SOFT TISSUE INJURY CLAIMS
ARISING FROM LOW IMPACT COLLISIONS By Blake A. Dickson, Esq. SCHIFF & DICKSON, L.L.C.

I NTRODUCTION

Treat these cases like any other cases. Do not be daunted by the propaganda being disseminated by the insurance companies. At the end of the day, all that matters is that you prove to the jury that your client suffered the injuries that he or she is claiming were caused by the subject collision. The presumption should be that they did suffer those injuries. Why else would they seek treatment. Don't allow yourself to become jaded by the cynicism of the defense bar and the insurance companies. In my experience, most claimants are honest. Some aren't. But most are. It is your job to weed out the dishonest claimants during the intake so that your credibility with the insurance companies and the defendants' attorneys remains intact. We need to stop being apologetic as plaintiff's lawyers. We send clients to certain doctors because those doctors help us document our client's injuries, we send clients to certain auto mechanics because those mechanics help us document our client's property damage, not because these people lie or tell us only what we want to hear. If my client is not hurt, I want the doctor to tell me. I don't get paid hourly. If I don't have a case, I want to know as soon as possible. I. Work with the treating doctors.

A. The treating doctors are the best possible witnesses to testify to the nature and extent of the injuries that your client suffered in the subject collision. Do not be afraid to schedule two or three treating doctors to testify, if the injuries warrant the litigation expenses involved. If I have a case where one of the treating doctors is a chiropractor with a large bill, I often ask that doctor to testify, in addition to another treating doctor who is usually an M.D. or a D.O., so that the chiropractor can explain why their bill was so high and why the client needed so much treatment. Remember, the insurance companies are not spending money on these cases. If the case is worth something, you need to spend the money. This makes for a very effective closing argument. "You heard from Dr. _____ who treated the Plaintiff for ten weeks and you heard from Dr. _____ who saw the Plaintiff 12 separate times and they both told you that the Plaintiff suffered injuries X, Y and Z. The defense wants you to ignore the testimony of both of these treating physicians because Dr. _____, who saw the Plaintiff for eight minutes, three years after the collision, for the sole purpose of rendering testimony in this case, on behalf of the Defendant, told you that the Plaintiff was not hurt or that the Plaintiff's injuries were not caused by the subject collision." B. Cross examine your doctor during his direct. Ask him all of the hard questions. Ask him about the size of the impact. Ask him about all of the client's treatment. Ask him why the client needed so much treatment. Ask him how the client could have suffered the injuries that he or she did suffer, given the nature and extent of the collision. Ask the doctor to articulate specific facts about your case that explain how your client got injured. Was your client turned a certain way? Did the car rotate after the impact?

C. Show your doctor all of your client's medical records before his deposition and

then ask him if all of the treatment was reasonable and necessary. Go through each set of records with your doctor during his testimony. Go through each bill. This way all of your exhibits will be admissible.

D. During the testimony of the treating doctor, whether by way of a video-taped deposition or live testimony, qualify the doctor as having worked with numerous patients who have been injured in automobile collisions. Ask the doctor how many such patients he has treated, total. In the alternative, ask him how many such patients he treats per week or per month or per year. Do not be afraid of the implication that your doctor treats a lot of plaintiffs. Of course, your doctor treats a lot of plaintiffs. Personal injury plaintiffs are, by definition, injured. In that they are injured they need medical treatment. Often, they seek this medical treatment from doctors.

E. Ask the doctor if he or she believes that there is a correlation between the amount of property damage that results from an impact and the nature and extent of the injury or injuries caused by such a collision. The answer will invariably be no. Ask the doctor to give examples of situations involving significant property damage and minor injury as well as situations involving minor property damage and significant injury.

Develop an effective Motion in Limine with respective to property damage estimates and photographs in cases where the Defendant has no expert. A. Remember, the insurance companies do not spend money on these cases. Learn to use this to your advantage. Judge Burnside of the Cuyahoga County Court of Common Pleas recently granted such a motion and has a policy of granting such motions. An effective motion should make the point that there is no clear correlation between property damage and injury. In the absence of expert testimony to explain to a jury why a certain collision could not have caused injury, defense counsel should not be allowed to argue that there is a correlation between property damage and injury. I would reserve filing this Motion in Limine until you were very close to trial. Specifically, I would wait until there is less than 30 days before the trial in Cuyahoga County or even less time in other counties so that the defendant's counsel cannot go out and retain an expert. Remember, they will likely not retain an expert in these cases because the insurance company will not pay for an expert. The insurance companies will often not authorize an IME, even in cases where the Plaintiff is claiming permanent injury. In the absence of a liability expert or a medical expert the Defendant's counsel should not be allowed to argue that the collision could not have resulted in the injuries claimed, simply because there was not sufficient property damage. Further, the Defendant's attorney should not be allowed to argue that the collision could not have caused injury when the Plaintiff's treating doctors are prepared to testify that the subject collision did cause the Plaintiff injury. III. Work with your mechanics. Have your mechanic take the bumper cover off the bumper and take a picture of the metal underneath. Often times the rubber bumper cover is compressed and then it springs back in shape. However, the crumple zones underneath are often damaged or compressed and that

damage is visible. A good mechanic will be willing to take the bumper cover off and take a photograph of the metal underneath, or, allow your investigator to take a photograph of the compressed and or damaged crumple zones. Someone who I use often is Jimmy Vaccarino of Mayfield-Brainard Auto Body, Inc. at 5608 Mayfield Road, Lyndhurst, Ohio at the corner of Mayfield and Brainard. He can be reached at (440) 442-4772. Mr. Vaccarino is very sensitive to the needs of the plaintiff's attorney with respect to an injury claim. He always works with me to help me document the property damage in a case. He also works with a lot of insurance companies so he has good credibility with them. He can often help your client resolve his or her property damage claim without your involvement. A picture really is worth a thousand words. Take good pictures when there is visible damage. Take pictures from all angles. Take pictures of the Defendant's car is well. Get copies of all of the pictures from the police. The police will not send you pictures unless you specifically ask for them. Attached hereto and marked as Exhibit A is my initial letter to the police, asking for documents. Attached hereto and marked as Exhibit B is my follow-up letter for police departments who are not cooperative. I have never, not gotten what I wanted using this second letter. Take pictures of your client's injuries, bruises, scars etc. We are in the business of documenting injuries. Have a camera in the office. Have a good investigator who you can call to investigate cases.IV. Prepare your client.

Talk with your client about anything that they can remember which will help articulate the nature and extent of the impact: Did coffee spill? Did anything move around in the compartment of the car or truck? I have had cases where bowling balls went through dashboards, tool boxes flew out of pick-up truck beds, etc., etc. Make sure you have thoroughly prepared your client to clearly articulate what happened inside the vehicle both in terms of what happened to the object inside the vehicle and what happened to his or her body inside the vehicle. B. Make sure you determine whether or not the defendant was injured. Very often, plaintiff's attorneys forget to ask about the defendant's injuries because we are not concerned about the defendant's claim for injury. However, if the defendant was injured it obviously refutes defendant's counsel's theory that the collision was not substantial enough to cause injury. C. Manage your client's expectations. I like to meet with my clients for an hour during the intake. I like to talk with them for an hour when I am finalizing our answers to written discovery. I like to meet with them for an hour and half before deposition, to make sure that we have obtained all of their records, all relevant reports and to prepare them for their deposition. Then, I like to meet with them for a half an hour before a mediation, an hour before an arbitration and two hours before trial. This may seem like a lot of time. However, if we lose a case we earn nothing. So all of our time is wasted. Further, an insurance company is more likely to pay you if they think your client will make a good witness, so your cases settle sooner rather than later. Further, these meetings help prepare the client, manage the client's expectations and place some of the burden of handling the case on the client, so

that they do not take our work for granted. We all know that if we recover $ 75,000.00 for a client who expected $ 125,000.00 we are perceived as failures. Whereas, if we collect $15,000.00 for a client who expected $ 4,000.00 we are perceived as great lawyers. Part of your job is to manage the client's expectations. Talk with them about the case. Ask them to assign a value to their case. Ask them how to persuade the adjuster, defense lawyer, mediator, arbitration panel or jury that their case is worth that much. Talk to them about what they will net. Explain to them how much they would need to recover at trial to net the same amount that they would net if they settled for what is being offered and then discuss the likelihood of recovering that much at trial. Use a spread sheet. We put all of our closing sheets on a spread sheet. That way, you can instantly calculate different scenarios, different settlement amounts etc. Further, our contract provides for a fee that is a higher percentage of the recovery if we have to go to trial or make final arrangements for trial, because of all of the extra work involved and so that the client bears the risk with us.

V. Get documentation of both your client's property damage and the defendant's property damage.

A. It may be that one or the other vehicles was a larger, more durable vehicle like a large truck, while the other vehicle was a smaller car, more susceptible to damage. Make sure that you get a property damage estimate and/or bill for your client's vehicle and photographs of your client's vehicle and a property damage estimate and/or bill for the Defendant's vehicle and photographs of the Defendant's vehicle. Oftentimes Defendant's counsel does not want to produce property damage estimates and/or bills. Make sure that you request these items in writing. Make sure that you follow-up on your requests. A Defendant's attorney's and or insurance company's refusal to comply with these requests and produce these materials will bolster your Motion in Limine.

B. Don't be fooled by the claim that the Defendant's vehicle sustained no damage. If, at deposition, the Defendant claims that his or her vehicle sustained no damage, follow-up by asking whether or not the vehicle was ever examined by a body shop or a mechanic. It's possible that a vehicle could be involved in a collision, so severe, that it causes the frame to bend, and yet, if the bend is of a certain nature it might not prevent the vehicle from operating. Therefore, a vehicle could be involved in a collision that bends its frame, never be looked at by a mechanic and still be operating on the road. The Defendant could claim there was no damage to his vehicle when, in reality, there was severe damage. This will also bolster your Motion to Compel because, if the defendant never had their damage investigated and quantified, they should not be allowed to argue that there was no damage in the collision. VI. Don't buy into the insurance company line that light impact soft tissue cases or minor impact soft tissue cases cannot be worth substantial compensation or that light impact or minor impact cases cannot result in substantial injuries.

A. This reinforces some of the points made above about working with the doctors and working with the clients. I was involved in a case involving a semi-truck which rear-ended my client in her Nissan Maxima going approximately seventy miles per hour. The Nissan Maxima was compressed from the rear bumper all the way up to the back of the front seats. My client was a very petite, healthy young woman who walked away from that collision with minor injuries. Conversely, I was involved in a case involving a rear-end collision that resulted in $500.00 in property damage. My client treated with a number of different physicians including a number of chiropractors. She went from doctor to doctor seeking relief. Her bills were approximately $11,000.00. The testimony of her treating doctor was that she suffered no permanent injury in the collision.

She did have a herniated disc. However, my orthopedic doctor was unable to relate that to the collision. The most that he could say was that it was aggravated by the collision. We recovered $75,000.00 in that case. There are no hidden facts that I am not revealing in this description. This was simply a case that we treated like any other case and made a substantial recovery, despite the small amount of property damage. VII. Work your files.

Remember that many defense counsel are either in-house counsel or the law firm for whom they work has a deal with the insurance company. This deal usually limits compensation for the handling of auto cases. Some firms receive a flat rate for auto cases depending on which stage the cases are in when they resolve.

For all of the work done from the time that a complaint is filed and an answer needs to be filed, until the time the discovery is completed, the firm receives a flat rate. They do not receive any more money unless the case actually goes to trial. Since the Defendant's attorney has a counter incentive to do a lot of work beyond the basic discovery, it is incumbent upon the plaintiff's attorney to do the work, to work the file, to obtain all the documents, to file the necessary motions, to obtain witness statements, photographs etc.

VIII. Ready made bad faith. As most of you know, Allstate's new policy is to evaluate every claim when it comes in and have the computer assign a value to the claim and then to stick with that value all the way through to a settlement at that value, or less, or a jury verdict. If, at any time along the way, you are willing to accept this number then you can settle this case. If you want a dollar more than this number, you have to try the case. This is obviously absurd.

It is bad faith per se. No one who handles personal injury cases with any frequency and or who tries any quantity of cases would agree that the value of a case does not fluctuate as the litigation process proceeds. Certainly, as you take various depositions and are able to see and hear and evaluate witnesses and parties and obtain additional records, obtain additional reports, etc., the case evolves, the value of the case changes. A witness who gave a statement to the police which was favorable to one side or another may show up at deposition and appear not to be creditable at all. A witness may change his or her story. You may obtain a report from a doctor which articulates a permanent injury which was not previously evaluated or known. In every one of these cases you have to make a decision as to what is in the client's best interest. I tell clients that we are always looking for the point at which their case peaks for

them, in terms of the net value to them. Not in terms of the overall value of the case or in terms of the attorney fee generated by the case but in terms of the net value to the client. Given the unavoidable litigation expenses associated with any personal injury case, including treating physician's testimony, certain cases may very well peak prior to trial or even prior to filing a complaint, despite the fact that the amount being offered is not the real value of the case. You have to constantly conduct this evaluation. In certain larger cases it is obviously, entirely worthwhile to go to trial. In those cases, you must be prepared to proceed to trial and to pursue all the different remedies available to you and to do the work on the case as described above. In certain cases, it may even be worthwhile to pursue a jury verdict in excess of the insured's policy limits and then to pursue a claim for bad faith, either a claim for bad faith against your client's own company, in cases involving cases with uninsured and or underinsured claims, or by pursuing a claim against the defendant's insurance company in situations where the defendant assigns the bad faith claim to you in exchange for a covenant not to sue him for the amount in excess of his policy limits. Obviously, you need a significant case to justify the time and expense involved in pursuing such a claim. However, with the appropriate case, this may very well be worthwhile. Obviously, there are certain situations where this does not make any sense. For example, situations where the underinsured policy limits are sufficient and any jury verdict in excess of the tortfeasor's policy limits would be paid by the underinsured carrier. IX. When to bring in the underinsured carrier.

In certain situations where you think your going to exceed policy limits you should bring in the underinsured carrier as a party to the lawsuit. The upside to this is that you do not have to try the case twice. Further, it shows that you are serious about assigning a significant value to the case and you can often make a more significant recovery. However, the downside is that you buy yourself a second defense counsel to depose your client and conduct written discovery and work on the case. Therefore, you should make a significant evaluation as to whether or not you have a case that is worth in excess of the policy limits not just in terms of your opening bid but in terms of what you would ultimately settle the case for. Always prepare for trial. Insurance companies know if you are not prepared to try a case. If you don't have your doctor's video deposition scheduled sufficiently in advance of the trial, if you don't produce witness lists and exhibit lists, if you haven't made other trial preparations, Defense counsel and the adjuster will know that you are simply waiting for their best offer and that you will settle for whatever they offer you. They will keep their numbers low.

Schedule your doctor to testify. As I indicated above, there are certain cases that aren't worth trying. In those cases, it is not in your client's best interest to try the case. With those cases you should settle the case. However, that does not mean you should not prepare for trial. In certain instances where it's really worthwhile to settle the case you may want to schedule the doctor to come in live,

you may want to actually have him reserve a period of time during the first or second day of trial and you may want to indicate to opposing counsel that you actually intend to call him live. This will give you the maximum amount of time to negotiate a settlement. In other cases, it may make more sense to schedule his video-taped deposition. If you actually conduct a video-taped deposition and your doctor makes a good appearance this may strengthen your case and increase your chances for settlement. Further, even in counties that do not have a 30 day rule for expert reports like Cuyahoga County, if you schedule a video-taped deposition for 14 or 21 days before trial and defense counsel has been lax in getting you a report from their doctor, you may foreclose that doctor from testifying. If you do not receive an expert's report prior to putting your doctor on video so your doctor does not have a chance to comment on the other doctor's opinion, you can successfully argue that the doctor should not be allowed to testify.Know the defendant's expert doctor.

Your colleagues may very well have deposition transcripts from most of the doctors that are often used by Defendant's counsel, Dr. Corn, Dr. Brooks, etc. Further, the accountants Cohen & Company did an audit on Dr. Brooks approximately two years ago of all his medical/legal activities. That material is available. You can contact my office and I can provide you with a copy. Further, other attorneys may have a copy of this audit.

Further, the OATL website and the OATL e-mail system are invaluable sources of information. Simply send an e-mail to the OATL members asking for information about any specific expert and you will likely get numerous responses. In the alternative, if you contact our firm or any firm that does a substantial amount of plaintiff's work they can probably provide you with transcripts of previous depositions of defendant's experts. I think it's imperative that we all conduct these depositions of these doctors and that we share this information so that we can strengthen our network of information and effectively combat these doctors. Many of these doctors testify based upon the premise that if we cannot prove that they have done one thing or another or they haven't done one thing or another then they won't admit to it. Many of these doctors have admitted for years that they haven't conducted surgery in an extended period of time. However, in every deposition this time frame moves up a little. However, if you obtain prior deposition testimony from 1997 for example where Dr. Brooks admits that he hasn't done a surgery in 3 years and then you ask him in 1999 when the last time he did a surgery and he says 2 years you can either cross-examine him or refresh his recollection with his prior testimony.

Don't forget to ask the expert at deposition when was the last time he conducted surgery on the part of the body that your client injured.

Question the propriety of using certain experts. Don't forget to make the point that very often the doctor who the defense is calling as an expert is an orthopedic surgeon and your client doesn't need any surgery. If my client's treating physician says that no surgical intervention is needed, I always argue in closing argument, "Why is it relevant what an orthopedic surgeon thinks? We're in

agreement that the Plaintiff doesn't need surgery. What he needs is pain management or trauma management and therefore the testimony of a doctor who does a lot of pain management work, or a doctor who sees a lot of people who have been involved in auto accidents is much more relevant than a doctor who does a lot of surgery." What is the cause of the Plaintiff's injuries. Many Defense experts conclude every report by either claiming that the Plaintiff is not hurt, or claiming that the Plaintiff's injuries were not caused by the subject collision. If the Plaintiff is not hurt, why is he complaining? Why are his treating doctors saying that he is hurt? Make the Defendant's expert say they are lying. Ask him what he bases that opinion on? In all likelihood he will have no basis for this conclusion. If the Defendant's expert claims that the Plaintiff was not injured in the subject collision, ask the doctor what did cause the Plaintiff's injuries. Usually the expert has no answer.

I think it is very relevant what these doctors earn for medical legal activities and, just as it was valuable to audit Dr. Brooks, it may very well be valuable to audit another doctor in the future. If you have a case of sufficient size to justify the litigation expense, an audit of the Defendant's expert is very effective. Moreover, the judge in the case where Dr. Brooks was audited not only ordered that the audit was admissible and relevant, he also compelled Dr. Brooks to appear live at trial, despite having given a video-taped deposition, so that his cross-examination could continue in light of his refusal to answer questions about his medical legal activity at his deposition. Further, the judge ruled that the audit could be disseminated to other attorneys.

DATE
[Police Station]
[Street Address]
[City], [State] [ZIP Code]
Attention: Automobile Collision Report Department
RE: My Client: [Client's Name]
Date of Incident: [Date of Incident]
Location of Incident: [Location of Incident]
Other Driver's Name: [Other Driver's Name]
Report Number: [Report Number]
Dear Sir or Madam: I represent [Client's Name] who was involved in the above-captioned automobile collision. Would you please send me the following;
1. A complete and accurate copy of the report which was prepared relative to this collision.
2. Copies of any and all witness statements that were taken relative to this collision.
3. Reprints of any and all photographs that were taken relative to this incident.
4. Copies of any and all diagrams and/or narratives that were prepared relative to this collision.
Please call me if you have any questions or concerns. Thank you very much for your time and consideration.

Very truly yours,

Blake A. Dickson
EXHIBIT A
DATE
[Police Station]
[Street Address]
[City], [State] [ZIP Code]
Attention: Automobile Collision Report Department.
RE: My Client: [Client's Name]
Date of Incident: [Date of Incident]
Location of Incident: [Location of Incident]
Other Driver's Name: [Other Driver's Name]
Report Number: [Report Number]
Dear Sir or Madam:

I represent [Client's Name] relative to the above-captioned automobile collision. I am attempting to obtain a copy of the police report which was prepared relative to this collision along with copies of any and all witness statements taken in connection with this collision, copies of any and all diagrams or narratives prepared relative to this collision and reprints of any and all photographs taken relative to this collision. Unfortunately, when I called [Police Station] to request these materials I was informed that these materials would not be released.

Please note that, Ohio Revised Code §149.43(B) provides;

(B) All public records shall be promptly prepared and made available for inspection to any person at all times during regular business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, governmental units shall maintain public records in a manner that they can be made available for inspection in accordance with this division.

O.R.C. §149.43(B) (emphasis added).

Law enforcement records are specifically defined in O.R.C. §149.43 as public records. Further, law enforcement records are only exempt from production if their release would create a high probability of disclosure of any of the following;

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom

confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness' identity;
(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness or a confidential information source.

O.R.C. §149.43(A)(2).
Obviously, none of the preceding exemptions apply in this case. I would very much prefer to obtain the materials I have requested amicably. However, if you refuse to release the materials I have requested, I will be forced to file a lawsuit against [Police Station] pursuant to the provisions of §149. If I do have to file a lawsuit against [Police Station], [Police Station] will not only be compelled by the Court to release all of the records I have requested, it will also be compelled to pay for all of the attorney fees and all of the litigation expenses incurred in connection with the lawsuit.

I sincerely hope that you agree to send me the records I have requested upon receipt of this correspondence so a law suit is not necessary. If you have any questions or concerns please call me. Thank you for your attention
Very truly yours, Blake A. Dickson
BAD:mmm