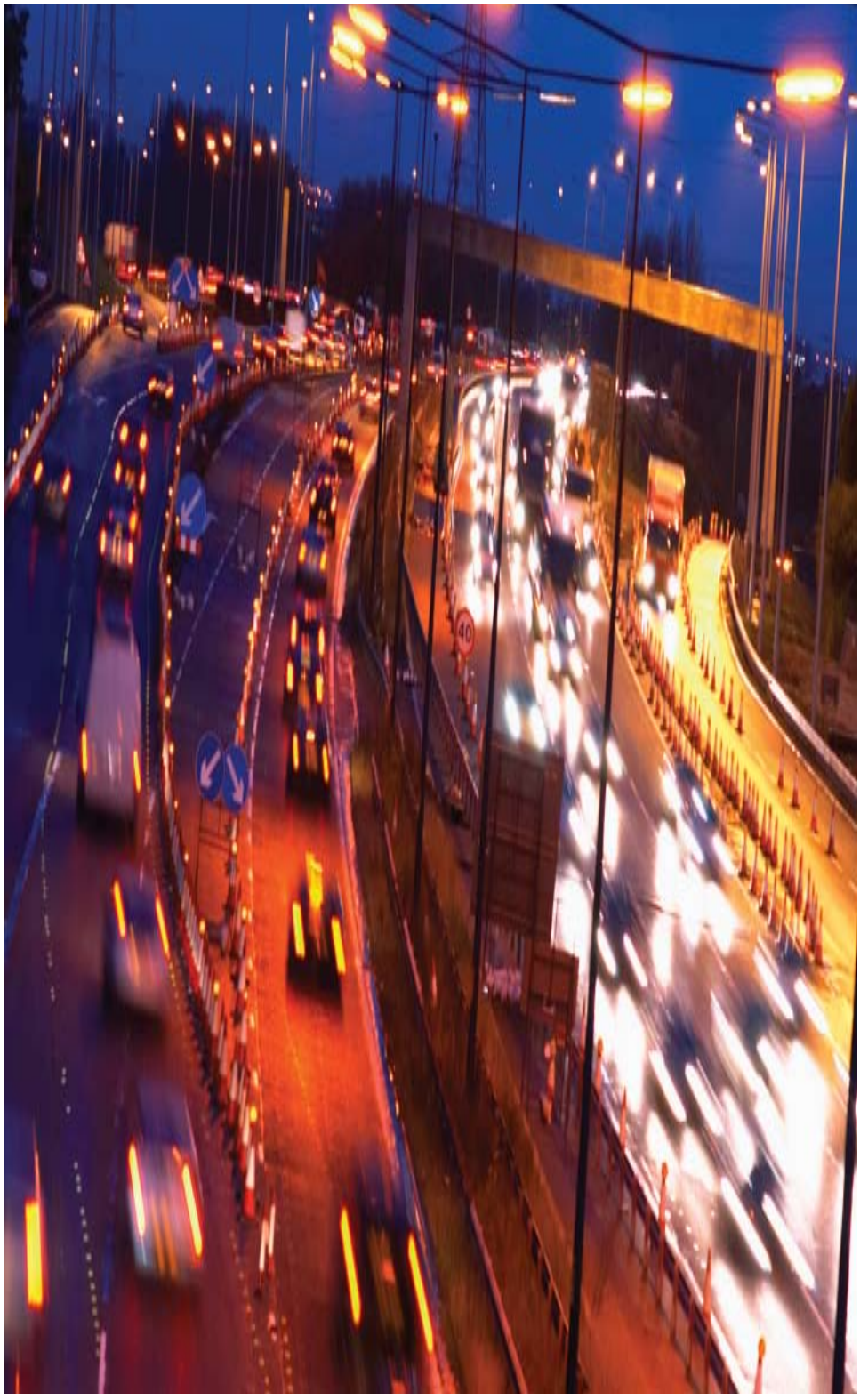
Every Picture Tells a Story–But in Illinois the Jury May Never Hear It

By Daniel Patrick Jackson

On February 11, 2008, Illinois Representative Edward J. Acevedo introduced Illinois House Bill No. 4899 ("the Bill") at the Ninety-Fifth General Assembly. As of March 14, 2008, the Bill was referred to the Rules Committee. The Bill seeks to amend the Illinois Code of Civil Procedure by adding Part 28 to Article VIII as follows:

> (735 ILCS 5/Art. VIII Pt. 28 heading new) Part 28. Photographic Or Electronic Images (735 ILCS 5/8-2801 new)
>
> Sec. 8-2801. Admissibility of photographic or electronic images. In any action concerning a motor vehicle accident or occurrence wherein personal injury or damage to property is in issue, a photographic or electronic image of a motor vehicle or other property shall be deemed relevant and shall be admissible in evidence upon authentication by a lay or occurrence witness with personal knowledge that the image truly and accurately portrays such vehicle or other property as it appeared before or after the motor vehicle accident or occurrence which is the subject of the action. It is not necessary for admission of the image into evidence that an expert or opinion witness testify as to the relevance of the image or to correlation between the vehicular damage or other property damage and the claimed bodily injury.
>
> 2007 IL H.B. 4899 (NS).

Boiled down to its essence, the Bill seeks to make photographs *automatically* relevant in automobile accident cases. This proposed amendment begs the question: does the



legislature really need to take discretion out of the judiciary to make sure the use of common sense by jurors stays in?

The Current First Appellate District Common Law Regarding Photographic Evidence in Auto Accident Cases–*DiCosola v. Bowman* and *Barniak v. Kurby*

Under the current law, relevance of such photographic evidence is determined by the trial court judge—not the legislature. "Relevant evidence" is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *DiCosola v. Bowman*, 342 Ill.App.3d 530, 535, 794 N.E.2d 875, 879 (1st Dist. 2003). In *DiCosola v. Bowman*, the plaintiff motorist brought a personal injury action against the defendant motorist stemming from a collision in which the defendant drove her vehicle through a parking space and collided with the plaintiff's vehicle, causing injury to plaintiff's elbow. The defendant sought to introduce evidence of the property damage and photographs of the vehicles. The trial court decided that, absent expert testimony, the defendant could not admit evidence of the property damage or the vehicle photographs "to argue that there [was] any relationship between the amount of the property damage and the nature and extent of the injury." *Id.* at 534, 794 N.E.2d at 878.

Relying on *Ciancio v. White*, 297 Ill. App.3d 422, 697 N.E.2d 749 (1st Dist. 1998), the defendant argued that the trial court was *required* to admit the photographs into evidence. *DiCosola*, 342 Ill.App.3d at 534, 794 N.E.2d at 878. In *Cancio*, the First District held that "photos of plaintiffs' vehicle were relevant to the nature and the extent of plaintiff's damages. They were relevant because they showed little or no damage, which is something the jury could consider in determining what, if any, injuries [plaintiff] sustained as a result of the accident."

The *DiCosola* court disagreed that *Cianco* supported the defendant's position that such accident photos are *automatically* relevant. Instead, according to the *DiCosola* court, *Cianco* stands for the proposition that the admissibility of photographs lies with the discretion of the trial court. *DiCosola*, 342 Ill.App.3d at 534, 794 N.E.2d at 878; *see also Bullard v. Barnes*, 102 Ill.2d 505, 519, 468 N.E.2d 1228, 1235 (Ill. 1984)("a decision [to admit a photograph] normally rests with the discretion of the trial court"). Applying this rationale, the appellate court found that the trial court *had not abused its discretion* in granting plaintiff's motions *in limine* to (1) exclude evidence as to the dollar amount of the property damage to plaintiff's or defendant's vehicle and (2) exclude testimony or photographs regarding the damage to the vehicles. *DiCosola*, 342 Ill.App.3d at 534, 794 N.E.2d at 880.

The appellate court found further support for its position in the Illinois Supreme Court case of *Voykin v. DeBoer*, 192 Ill.2d 49, 733 N.E.2d 1275 (Ill. 2000). In *Voykin*, the plaintiff suffered injuries to his neck and back in a car accident caused by the defendant. At trial, the defendant sought to introduce evidence that approximately five years before the accident, the plaintiff suffered an injury to his lower back. The trial court admitted the evidence, but the appellate court reversed. The Illinois Supreme Court upheld the appellate court's reversal. The *Voykin* court ruled, in part, that when a defendant seeks to introduce evidence of the plaintiff's prior injury to the same part of the body, the defendant must first introduce expert testimony concerning the relevance of the evidence with respect to the proximate cause element of negligence. *Voykin*, 192 Ill.2d 49, 248 Ill.Dec. 277, 733 N.E.2d 1275.

In so ruling, the Illinois Supreme Court rejected the evidentiary rule known as "the same part of the body rule," which had essentially provided as follows: "[I]f a plaintiff has previously suffered an injury to the same part of the body, then that previous injury is automatically relevant to the present injury simply because it affected the same part of the body." *Voykin,* 192 Ill.2d at 57, 248 Ill.Dec. 277, 733 N.E.2d at 1279. The *Voykin* court described the same part of the body rule as "nothing more than a bright-line relevancy standard." *Voykin,* 192 Ill.2d at 57, 248 Ill.Dec. 277, 733 N.E.2d at 1279. In abrogating the same part of the body rule, the *Voykin* court criticized this automatic relevancy basis of the rule. As the court explained " ' "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." ' [Citation.]" *Voykin,* 192 Ill.2d at 57, 248 Ill. Dec. 277, 733 N.E.2d at 1279. The *Voykin* court instead decided that for evidence of a plaintiff's prior injury to be admissible, the prior injury must make the existence of a fact that is of consequence more or less probable. *Voykin,* 192 Ill.2d at 56-57, 248 Ill.Dec. 277, 733 N.E.2d at 1279.

DiCosola extended the *Voykin* rationale to the relationship between damage to a plaintiff's vehicle and the nature and extent of a plaintiff's personal injuries, basing its extension (in part) on the *Voykin* court's sentiment that "jurors are not skilled in the practice of medicine" (*DiCosola*, 342 Ill. App.3d at 536, 794 N.E.2d at 880 (quoting *Voykin,* 192 Ill.2d at 58-59, 733 N.E.2d at 1279)) and the rationale for requiring a defendant to introduce expert testimony is "to avoid what amount[s] to the jury forming medical opinions." *DiCosola*, 342 Ill. App.3d at 536, 794 N.E.2d at 880 (quoting *Hawkes v. Casino Queen, Inc.*, 336 Ill. App.3d at 1008, 785 N.E.2d at 518 (5th Dist. 2003)).

In *DiCosola*, there was no expert testimony**.** The Defendant sought to argue the extent of plaintiff's injuries solely on the basis of photos showing little or no damage to his vehicle. In discussing the impropriety of such a tactic, the *DiCosola* court discussed *Davis v. Maute,* 770 A.2d 36 (Del.2001). In *Davis* the Delaware Supreme Court held that a party in a vehicular personal injury case generally may not argue that there is a correlation between the extent of vehicular damage and the extent of a person's injuries caused by the accident in the absence of expert testimony on that issue and may not rely on photographs of the vehicle(s) involved to indirectly accomplish the same purpose. The *Davis* court decided that "[a]bsent such expert testimony, any inference by the jury that minimal damage to the plaintiff's car

translates into minimal personal injuries to the plaintiff would necessarily amount to unguided speculation." *Davis,* 770 A.2d at 40.

However, *DiCosola* should not act as an automatic bar to the use of automobile accident photographs absent expert testimony. The *DiCosola* court went to great lengths to ensure it would not be viewed as such, explicitly stating it was *not* creating a bright line rule that "expert testimony must always be required for such photographic evidence to be admissible." *DiCosola*, 342 Ill.App.3d at 536, 794 N.E.2d at 881. The actual narrow, limited holding in *DiCosola* was: "the trial court *in this case* did not abuse its discretion in requiring expert testimony to show a correlation between the extent of vehicular damage and the extent of plaintiff's injuries." *Id.* (emphasis in original).

DiCosola is Often Misapplied in Practice

The current (and arguably incorrect) application of *DiCosola* today often bans the use of post automobile collision photos in the event either the plaintiff or defendant argues that there is no expert testimony directly correlating the extent of damage to the vehicles and injuries sustained by the parties. *See Williams v. City of Evanston*, 378 Ill.App.3d 590, 599, 883 N.E.2d 85, 93 (1st Dist. 2007)(excluding plaintiff's photographic evidence of damaged vehicles. Plaintiffs sought to enter evidence to show the speed at the time of impact, but not as evidence of plaintiffs' injuries. The appellate court affirmed the trial court's barring of the photographs under *DiCosola* and *Barniak* (discussed *infra*)).

The *DiCosola* dissent warned of this. In her dissent, Justice Frossard voiced her fear that by affirming the trial court's decision to exclude evidence of the minimal damage to the plaintiff's vehicle, "the majority has, in addition to a relevancy requirement, created a new requirement of *expert* testimony as a prerequisite for admitting such evidence." Justice Frossard went on to state she "was concerned this opinion will be interpreted as creating the following bright line rule: if a defendant wishes to minimize the injury to a plaintiff's person by offering evidence of minor damage to plaintiff's vehicle, then the defendant must introduce *expert* testimony demonstrating why the damage to the plaintiff's vehicle is relevant to the nature and extent of the plaintiff's injury. *Id.* at 540, 794 N.E.2d at 883.

Justice Frossard's dissent strongly disagreed with the majority's reliance on *Voykin* and distinguished the *Voykin* rationale as inapplicable to arguments equating the minimal damage of a vehicle to the minimal injuries sustained by a party. Justice Frossard noted that the connection between the parts of the body and past and current injuries is beyond the ken of the average layperson and that in normal circumstances, a lay juror will be unable to effectively or accurately assess the relationship between a prior injury and a current injury without expert assistance. She further recognized that "the [majority's] analogy to *Voykin* fails because the facts….[did] not present the complex relationship recognized in *Voykin* which required expert testimony to assist the jury." *DiCosola*, 342 Ill.App.3d at 541, 794 N.E.2d at 884.

According to Justice Frossard, a lay juror can readily appraise the relationship, if any, between the minimal damage to a plaintiff's vehicle and the extent of a plaintiff's injuries. Soft tissue personal injury cases are distinct from the level of complexity addressed in *Voykin*. *Id.* Following Justice Frossard's dissent, a strong argument can be made that rather than requiring a parade of experts to connect the dots for jurors, jurors should be allowed to "use their common sense and everyday experience" when using "photos of a plaintiff's vehicle in determining the nature and extent of plaintiff's damages, including personal injury." *Id.* Further, "jurors without expert testimony have considered photographic evidence in determining the minor nature of the impact in connection with evaluating a plaintiff's credibility." To suggest that jurors are unable to gauge the relationship between damage to a vehicle and injuries sustained by the person, in simple soft-tissue automobile accident cases, "flies in the face of common sense and everyday experience." *Id.*

Despite the deliberately narrow language used by the First District Appellate Court in *DiCosola* and Justice Frossard's warning, trial courts routinely grant plaintiff motions *in limine* to bar photographic evidence of post-collision vehicles--*even when medical experts are testifying for both plaintiff and defendant* and the "unguided speculation" the *Davis* court warned of is no longer a concern. *DiCosola* is often then used as a shield; disallowing the use of automobile collision photographs absent some form of expert witness who is versed in both the subtleties of the automotive and human body.

Barniak v. Kurby—Following in the Wake of DiCosola's Slippery Slope

Barniak v. Kurby, 371 Ill.App.3d 310, 862 N.E.2d 1152 (1st Dist. 2007), applied, interpreted, and extended *DiCosola*. In *Barniak*, a rear-ended motorist brought a negligence action against the driver of the vehicle that hit her. Prior to trial, the plaintiff made a motion *in limine* to prohibit statements, suggestions or arguments connecting minimal damage to the plaintiff's vehicle and minimal personal injury to the plaintiff herself. Another motion *in limine* was made to exclude photographs of the plaintiff's vehicle "for any purpose." *Id.* at 316, 862 N.E.2d at 1157. In response, defense counsel advised the trial court that it intended to use the photographs of plaintiff's car during cross-examination. The trial court permitted defendant to use the photographs during the plaintiff's cross-examination. *Id.* at 316, 862 N.E.2d at 1156. The rear-ended motorist was awarded $15,000.00 and appealed.

On appeal, the defendant argued that the vehicle photographs were not admitted into evidence in order to support a connection between the amount of the property damage and the extent of the plaintiff's injuries but were used to aid the jury in assessing the plaintiff's credibility when she testified that the impact was hard. *Id.* at 317, 862 N.E.2d at 1158. To further illustrate her point, defendant cited to her counsel's closing argument, in which he stated:

> When you take these photographs back into the jury room, you can use them to [the] issue of credibility. The plaintiff testified that this was a really hard or heavy impact. Now,

since so much of what is going on here depends on her credibility, take a look at the photos and see whether it is credible that this is a hard or heavy impact or the defendant's testimony that this was a light impact, a fender bender impact, so to speak * * *."

The appellate court found that the photos should not have been used and reversed stating that:

"if [it] w[as] to accept defendant's reasoning, [it] would essentially be conducting an end run around the relevancy rule, and photographs of damaged vehicles would always be admissible in trials of this nature on the grounds that credibility is always an issue. The effect of such a ruling would be to allow parties to accomplish indirectly what courts have already determined is improper absent expert testimony, *i.e.* to argue or even imply that there is a correlation between the extent of vehicular damage and the extent of a person's injuries caused by an accident."

Id. at 317, 862 N.E.2d at 1158.

In so holding, the *Barniak* court arguably misapplied *DiCosola* and took it one dangerous step further. Under a plain reading of *Barniak*, post automobile collision photographs cannot be used to impeach the credibility of a witness absent expert testimony showing a correlation between the extent of vehicular damage and the extent of a person's injuries. Jurors are oftentimes now forced between the defendant's word that the impact was low and the plaintiff's word that the impact was high—when perfectly neutral evidence *i.e.* the photographs, suggesting the level of impact are available. This allows litigants dangerous leeway to potentially exaggerate claims without fear of exposure or reprisal (through use of the photographs) on cross-examination.

Common Sense in the Courtroom

Both the *DiCosola* and the *Barniak* decision reveal veiled notions that jurors are incapable of making common sense determinations in the absence of expert testimony. Illinois Pattern Jury Instruction 1.01 states, in part:

[3] You will decide what facts have been proven. Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses and of exhibits admitted by the court. You should consider all the evidence without regard to which party produced it. **You may use common sense, gained from your experiences in life, in evaluating what you see and hear during trial.**

[4] **You are the only judges of the credibility of the witnesses.** You will decide the weight to be given to the testimony of each of them. In evaluating the credibility of a witness you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act by the witness concerning an issue important to the case.

Ill. Pattern Jury Instr.-Civ. 1.01 (2007 ed.)(emphasis added).

Jurors' use of common sense and life experiences are a recurring themes throughout both Illinois jury instructions (*see, e.g.* Ill. Pattern Jury Instr.-Civ. 3.04)(2007 ed.)) and skilled closing arguments.

2007 IL H.B. 4899 attempts to keep the use of this common sense alive in the courtroom through the automatic relevancy of automobile accident photographs--but perhaps at too great a cost. With passage of the Bill, the Illinois State Legislature might "launch[] a missile to kill a mouse." *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2904, 505 U.S. 1003. 1036 (1992)(Blackmun, J., dissenting). Instead of completely divesting the judiciary with discretion as to what photographic evidence is or it not relevant, courts should simply apply *DiCosola* in its original, narrow context as opposed to the absolute bar of photographs cases like *Barniak* and *Williams* seemingly interpret it to be.

Many cases are already doing just that—obviating the need for this legislative intervention. *See generally Ferro v. Griffiths*, 361 Ill.App.3d 738, 836 N.E.2d 925 (refusing to adopt a rigid rule "that proscribes the admission of pictures without an expert" and leaving the trial judge with the discretion to ask the question "whether the jury can properly relate the vehicular damage depicted in the pictures to the injury without the aid of an expert."); *see also Fronabarger v. Burns*, No. 5-07-0433, 2008 WL 4446016 (5th Dist. Sept. 29, 2008).

At this point, such drastic legislative action *may* not be the answer, but rather a careful exercise of judicial discretion when determining the admissibility of post automobile collision photos absent correlating expert testimony. ■

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Have a Heart Toiletries Collection

Save hotel toiletries when you travel for work! The YLS will collect toiletries for women in a domestic violence shelter. Please only donate unopened items such as shampoo, lotion, soap, razors, unopened makeup and toothpaste.

Cell Phone Collection

Donate your old, working cell phones, batteries and chargers to the Wireless Foundation and the Verizon Wireless Hope Line, both of which reprogram cell phones to ring 911 for victims of domestic violence.

Eyeglasses Collection

Donate your old prescription glasses and the YLS will deliver them to the Lions Club.