FEATURE ARTICLE
Evidence of Prior Injury

Admissibility of Evidence of Prior Injury Under the “Same Part of the Body” Rule

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I. Introduction

Historically, evidence of a prior injury to a plaintiff in a personal injury action was allowed at trial if the party proffering the evidence established a causal relationship between the prior injury and the present injury or where the injury involved the same area of the body.1 Numerous Illinois cases established that prior injury to the same area of the body as the injury at issue was admissible without establishing a causation foundation. The evidentiary foundation for injuries to other areas of the body required that the plaintiff present testimony of a medical expert to establish the relationship between the prior injury and the event and damages at issue.2

The general rule that injury to the same part of the body did not require a causal foundation was based on the simple maxim that evidence which is relevant to an issue in controversy is always admissible.3 This kind of evidence was deemed relevant to the questions of whether the defendant’s negligence was the proximate cause of the plaintiff’s injury and the extent of the plaintiff’s damages.4

Over the past decade, however, each Illinois appellate district has addressed the general rule that evidence of prior injury to the same area of the body is admissible without a causation foundation. Unfortunately, there has been an erosion of the general rule in several districts, and in some opinions, a foundation requirement has been added before evidence of the prior injury to the same area of the body is admissible.5 As the Illinois Supreme Court has not addressed this issue,6 the foundation requirements for admissibility of evidence of prior injury will depend on the decisions of the appellate court in the district where the case is litigated.7 This article will describe the position of each of the appellate court districts regarding the foundation requirements for the same part of the body rule.

II. The Third District: No Medical Foundation for Prior Condition is Required

In 1990, the Third District in Elliot v. Koch,8 addressed the admissibility of evidence of injury to the same part of the body without an evidentiary foundation. In Elliot, the plaintiff was involved in an auto accident where he claimed that he sustained a ruptured disk that resulted in a laminectomy. On cross-examination at trial, the defense questioned the plaintiff regarding four separate occasions when he was treated for back injuries before the auto accident at issue. The earliest back injury was eight years before the accident at issue and the most recent was four years before the accident. The plaintiff wore a back brace after one prior injury and was hospitalized after another.

The jury returned a verdict for the plaintiff but awarded him nominal damages. The plaintiff appealed to the Third District, arguing that he was prejudiced by the evidence of his prior back injuries when the defendants failed to connect these prior injuries to the current injuries. The plaintiff also argued that the trial court erred by not instructing the jury that the defendant had the burden of proof to establish the causal relationship between the prior injuries and the plaintiff’s ruptured disk.
The court described the long history of the “same part of the body rule,” i.e., that evidence of prior injury is admissible where the injury involves the same part of the body.\(^9\) The court then concluded that in a personal injury action, evidence of prior injury to the same area of the body is relevant to the ultimate issue of fact regarding the proximate cause of the plaintiff’s injuries and the extent of the plaintiff’s damages. The court held that no medical foundation was required to introduce evidence of a prior injury to the same area of the body. The court further held that the evidence of the plaintiff’s prior injuries to his back was not “affirmative matter” that required the defendant to prove that a connection existed between the prior injury and the present injury.\(^{10}\)

Finally, the court in \textit{Elliot} found that evidence of the plaintiff’s prior back injury was relevant to establish that the plaintiff did not give a complete medical history to his treating doctor when he was in the emergency room and that this was proper cross-examination to establish the plaintiff’s lack of credibility.\(^{11}\) Based on the decision in \textit{Elliot v. Koch}, evidence of prior injury to the same part of the body in the Third District is admissible without any foundation evidence establishing a causal relationship between the prior injury and the injury at issue in the lawsuit.

\section*{III. The Fifth District: A Medical Foundation for Evidence of Plaintiff’s Prior Condition is Required Unless the Symptoms of the Prior Injury are Permanent and Similar}

In 1996, the Fifth District in \textit{Brown v. Baker} addressed the admissibility of evidence of a prior back injury in a case involving an automobile accident.\(^{12}\) The plaintiff alleged that he experienced pain in his neck and lower back as a result of the accident and his treating physician testified that he had a herniated disk in his lower back. Prior to trial, the plaintiff’s physician admitted in deposition that he had treated the plaintiff for a back problem prior to the accident.

At trial, the defendant filed a motion \textit{in limine} to admit evidence of the plaintiff’s prior back injury. The trial court denied the motion, and although the defendant inquired generally about the plaintiff’s previous back injury, the defendant did not solicit testimony from the plaintiff’s treating doctor that the plaintiff’s current ailments were causally related to the plaintiff’s prior back injury.

The jury returned a verdict in favor of the plaintiff but awarded nominal damages. The plaintiff appealed the inadequacy of the verdict. The plaintiff contended that the trial court erred by allowing the evidence of the prior back injury without evidence that the prior injury was causally related to the current injury.\(^{13}\)

The Fifth District acknowledged the abundant case law which holds that no foundation is required to introduce evidence of a plaintiff’s prior injury when the plaintiff’s present injuries were to the same part of the body as the prior injury, but noted that this analysis “needed refining:”

\begin{quote}
If the prior injury has long since healed and has shown no reoccurring symptoms, the defendant should not be permitted to introduce evidence of a prior injury without establishing causation.\(^{14}\)
\end{quote}

The court compared the defendants’ evidence regarding the plaintiff’s prior injury with evidence required for a plaintiff to present expert testimony to establish the element of causation for his damages. Unlike \textit{Elliot}, \textit{Brown} interpreted the evidence of prior injury to the body as “affirmative matter” and required the same standard of proof applicable to the plaintiff in presenting evidence of causation.\(^{15}\) The court concluded that the defendant owed the same obligation of proof as the plaintiff for causation when it introduced evidence of a prior injury. \textit{Brown} distinguished the Third District’s ruling in \textit{Wilson v. Granite City Steel Division of National Steel Corporation},\(^{16}\) which allowed evidence of the plaintiff’s prior knee injury without an independent showing of causation. \textit{Brown} noted that in \textit{Wilson}, the evidence of the symptoms from the prior injury were similar to the current condition, and the plaintiff’s doctor testified that the plaintiff’s symptoms from the prior injury were permanent.\(^{17}\) \textit{Brown} held that when the symptoms from the prior injury were both permanent and similar, a party is not required to show causation in order to admit evidence of the prior injury.\(^{18}\) As the defendant in

Brown had not shown a causal relationship between the prior injury and the current injury, nor established that the symptoms of the prior injury were similar or permanent, the case was reversed and remanded.

IV. The First District: A Medical Foundation for Evidence of Plaintiff’s Prior Condition is always Required

In June of 1998, the First District in Cancio v. White expanded the Fifth District’s “refinement” of the same part of the body rule in Brown v. Baker by barring any evidence of prior injuries without an evidentiary foundation establishing causation.19

In Cancio, the plaintiff was injured in an automobile accident and alleged that he suffered a herniated disk. Prior to the trial, the plaintiff moved, in limine, to exclude any evidence of the plaintiff’s prior condition of arthritis. The motion was denied. At trial, the plaintiff’s treating physician testified that the plaintiff had preexisting disk degeneration, including arthritis and natural aging of the spine. His treating doctor also testified that some of the pressure on the disk was due to the preexisting arthritis. The defendant won the case, and the plaintiff appealed, contending that the introduction of the evidence of the plaintiff’s arthritis was improper because there was no showing that it caused the herniation.

Cancio, citing Brown v. Baker, essentially rejected the same part of the body rule. 20 The court specifically noted the language in Brown that “if a prior injury has long since healed and has shown no reoccurring symptoms, the defendant should not be permitted to introduce evidence of the prior injury without establishing causation.” The court then expanded Brown to include a bar against evidence of a preexisting condition without establishing a causal relationship. The First District held that competent and relevant evidence of a causal connection between the preexisting condition and the injury complained of is required before evidence of the preexisting condition becomes admissible.21 The court defined competent evidence as evidence that is more than the mere possibility that the preexisting condition is the cause of the injury.22 The court concluded that the admission of the evidence of the plaintiff’s preexisting arthritis at trial was in error, and reversed and remanded the case.

Six months after Cancio, the First District again addressed the foundation requirements for the same part of the body rule. In Lagestee v. Days Inn Management Company, the court further refined its position that no evidence of a preexisting condition or injury be admitted in the absence of foundation evidence of a causal relationship.23

In Lagestee, the plaintiff filed a negligence action for a slip and fall against a premises defendant. At trial, the plaintiff admitted on cross that he had injured his back several years earlier, but that the injuries were not serious and that he had had back pain for only a few days following the injury. He further testified that at the time of the more recent fall, he was not experiencing any symptoms from these prior injuries. The plaintiff’s retained expert physician testified that the plaintiff’s injury was a “fresh injury,” and that the fall caused the herniation. The defense counsel questioned the plaintiff’s expert about the plaintiff’s prior back injuries from a prior car accident and playing football in high school.

In reversing the verdict in favor of the defendant, the First District held that the court erred in permitting the evidence of the plaintiff’s prior injuries, accidents and preexisting condition.24 The court noted that a prior injury or preexisting condition might be relevant to the issues of the plaintiff’s damages in a personal injury case citing, Wilson v. Granite City Steel.25 However, the court noted that the defendant must first establish a causal connection between the evidence of the prior injury and the current injury before this evidence becomes relevant. Evidence of causation, the Lagestee court noted, cannot be based on mere possibility or conjecture, and as such, causal foundation is required before any evidence of a preexisting condition or prior injury is allowed.26

The court reviewed the evolution of the same part of the body rule through the Brown and Cancio decisions. Not surprisingly, the court held that the defendant was required to present medical or other competent evidence of a causal or relevancy connection between the plaintiff’s prior injury, prior accident, or preexisting condition
and the injury at issue as a prerequisite to its admissibility. However, the court also noted that the defendants need not always present medical expert testimony to support the admissibility of a prior injury. The court stated that the exact evidence defendant will need to produce to establish relevancy or causal connection may depend on the nature, extent, duration or treatment of the prior injury, prior accidents, or preexisting conditions involving the injury for which the plaintiff is seeking damages. The court noted that the evidence about the plaintiff’s high school injury invited the jurors to speculate, and therefore, should not have been allowed. Similarly, the court ruled inadmissible the evidence about the plaintiff’s prior auto accident, as there was no expert testimony to establish a connection for causation purposes. However, the court indicated that evidence of the plaintiff’s degenerative disk disease was admissible because the plaintiff’s expert had admitted that the plaintiff had the disease at the time of the accident.

Although the First District in Cancio had previously ruled preexisting condition involving degenerative changes inadmissible without expert foundation, the foundation required by Lagestee appears to be minimal. Cancio held that the plaintiff’s treating physician’s testimony that “some of the pressure on the disk was due to a preexisting arthritis” was insufficient to establish the foundation for a causal connection. However, in Lagestee, six months later, the court held that the plaintiff’s expert’s testimony that the plaintiff had “some degree of degenerative disk disease or he wouldn’t have had the disk herniation” was sufficient foundation for causation to allow the evidence of the preexisting condition.

Cancio and Lagestee together hold that in the First District, evidence of a preexisting condition or prior injury to the same area of the body is generally not allowed without medical foundation establishing a causal relationship. However, if any of the symptoms of the preexisting conditions is permanent, then the evidence of the preexisting condition to the same area of the body is admissible without foundation. The permanent nature of the preexisting condition is established by expert medical testimony or by the nature, extent, duration or treatment of the prior injury.

V. The Fourth District: Affirms the Same Part of the Body Rule

From 1990 through 1998, the trend in Illinois cases appeared to favor the requirement of a causation foundation to allow evidence of a preexisting injury or condition. However, in September, 1998, in Bailey v. Wilson, the Fourth District Appellate Court reversed the trend and reaffirmed the same part of the body rule which admitted evidence of prior injury to the same part of the body without expert foundation.

In Bailey, the plaintiff was injured in an automobile accident in which she claimed personal injury to her head, neck, and back, including nerve root irritation and a fractured vertebra. During the trial, the defendant introduced evidence of a prior automobile accident in which the plaintiff sustained injuries to her neck, a concussion and a left brachial plexopathy. The plaintiff said she was pain-free from the injuries from the prior auto accident for two years before the accident at issue. Following a verdict in favor of the defendants, the plaintiff appealed.

On appeal, the plaintiff contended that the trial court erred by allowing the defendant to introduce the evidence of the prior automobile accident. The plaintiff argued that the similar location of previous and current injuries was insufficient to admit the evidence of the prior accident without a foundation, and the court should not have allowed the evidence of the prior accident without a medical foundation.

Bailey noted that even in Brown v. Baker, the Fifth District stated that when the plaintiff’s prior injury was permanent and resulted in symptoms similar to the ones she was experiencing as a result of the accident at issue, the defendant was not required to prove causation before the evidence of the plaintiff’s prior injury was admissible. Bailey rejected Brown’s refined interpretation of the same part of the body rule, noting the maxim that “relevant evidence is generally admissible.” Bailey reiterated that in a personal injury action, evidence of the prior injury to the same part of the body is germane to both causation and the extent of the plaintiff’s damages. Bailey also noted that the plaintiff has the burden to prove negligence, and the defendant need not disprove it. According to Bailey, the lack of expert testimony establishing a causal link between the past
injury and the present injury is an issue of the weight the jury should afford to the evidence, but it does not preclude the admission of evidence.\textsuperscript{35}

\textbf{VI. The Second District: Rejects the Same Part of the Body Rule}

In the most recent decision on this issue, the Second District in \textit{Voykin v. the Estate of DeBoer},\textsuperscript{36} sided with the First and Fifth Districts and rejected the same part of the body rule. In \textit{Voykin}, the plaintiff filed a personal injury claim, which arose from an automobile accident where the plaintiff complained that he sustained low back and neck injuries. At trial, the plaintiff’s doctor admitted on cross that the plaintiff listed a prior back injury on a medical history form. The treating doctor also admitted his knowledge of the nature and extent of the plaintiff’s prior back injury.

The plaintiff moved to bar this testimony because the defendant did not establish that the prior injury was related to the present injury. The trial court denied the plaintiff’s motion, and the jury returned a verdict in favor of the defendants. The plaintiff appealed the judgment contending that the trial court erred.

\textit{Voykin} noted the conflict between the districts, but concluded that although “medical expert testimony may not always be necessary to establish causation for admissibility purposes, \ldots in a case where injuries were complex \ldots expert testimony was necessary to establish the causal link between the plaintiff’s past injury and his present complaints of ill being.”\textsuperscript{37} The court, however, also affirmed the rationale of \textit{Wilson v. Granite City}, that the defendant should not be required to show causal connection when the prior injuries create similar and permanent symptoms. The court distinguished \textit{Wilson} because \textit{Voykin} involved no specific showing that the plaintiff’s prior back injury was permanent. The trial court erred when it admitted evidence of the plaintiff’s prior injuries without requiring evidence of a causal foundation.

\textbf{VII. Conclusion}

The rules regarding the admissibility of the plaintiff’s prior injury or preexisting condition without a foundation for a causal relationship under the same part of the body rule are different from district to district. In the Third and Fourth Districts, the rule is strictly applied. Even in those districts that require causation evidence before admitting evidence of the preexisting condition or injury, there are exceptions if any medical evidence or party admissions establish that the preexisting injury to the same area of the body is similar and permanent. Until the Illinois Supreme Court addresses this issue and establishes a uniform rule, defense counsel must be prepared to develop the facts which create the best case for the admission of all relevant aspects of the plaintiff’s prior injuries.

\textbf{Endnotes}


3. \textit{Elliot v. Koch}, supra at 503

4. \textit{Id.}

In a recent article about this subject in another journal, the author suggests that the Illinois Supreme Court in *Marut v. Costello*, 34 Ill. 2d 125, 214 N.E.2d 768 (1965) previously addressed the issue of the foundation requirements for the admissibility of a prior injury to the same area of the body. However, in *Marut*, the first accident involved an injury to the cervical spine which resulted in three surgeries. The second accident required three major operations on the lower back or lumbar area. An alternative reading of *Marut* is that the prior and subsequent injuries involved different parts of the body, and, as such, foundational requirements were necessary.

When conflicts arise amongst the districts of the appellate court, the circuit court is bound by decisions of the appellate court of the district in which it is located. *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 679 N.E.2d 1224, 223 Ill. Dec. 451 (1997).


*Elliott v. Koch*, supra at 504

*Id.* at 504-505

*Brown v. Baker*, supra

*Id.* at 70

*Id.* at 71

See, *Elliott v. Koch*, supra at 504-505; See also, *Brown v. Baker* at 71


*Brown v. Baker*, supra at 72

*Id.*

*Cancio v. White*, supra

*Id.* at 754

*Id.*

*Id.* at 754-755


*Lagestee v. Days Inn Management Company*, supra at 9

*Wilson v. Granite City Steel Division of National Steel Corporation*, supra

*Lagestee v. Days Inn Management Company*, supra at 7

*Id.* at 9

In *Lagestee*, unlike *Cancio*, the court found that preexisting degenerative disk disease was a prior permanent condition. See, *Lagestee v. Days Inn Management Company*, supra at 10-11; See also, *Cancio v. White*, supra

*Cancio v. White*, supra

*Lagestee v. Days Inn Management Company*, supra

*Bailey v. Wilson*, supra

*Id.* at 1116

*Id.* at 1117

Again, the court is struggling with the issue of whether evidence of a prior accident is affirmative matter. If it is affirmative matter, the defendant has the burden of proof. If it is not affirmative matter, the defendant does not have the burden of proof See, *Bailey v. Wilson*, supra at 1117.
NOTES

35 Bailey v. Wilson, supra at 1117
36 Voykin v. the Estate of DeBoer, supra
37 Id. at 5

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