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News Story

Low-Impact Car Crash Results In $2.5M Verdict

Keeping Defense Expert's Testimonial Out Key

Can an auto accident victim injured in a rear-end collision collect significant damages, even though she never lost consciousness and her vehicle sustained no visible damage?

A $2.5 million verdict — the largest reported auto verdict in Michigan for 2003 — indicates the answer is "yes." The verdict was 10 times the defendant's highest offer to settle.

Southfield attorney Steven M. Gursten, who submitted the top auto verdict in three of the last six years, and whose firm claimed the top three auto verdicts last year, represented the victim in this case.

According to Gursten, one of the keys to victory was preventing the defendant's biomechanical expert from testifying that the plaintiff could not have been injured in such a low-impact accident.

"The problem with such testimony is that it attempts to apply a scientific correlation between property damage and the injury potential of a population," Gursten explained. "However, when dealing with a particular individual, this correlation is merely speculative, and therefore inadmissible."

Gursten, who has been highly successful on cases that appear to be "slam dunk" defense verdicts, said lawyers should never assume a case like this has no value. Many of them, he said, can be won if attorneys:

- seek to prevent the defense from introducing the testimony of a biomechanical expert;
- understand that a victim can suffer a significant brain injury without losing consciousness; and
- learn to increase the value of cases for settlement or trial by demonstrating a willingness to try cases and by understanding the sophisticated computer programs being used by major insurance companies to value these cases.

Registered subscribers can find a Verdicts & Settlement report of the case, *Lloyd v. First Choice Trucking,* in the archives.

Low Impact

On Nov. 22, 1999, plaintiff Joy Lloyd was stopped at a red light at the intersection of King Road and Ford Street in Trenton when she was rear-ended by a truck. The truck was owned by First Choice Trucking & Repair, and driven by defendant Willie Paul Jackson.

The defendant claimed he was traveling between 5 mph and 7 mph at the time of impact.

There was no visible damage to the back of the plaintiff's pickup truck — bumper or frame — or to the defendant's truck, and the plaintiff did not lose consciousness.

The plaintiff subsequently sued the defendant for her injuries, which included a traumatic brain injury and a shoulder injury.

At trial, the defendant admitted striking the plaintiff's vehicle, but disputed that the low-impact collision could have caused any of the plaintiff's claimed injuries.

The defendant's highest offer to settle was $250,000. The defendant claimed there was no medical basis for the plaintiff's medical claims and asserted that the plaintiff was an "exaggerator" and "malingerer," according to Gursten.

The jury disagreed, however, awarding the plaintiff $2.5 million in damages.

Before bringing a biomechanical expert into your case — a proposition that could become cost prohibitive depending on the circumstances — you should consider whether you can simply keep certain testimony from the defense's biomechanical expert out of the case, Gursten said.

According to Gursten, as long as their biomechanical engineer can admit that it is at least within the realm of possibility that your client sustained an injury in the crash, then his opinion on your client becomes a guess based upon the probability of injury to a population and not to your client.

"It is speculation, and speculation in not admissible," Gursten explained. "It is unsupported by any factual evidence specific to your client such as your client's height, weight, gender, age, susceptibility, pre-existing injuries, and so forth. It is also non-specific to the types of vehicles involved in the impact. It is non-specific to your client's body position within the vehicle, and it is non-specific to where the headrest position, seat position, steering wheel, etc. were located at the time of impact."

In addition to having the defense expert admit that the client could have been injured, you should also have the expert agree that people have been severely injured and even killed in very low-damage motor vehicle accidents, Gursten advised.

"Once the expert admits your client could have been injured, this testimony must be stricken as speculative as he is then guessing whether or not your client falls within a generalization about an average population's injury potential based upon unscientific generalizations about different factors, conditions, vehicles, impacts and the like," he concluded.

No 'Apparent' Brain Injury

Next, Gursten discussed the importance of understanding and being able to explain that a person can suffer a serious brain injury without losing consciousness.

"There is published literature which indicates that nearly 85 percent of brain injuries are entirely missed in the emergency room," he said, noting that this can be partly explained by the fact that ERs are acute care facilities that are not equipped or sufficiently trained to spot many "mild" traumatic brain injuries, the effects of which can become obvious in the days or weeks following a car accident.

Gursten stressed that attorneys must also understand that "mild" is a medical classification and the effects of such a brain injury can be quite severe.

In addition to the aforementioned literature, Gursten said there is plenty of literature showing that brain

injuries and loss of consciousness do not necessarily go hand in hand.

"When the head is subjected to sudden acceleration-deceleration or flexion-extension movements, brain injury can occur without the head striking anything," he explained. "This is known as a 'contrecoup' injury — French for 'against the blow.'"

Gursten said any of the following forces can play an important role in such an injury: inertia, centrifugal force, shearing (force causing a portion of the brain to slide with respect to another portion, and cavitation (the formation of microbubbles in a liquid behind a rapidly moving mass.

"The three main forces that contribute to traumatic brain injury are impact of the brain against the skull, cavitation and shearing," Gursten explained.

Gursten further noted there are certain defense myths which must be dispelled.

"One mistaken assumption is that there is some direct causal relationship between the apparent force of the external mechanism of injury, i.e., the crash, whether the head strikes another object, and the result, i.e., the injury, based upon the amount of tissue damage or the level of clinical disability," he said.

"Another is that you need to spend thousands of dollars on a biomechanical engineer to explain this," he added. "As previously noted, you can kill two birds with one stone by asking these questions of the defense expert."

Gursten said these concepts are well supported in medical literature.

'Collosus'

Finally, it is noteworthy that Gursten's verdict is occurring at a time when the major insurance companies such as Allstate, State Farm and Farmers are using highly sophisticated computer programs to determine the value of cases.

"Many of these insurance companies have incentive or bonus programs for adjusters who pay 80 percent or less of what the computer determines is the average value for that particular injury in that jurisdiction and geographic location," Gursten noted.

"The larger goal of these insurance companies," he continued, "is that each year following the next, settlement values will be further reduced as settlements continue a downward spiral based upon the falling 'average' settlements."

According to Gursten, the only way for plaintiffs' attorneys handling car accident cases to combat this new approach is to continue taking cases to trial.

"There is very little a plaintiffs' lawyer can do to influence the computer program's determination of value," he observed. "However, the one variable a plaintiffs' lawyer can control is his or her willingness to try cases."

This, he said, can increase the amount insurance companies will offer to settle a case. "In some cases, depending upon the insurance company, offers to lawyers who present a legitimate threat to go to trial can be as much as two times greater than offers to lawyers who are not likely to go to trial," Gursten explained.

"You don't even have to win all these cases," he noted. "You just have to be willing to take them to trial

because it increases the insurance company's exposure."

Gursten said he learned this by achieving several verdicts over policy limits, and seeing first hand how the initial offers of settlement were made during subsequent bad-faith litigation.

"We may be the only law office in the state that actually possesses the entire 'Collosus' software that Allstate uses in Michigan," Gursten told Lawyers Weekly.

Nevertheless, Gursten said he is adamant that the only way to achieve just compensation for his clients is by focusing relentlessly on how their lives have been affected.

"It is only by truly engaging a jury's or insurance company's appreciation of the way in which an injury can affect every major area of a person's normal lifestyle — from working to recreational activities to social relationships — that a settlement or jury verdict can properly take into account the true and very profound impact these injuries are having on people's lives," Gursten said.