No. 99C-01-001, Stokes, J. (June 8, 2000)(allowing inference regarding force of impact from photographs of plaintiff's vehicle); *Young v. Rolan*, Del. Super., C.A. No. 95C-06-105 SCD, Del Pesco, J. (Oct. 6, 1997)(Mem. Op.)(same); *Gregory v. Pavlik*, Del. Super., C.A. No. 81C-MY-19, Taylor, J. (Aug. 3, 1984)(Mem. Op.)(same).

[8] *E.g. Hall v. Dorsey*, Del. Super., C.A. No. 96C-06-045, Quillen, J. (Nov. 5, 1998)(Mem. Op.)(referencing parties' description of the force of impact).

court would permit evidence regarding estimates of property damage.[9] Here again, no expert predicate was required to admit this evidence.

B. *Davis v. Maute*

[9] *See Gregory*, supra, (Mem. Op. at 3).

The Supreme Court's decision in *Davis v. Maute* marked a significant change in the evidentiary practice of this court.[10] *Davis* expressly rejected the argument that photographs of the vehicles "support a common sense inference that [plaintiff's] subjective complaints are not credible."[11] Instead, the court held that "a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce ***competent*** expert testimony on the issue."[12] According to *Davis,* an inference that minor damage "translates to minimal personal injuries," absent expert

[10] *Accord Hovis v. Hughes*, Del. Super., C.A. No. 99C-01-293 SCD, Del Pesco, J. (May 11, 2001)(Mem. Op.)(noting that *Davis v. Maute* required a new trial when the trial court, pre-*Davis,* had admitted photographs of the vehicles involved in the accident without expert foundation).

[11] *Davis*, 770 A.2d at 41.

[12] *Id.* at 40 (emphasis supplied)(citing *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993)(other citations omitted)).

testimony on the issue, is tantamount to "unguided speculation."[13] The message to the trial courts was clear: lay arguments that vehicle damage is probative of personal injuries will not be countenanced.[14]

[13] *Id.*

[14] Significantly, the Supreme Court concluded that the trial court abused its discretion by allowing evidence of damage to the vehicles to support the minimal damage/minimal injury inference absent expert foundation. *Id.* at 43. In other words, the court concluded that the admission of the evidence "was significantly prejudicial so as to deny [the plaintiff] a fair trial." *Id.* at 42 (citation omitted).

It came as no surprise, then, that the Supreme Court would not sanction the use of photographs of vehicle damage to support an argument that it had just determined was improper. The court held that to admit photographs depicting damage (or lack thereof) to the vehicles without expert testimony to place the photographs in context would be to allow the jury to "make unguided empirical assumptions on issues that are outside the common knowledge of laymen."[15]

The clear import of *Davis* is that a proper expert foundation must be laid before a party can argue that damage to a vehicle is probative of the injuries sustained by an occupant. But *Davis* does not address specifically the nature of the expert testimony required to support the damage-to-injury inference. The court stated simply that the expert must be "competent."[16]

C. Admissibility of Evidence Regarding Vehicle Damage

[15] *Id.* at 41 n. 9 (citation omitted).

[16] *Id.* at 40.

The Court's analysis of the competency of an expert must be guided by D.R.E. 702.[17] To determine the competency of an expert, of course, it is first necessary to ascertain specifically the topic(s) about which the expert will testify. Here, as in most MIST cases, the defendant wishes to make a two pronged argument: (1) the minimal damage to plaintiff's vehicle reflects minimal force of impact; and (2) minimal impact indicates minimal resulting injuries. As to the first prong of the argument, defendant wishes to admit photographs of the vehicles depicting minimal damage and evidence regarding estimates to repair the vehicles. The expert they proffer to explain the photographs and vehicle damage to the jury is an orthopaedic surgeon who candidly has acknowledged that he lacks the scientific expertise to bring more than a lay perspective to the images displayed on the photographs.[18] He offers no "empirical" guidance to explain the correlation between vehicle damage and force of impact, or vehicle damage and injury.[19] Dr. Berner's admitted lack of expertise with respect to the interpretation of vehicle damage renders any opinions he may have regarding the

[17]D.R.E. 702 (a witness may offer expert opinions if "qualified as an expert by knowledge, skill, experience, training or education"). *See also Mazda Motor Corp. v. Lindahl*, Del. Supr., 706 A.2d 526, 533 (1998)(adopting analysis of Rule 702 first articulated in *Daubert*, supra).

[18]Dr. Berner testified: "... I can't necessarily draw a scientific conclusion from looking at a picture of a vehicle in two dimensions as to what the person within the passenger compartment or driver's seat might have experienced..." Berner Trial Depo. at 17.

[19]*Cf. Davis*, 770 A.2d at 41 n. 9 (calling lay interpretations of photographs "empirical assumptions").

photographs inadmissible.[20]

The Court's decision here recognizes that the correlation between vehicle damage and force of impact involves more than common sense, even common sense informed by medical training. To make the correlation between vehicle damage and force of impact requires specialized training and experience in the science of motor

[20]*See* D.R.E. 702. *See also Kelly v. McHaddon*, Del. Super., C.A. No. 98C-12-176 JRS, Slights, J. (Jan. 24, 2001)(Letter Op.)(holding that biomechanical engineer was not qualified to opine that minor impact could not cause plaintiff's injuries).

vehicle crashes.[21] Absent this foundation, photographs depicting vehicle damage are not admissible to support a correlation between vehicle damage and impact or vehicle damage and injury.[22] Other evidence regarding the extent of damage to the vehicles likewise is inadmissible absent the requisite expert foundation.

D. Admissibility of Evidence Regarding Force of Impact

1. The Mechanism of Injury

[21] *See* National Highway Traffic Safety Administration, Bumper Q&A's, **www.nhsta.dot.gov** (Dec. 16, 2001)(noting "there [is no] way to determine how fast a car was going during a rear end crash based on the damage to the bumper(s). Many parameters such as vehicle masses, the pre-impact velocity of both vehicles, impact angles, crush resistance, metallurgical fatigue, etc, affect how the bumpers behave during an impact. Each crash must be analyzed with respect to all of the parameters before an estimate can be made.")

[22] Photographs may, however, be admissible for some other purpose assuming their probative value is not substantially outweighed by the danger of unfair prejudice resulting from their admission. *See* D.R.E. 403; *Davis*, 770 A.2d at 41.

Plaintiff's motion also addresses the second prong of defendant's anticipated argument, that is, plaintiff seeks to exclude any evidence regarding the force of impact absent expert correlation between the force of impact and injury. *Davis,* and particularly its interpretation of D.R.E. 702, is at the heart of this argument as well.

Certainly, to the extent Dr. Berner relies upon vehicle damage to determine force of impact, the Court already has determined that this is improper. But there are other means by which a physician may ascertain, at least in general terms, the extent of the trauma to the plaintiff for purposes of rendering a medical diagnosis. For instance, a physician may simply ask the patient what happened to them in the compartment of the vehicle upon impact. Or the physician may rely upon a biomechanical analysis of the accident.[23] In either event, assuming a foundation has been laid to establish the physician's expertise to diagnose traumatic injuries, and to determine their origin, the physician may address such factors as are relevant to these determinations, including generally what happened to the body upon impact, i.e., the mechanism of injury.

The Court rejects an interpretation of *Davis* which, practically speaking, would require a biomechanical engineer, or similarly trained expert, to appear on behalf of

[23] *See e.g. Kelly*, supra, Letter Op. at 4-5 (noting that physician could rely upon biomechanical engineer's opinion as a basis for his opinion that an accident did not cause injury to the plaintiff).

the defendant in every case where the defendant wished to challenge the extent of the injuries sustained by the plaintiff in a low impact automobile accident. In the Court's view, the determination of medical causation is a matter best left to medical experts.[24] While reference to g-forces and crash test data may enhance the expert's presentation, such information is not mandated by D.R.E. 702 to support a medical expert's opinion regarding the cause of a traumatic injury.

[24] *Id.*

In this case, Dr. Berner testified that he considers the history taken from a patient complaining of traumatically-induced injuries in order to determine the mechanism of injury, in addition to reviewing relevant medical records and conducting a clinical examination.[25] The history from the patient would include a general description of what happened to her body in the accident.[26] Plaintiff's own treating physicians testified that they too rely upon the patient's description of body movement on impact to determine the mechanism of injury.

The Court is satisfied that *Davis* does not preclude a physician from relying upon, and testifying about, a patient's description of her body's reaction to impact in an automobile accident for purposes of forming and then expressing his medical opinions. Nor does *Davis* prohibit the plaintiff herself from describing what happened to her in the compartment of the vehicle upon impact.[27] Such testimony does not run

[25] *See generally* Trial Depo. at 6-7, 16-18.

[26] *Id.*

[27] Testimony from the defendant on this issue, however, must be carefully scrutinized to ascertain its probative value. Unless relied upon specifically by an expert to reach an admissible opinion, it is difficult to imagine the relevancy of the defendant's description of his body movements on impact (unless, of course, he is counterclaiming for personal injuries).

afoul of D.R.E. 702, nor does it fail the D.R.E. 403 balancing test.

3. Speed of Vehicles and Lay Characterization of Force of Impact

Having concluded that the plaintiff can describe in general terms the mechanism of her injury, the Court must next consider under what circumstances either party can go a step further and testify regarding the speed of the vehicles at the time of impact or the force of impact.[28] Plaintiff contends that any such testimony would offend *Davis* because, absent expert testimony correlating the speed of the vehicle to the force of impact or resulting injuries, the jury would be left to draw a speculative inference that a low speed impact would generate minimal injuries. Plaintiff contends that a biomechanical work-up of the accident is required to support the low speed/minimal injury inference.

[28] According to the record, plaintiff's vehicle was stopped at the time of impact. Thus, in this case, the focus of the arguments has been evidence relating to the speed of the defendant's vehicle. Defendant wishes to testify that he "tapped" the plaintiff's bumper at a speed no greater than five miles per hour.

Defendant offers three arguments in response. First, he argues that the *Davis* analysis does not apply to the low speed/minimal injury argument. Second, he argues that even if expert testimony is required to ground the inference, a medical expert can provide the requisite foundation. He contends further that Dr. Berner has laid an adequate foundation in this case. Finally, defendant contends that the speed of the vehicles at impact is relevant to impeach plaintiff's credibility since she has told her treating medical providers that she was struck by a vehicle traveling at least thirty miles per hour at impact. In other words, he suggests that if directed by the Court, he will offer evidence regarding vehicle speed only to impeach the plaintiff. Presumably, a curative instruction as contemplated by *Davis* would then follow.[29]

A careful reading of *Davis* confirms that an unsubstantiated inference that a minimal impact will cause minimal injuries suffers from the same maladies as the unsubstantiated inference that minimal property damage will cause minimal injuries. Both inferences, when unsupported by expert testimony, require the jury to engage in speculation about matters beyond its lay understanding and experience. How does one quantify a minimum impact? What variables may affect whether an occupant of a vehicle can/will sustain injury when struck from behind by a vehicle traveling at a low

[29] *Davis* speaks of an instruction to the jury which explains that evidence regarding property damage - - or, in this instance, vehicle speed - - cannot be considered as supporting the improper inference that a low impact accident will cause minimal injuries. *Davis*, 770 A.2d at 42.

speed? What happens to the body in a low impact collision? These and other questions cannot be answered intelligently without the aid of expert testimony. And uninformed efforts to answer these questions inevitably will lead to speculation and, ultimately, prejudice.

The Court has concluded that evidence regarding the speed of the vehicles at impact - - when offered to support an inference regarding the extent of injuries sustained by the occupants - - must be accompanied by expert testimony. This conclusion, of course, begs the question of what expert is competent to address the correlation between speed of the vehicles and injury to the occupants. Plaintiff would have the Court conclude that only a biomechanical engineer can speak intelligently with respect to this issue. The Court disagrees. To reiterate, the question of whether a particular trauma caused a particular injury requires an answer from an expert trained in the healing arts.[30] Such experts may properly rely upon other experts in reaching their opinions,[31] but they need not do so. Certainly, an orthopaedic surgeon could address the issue assuming his training or experience provide him with the requisite expertise.

The Court has studied both the discovery and trial depositions of Dr. Berner. His testimony reveals that he would be qualified to render an opinion regarding the correlation between accident impact and injury. He is a board certified orthopaedic surgeon with extensive experience treating traumatic injuries, including those

[30] *McHaddon*, supra.

[31] *See e.g. Id.*

sustained in high and low impact automobile collisions. He also has participated in at least one course regarding the evaluation of injuries from high and low impact automobile accidents. Yet there is no indication in the record that he has actually stated the opinion which would allow the Court to admit the evidence regarding force of impact and speed at impact which the defendant seeks to introduce in this case. Indeed, the Court is hard pressed to find where in the record Dr. Berner even offers an opinion regarding the correlation between impact and injury in general terms, much less an opinion that plaintiff's clinical presentation or subjective complaints of injury are consistent or inconsistent with a particular degree of impact.

The flaw in defendant's plan to introduce evidence regarding speed of the vehicles at impact or force of impact is not Dr. Berner's lack of expertise, but rather Dr. Berner's lack of an opinion on the issue. And the absence of an expert opinion to ground the conclusion that plaintiff sustained minimal injury which the defendant intends to urge the jury to draw from evidence of speed and force of impact renders the evidence inadmissible under *Davis*.

4. The "Other Purpose" Exception

Finally, with respect to the argument that defendant should be permitted to elicit testimony regarding property damage, force of impact and speed of the vehicles in order to attack plaintiff's credibility, the Court is not satisfied that this case represents

the case envisioned by *Davis* where evidence otherwise inadmissible could be admitted for a purpose other than the proscribed minimal damage/minimal injury inference.[32] Certainly, there may be a case where the plaintiff has so misstated a fact regarding the accident that evidence otherwise prohibited by *Davis* would be admissible to impeach the plaintiff. Under these circumstances, the otherwise inadmissible evidence would be permitted so that a misleading image of the accident was not permitted to fester with the jury.[33] This case, however, presented no such

[32]*Davis*, 770 A.2d at 41("Of course, even where the sole issue at trial is damages, photographs of the plaintiff's car could conceivably serve some valid purpose other than supporting the minimal damage/minimal injury inference").

[33]For instance, if a plaintiff was to describe a violent thrashing of her body about the compartment of the vehicle on impact, or multiple impacts when other evidence suggested only one, then evidence otherwise inadmissible under *Davis* may be admitted, in the exercise of the trial court's discretion, to attack the credibility of the plaintiff's testimony. Of course, the admission of such evidence would be accompanied by an appropriate limiting instruction from the court.

concerns.[34] The plaintiff did not describe the impact in her testimony and offered only a sterile description her body's movements on impact. There simply was no justification presented at trial to allow an attack on her credibility with potentially misleading references to vehicle speed and property damage.

IV. CONCLUSION

The Court has concluded that Dr. Berner is not qualified to testify regarding the correlation between property damage and impact or property damage and injury. Consequently, to the extent the motion *in limine* seeks an order excluding any evidence regarding the extent of damage sustained by the vehicles involved in the accident, the motion is **GRANTED.**

To the extent the motion seeks an order excluding any evidence regarding the mechanism of injury, i.e., what happened to the plaintiff's body on impact, the motion

[34]Defendant argues that an isolated reference in a treating chiropractor's note, where plaintiff purportedly stated that defendant's vehicle was traveling approximately 30 miles per hour at impact, creates a valid basis to attack her credibility with evidence of photographs of the vehicles, defendant's testimony that he was traveling only 3-5 miles per hour at impact, and vehicle repair estimates, notwithstanding the lack of expert foundation. This attenuated reference to a statement plaintiff has denied making, found in a record of a provider who did not testify, a reference which itself was excluded as evidence, is not sufficiently probative of a fact at issue to justify the circumvention of the evidentiary proscription clearly embodied in *Davis*.

is **DENIED.** Dr. Berner and plaintiff's own treating physicians have laid the foundation for this testimony.

To the extent the motion seeks an order excluding any evidence regarding force of impact or speed of the vehicles at impact, the motion is **GRANTED.** Defendant has failed to lay a foundation of expert testimony to place this otherwise confusing and prejudicial evidence in its proper context.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary