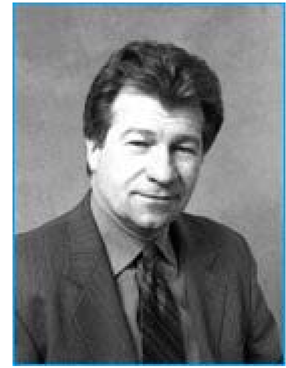
Jury Instructions on Aggravation Of a Pre-Existing Condition: The Time for a Change



by Thomas P Burke

In *Schultz v. Northeast Illinois Regional Commuter Railroad Corp., d/b/a Metra*, 2001 Ill. 2d 260, 775 N.E.2d 964 (2002), the Illinois Supreme Court held that it was error to give IPI 30.21 in a FELA case where the plaintiff was seeking damages for aggravation of a pre-existing condition. Although the court's holding is limited to FELA cases, the underlying reasoning applies with equal force to tort actions where there is evidence that the injured party had a pre-existing condition which either was aggravated by the tortious event, or which rendered the injured party more susceptible to injury from the tortious event.

Because of changes in other damage instructions and in the manner in which verdicts are presented to juries, IPI 30.21 no longer fairly or adequately instructs the jury regarding the manner in which a pre-existing condition should be treated in assessing damages. The time has come for revision of this instruction.

IPI 30.21 was promulgated in response to the Illinois Supreme Court's decision in *Balestri v. Terminal Freight Cooperative Association*, 76 Ill. 2d 451 (1979). In *Balestri*, the trial court gave IPI 30.01 and included, among the enumerated items of damages, IPI 30.03, "The aggravation of any pre-existing ailment or condition." The trial court refused an instruction, tendered by the plaintiff, informing the jury that the plaintiff's right to recover damages was not limited by the fact that plaintiff's injuries and disabilities resulted from the aggravation of a pre-existing condition. The Supreme Court held that this refusal was reversible error and that IPI 30.03, without further explanation, failed to adequately instruct the jury on this issues.

Until 1994, juries were instructed that one of the elements of damages for which a plaintiff could be compensated was "The aggravation of any pre-existing ailment or condition." IPI 30.03. Pursuant to the Notes on Use for IPI 30.03, those same juries also received IPI 30.21. This changed when the First District of the Illinois Appellate Court decided *Smith v. City of Evanston*, 260 Ill. App. 3d 925, 631 N.E.2d 1269 (1994). In *Smith*, the Appellate Court commented that most of the pattern instructions on damages were based on case law that predated the use of itemized verdicts. The instructions were designed only to inform jurors of considerations that would affect the determination of what single sum would fully and fairly compensate that plaintiff for losses, rather than as line items for an itemized award. *Citing Powers v. Illinois Central Gulf Road Company*, 91 Ill. 2d 375, 483 N.E.2d 152 (1982), the Appellate Court noted that the separate headings of the pattern instructions did not always reflect separate and distinct elements of damages, thereby raising the possibility of overcompensation. The court held that aggravation of a pre-existing condition was not a separate and distinct element of damages, and that a jury appraising the monetary value of aggravation needed to look at the increase in medical costs, the earning lost which would not have been lost by reason of the pre-existing condition alone, the increase in pain and suffering, and any worsening of disabilities and disfigurement. Significantly, the court also noted that if an accident aggravates a pre-existing condition, the defendant is liable for damages caused by the aggravation of the condition, but not for losses which would have resulted form the pre-existing condition even if the accident has not occurred.
Smith at 938-9.

Although other courts have disagreed with the rationale in Smith (See, e.g., *Ficken v. Alton & Southern Railway Company*, 255 Ill. App. 3d 1047, 625 N.E.2d 1172 (1993)) and the Illinois Supreme Court Committee on Jury Instructions in Civil Cases has taken no position on the issue, many trial courts follow the rationale in *Smith*, and do not allow 30.01 damage instruction, not aloe aggravation of a pre-existing condition which could account in whole or in part, for some or all of the plaintiff's damages, IPI 30.21 is typically given to the jury.

When it is the sole specific instruction on the issue of aggravation of a pre-existing condition, IPI 30.21 does not fully or adequately instruct the jury on appraising the monetary value of the injury. The instruction is entirely one-sided, as it only tells the jury that they may not deny or limit the plaintiff's right to damages because the injury resulted from an aggravation of a pre-existing condition or a pre-existing condition which rendered the plaintiff more susceptible to injury. In Schultz, the Supreme Court expressly rejected the argument that IPI 30.21 stated that the plaintiff can recover only for "damages resulting from this occurrence." The court stated that the instruction instead tells the jury that it may not deny or limit damages resulting from the occurrence simply because the plaintiff has a pre-existing condition, IPI 30.21 provides only one side of the equation. The instruction does not inform the jury that the defendant is <u>not</u> liable for damages which would have resulted from the pre-existing condition even if the tort had not occurred.

A common and recurring situation in which this issues arises is in cases involving spinal disc herniations and subsequent surgeries. In such cases, defendants often present evidence that the plaintiff has a pre-existing back condition, such as degenerative disc disease, along with expert testimony that he plaintiff's degenerative disc disease, although temporarily aggravated by the traumatic incident, would have eventually resulted in disc herniation and surgery even if the tort had not happened. A jury hearing this evidence and following IPI 30.21 would be compelled to reject this defense, even if it

found the testimony of the defense expert persuasive and believable.

The Supreme Court's holding in Schultz is limited to FELA cases. Citing several cases, the court noted that under FELA, as a general matter, when defendant's negligence aggravated plaintiff's pre-existing health condition, the defendant is liable only for the additional increment caused by the negligence, and not for the pain and impairment that the plaintiff would have suffered even if the accident had never occurred. The aforementioned standard is a completely accurate statement of Illinois law with respect to this damage issue in a common law tort case as well. *See Behles v. Chicago Transit Authority*, 346 Ill. App. 220, 104 N.E. 2d 635 (1952); *Smith v. City of Evanston, supra*. The proposition that IPI 30.21 fails to adequately instruct the jury regarding the treatment of aggravation of a pre-existing condition as an element of damages therefore applies with equal force both to FELA cases and to common law tort cases.

It appears that itemization of tort damages is here to stay. However, it is that development which has rendered the current instructions inadequate to properly instruct the jury on the question of aggravation. *Powers and Smith* are well reasoned in their rationale that while the nature and extend of an injury is an aggravation or a "fresh" injury, are factors that a jury should consider in reaching an award, they are not separate and compensable elements of damage.

Therefore, IPI 30.03 should be incorporated into IPI 30.01, just as 30.02 was incorporated into that instruction after Supreme Court's ruling in Powers, IPI 30.01 would therefore be amended as follow:

If you decide for the plaintiff on the questions of liability, you must then fix the amount of money which will reasonably and fairly compensate him/her for any of the following elements of damage proved by the evidence to have resulted from the [negligence][wrongful conduct] [of the defendant], [taking into consideration] [the nature, extent and duration of the injury] [and] [the aggravation of any pre-existing ailment or condition].

Additionally, the following model instruction is proposed to replace IPI 30.21:

> "If you decide for the plaintiff on the questions of liability, you may not deny or limit the plaintiff's right to damages resulting from this occurrence because of any injury resulted from [an aggravation of a pre-existing condition] [or] [a pre-existing condition which rendered the plaintiff more susceptible to injury]. However, defendant[s] [is] [are] not liable for injuries or damages which would have resulted from the pre-existing condition even if the accident had not occurred."

The proposed model adds a single additional phrase to IPI 30.01, and just one additional sentence to IPI 30.21. These minimal changes provide accuracy and balance, and fully inform the jury of the law applicable to the issue. The changes are similar to one of the instructions approved by the court in *Schultz* and to the general instruction suggested by the Appellate Court in *Smith* and by the Supreme Court in *Powers.*

Correct instruction of the jury is mandated by statute, and errors in jury instructions are fertile grounds for appeals. Although the Illinois Pattern Jury Instructions are generally effective and accurate recitals of the law, the changing landscape has created the need for change in the instructions on the issue of aggravation. The proposed changes suggested in this article address the recent changes in the law and practice, and provide balanced and accurate instruction on this frequently encountered issue.

Proposed Revised Jury Instructions on Aggravation of a Pre-Existing Condition

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him/her for any of the following elements of damage proved by the evidence to have resulted from the [negligence] [wrongful conduct] [of the defendant], [taking into consideration] [the nature, extent and duration of the injury] [and] [any aggravation of any pre-existing ailment or condition].

IPI 30.01 (revised, incorporating elements of 30.03)

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If you decide for the plaintiff on the question of liability, you may not deny or limit the plaintiff's right to damages resulting from this occurrence because of any injury resulted from [an aggravation or a pre-existing condition] [or] [a pre-existing condition which rendered the plaintiff more susceptible to injury]. However, defendant[s] [is] [are] not liable for injuries or damages which would have resulted form the pre-existing condition even if the accident had not occurred.

IPI 30.21 (revised)

Source Materials

1. 735 ILCS 5/2-1109 (itemized verdicts)
2. *Balestri v. Terminal Freight Cooperative Association*, 76 Ill.2d 451 (1979)
3. *Behles v. Chicago Transit Authority*, 346 Ill. App. 220, 104 N.E. 2d 635 (1952)
4. *Ficken v. Alton & Southern Railway Company*, 255 Ill. App. 3d 1047, 625 N.E.2d 1172 (1993)
5. *Powers v. Illinois Central Gulf Road Company*, 91 Ill.2d. 375, 483 N.E.2d 152 (1982)
6. *Schultz v. Northeast Illinois Regional Commuter Raulroad Corp., d/b/a Metra*, 2001 Ill.2d. 260, 775 N.E.2d 964 (2002)
7. *Smith v. City of Evanston*, 260 Ill.App.3d 925, 631 N.E.2d 1269 (1994)
8. *Tedeschi v. Burlington Northern RR Co*., 282 Ill. App. 3d, 638 N.E. 2d 138 91996)

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