

Seminar 2010

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Since February of 2000, a publication entitled the Indiana Jury Verdict Reporter (the IJVR) has provided a summary of jury verdicts statewide. The IJVR is published monthly and contains synopses of cases based on data obtained from trial courts and attorneys. Each synopsis typically includes the facts of the case, arguments and defenses raised, and the amount of jury awards, if any. The following trends are based on a synthesis of the reported jury verdicts from February, 2000, through September, 2010, inclusive.

I. TERMS AND METHODOLOGY

Certain terms will be used throughout these materials. The terms “*average verdict*” and “*average gross verdict*” are interchangeable. They convey the mean average of all verdicts in a subject area, without considering the plaintiff’s own fault. By contrast, “*average reduced verdict*” and “*average net verdict*” are synonymous. This figure factors in such comparative fault. An “*average plaintiff verdict*” or “*average gross plaintiff verdict*” is the gross verdict, only without factoring in those cases in which juries found for the defendant. An “*average reduced plaintiff verdict*” or “*average net plaintiff verdict*” is the mean of all plaintiff verdicts, after eliminating defense verdicts.

In compiling the data, it is our objective to determine patterns and trends which may be helpful to our clients. Sometimes, cases bear unusual facts which produce verdicts so far out of mainstream that they are clearly anomalies. When anomalous verdicts are so extreme that they skew the data pool and distort the trends, we will exclude them from our analysis. This is the case in five of the cases in the premises liability/slip and fall discussion. In addition, one uninsured motorist case, one underinsured motorist case have been excluded, as have all seven- and eight-figure auto negligence verdicts. Trucking negligence cases are also not factored into the analysis.

We further note that the pie graphs in these materials round percentage figures to the nearest whole number. To be precise, we have rounded the figures in the text of our material to the nearest tenth of a percentage point.

II. BAD FAITH

The IJVR has reported thirteen bad faith cases to date. One of these is excluded from our analysis, as the court entered a directed verdict against the insurer, establishing the amount of compensating damages as a matter of law. We have added a synopsis of the case below, even though the judgment is not part of the calculations.

Of the remaining twelve cases, four resulted in defense verdicts. The other eight produced judgments against insurers ranging between \$33,220 and \$20,000,000. This highest verdict was reduced by the court to \$8,000,000 as the jury’s original punitive assessment exceeded the statutory limit. After the reduction, the average verdict was

\$1,603,963. Excluding the four cases in which defense verdict was entered, the average plaintiff verdict was \$2,405,944. Brief summaries of each case follow:

- i Plaintiffs initiated a claim for bad faith when Allied Property & Casual refused to pay for property damage sustained in a fire. Allied alleged arson and even had a witness willing to testify that plaintiffs had offered him money to set their house on fire. However, Allied neglected to secure a subpoena for its witness who, in turn, failed to appear at trial. Consequently, the trial court declared a mistrial. On retrial, the judge directed verdict on the issue of liability against Allied in the amount of \$481,000. Only the issue of punitive damages was submitted to the jury. The jury awarded plaintiffs \$50,000 in punitive damages.

As the jury was precluded from determining the compensatory damage, this case has been excluded from our calculations. Certainly, the jury punitive damage award is substantially smaller than the court-ordered compensatory award. This suggests that the jury was not thrilled with the plaintiffs' bad faith argument and suggests that the total award may have been smaller, had the jury been given free rein to award damages.

- i Plaintiff sustained damages exceeding \$10,000 (medical expenses totaling \$5,827 and lost wages of \$4,424) as a result of a collision with an uninsured motorist. Although plaintiff had \$25,000 in UM coverage, the insurer only offered \$3,500. As a result, plaintiff initiated a bad faith action. The insurer defended on the grounds of comparative fault and challenged the nature and extent of injury. Verdict: \$100,000 (\$50,000 UM claim, reduced to \$25,000; \$50,000 bad faith).
- i Plaintiff brought uninsured motorist claim, seeking his \$50,000 limits. Special damages totaled \$24,000. Allstate denied the claim and made no offers whatsoever, even though its claim evaluation program, Colossus, valued it at between \$45,000 and \$51,000. In addition, plaintiff employed an insurance claim-handling expert, who testified that Allstate tied its adjusters' compensation to the frequency they settled claims beneath Colossus' recommendations. Plaintiff claimed Allstate's "hardball tactics" caused him to experience hypertension, heart problems and a stroke. Verdict: \$20,000,000 (\$2,000,000 compensatory damages; \$18,000,000 punitives). The court reduced the punitive award to \$6,000,000 (the statutorily allowed limit), for a total verdict of \$8,000,000. ‘

We note that this case was reversed on appeal, *Allstate Ins. Co. v. Fields*, 885 N.E.2d 728 (Ind. Ct. App. 2008). The Indiana Court of

Appeals held that summary judgment should have been entered on behalf of Allstate. Also, the trial court should not have allowed evidence of Allstate's conduct after the bad faith claim had been filed.

- i Insurer denied collapse claim, arguing water had pooled on the roof. However, in various claim documents, adjuster referred to the roof's collapse. Verdict: \$5,100,000 (\$750,000 breach of contract; \$350,000 bad faith compensatory damages; \$4,000,000 punitives). This verdict was affirmed on appeal, *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968 (Ind. 2005).
- i Insurer delayed payment of medical bills on UIM claim and would not respond to insured's letters; deficient claim handling. Verdict: \$2,600,000 (no breakdown of award provided by the IJVR).
- i Insurer erroneously denied fire loss, alleging arson and material misrepresentation in the application about whether burglar alarms were in place. Verdict: \$1,715,000 (\$255,000 breach of contract; \$710,000 bad faith compensatory damages; \$750,000 punitives).
- i Worker's compensation carrier improperly stopped paying long-term disability benefits. Verdict: \$1,522,583 (\$22,583 breach of contract; \$1,500,000 bad faith).
- i Insurer denied fire loss based on statement of insureds' subsequently-incarcerated foster child, and removal of sentimental objects from home. Verdict: \$176,750 (\$126,000 compensatory damages; \$50,750 punitives).
- i Insured paid premium late, and premium check was cashed by insurer. Insurer later returned premium and denied coverage for accident occurring between original date premium was due and date premium check was received. Verdict: \$33,220 (\$23,220 compensatory damages; \$10,000 punitives).
- i Insurer denied theft claim where plaintiff had no receipts. Verdict: \$0.
- i Insurer decreased its assessment of vehicle's value after having learned it had been salvaged. Verdict: \$0.
- i Insured alleged insurer intentionally undervalued vehicle damaged in fire loss. Verdict: \$0.
- i Insurer denied hail claim. Verdict: \$0.

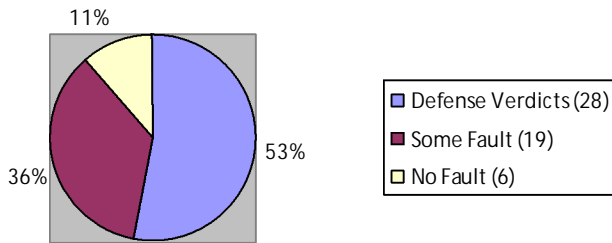
III. SLIP AND FALL; PREMISES LIABILITY

A total of 275 trials have been reported which involve either slip-and-fall or premises liability. Of these, 153 (55.6%) culminated in a defense verdict. Plaintiffs were apportioned fault in an additional 95 cases (34.5%). Plaintiffs were assessed no fault whatsoever in only 27 cases (9.8%). Fault apportionment varies greatly, depending on the nature of the claim and the alleged defect, as will be seen below.

Verdict size also typically correlates to the type of accident. As such, these cases are very fact-sensitive. We have broken down this category into four frequently-seen subsets: ice and snow, foreign or unexpected substances, structural defects and obstacles. Some unusual cases did not fit into any of the subsets, and have been excluded reducing the total number of analyzed cases to 245. We also disregarded four cases that resulted in disproportionately high, seven-figure verdicts.

A. Ice and Snow

We have analyzed data from 53 published cases which involved plaintiffs who tripped on exterior surfaces which were covered with snow and/or ice, typically parking lots and sidewalks. In these cases, the surfaces were not alleged to have any sort of structural



defect. Of the 53 ice and snow cases, 28 cases (52.8%) resulted in defense verdicts, and another 19 (35.8%) involved a comparative fault apportionment to plaintiff. Only six ice and snow cases (11.3%) resulted in no fault apportionment to plaintiff. The verdicts range between \$0 and \$494,744.

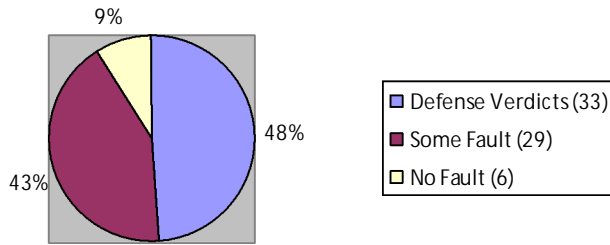
In 2008, we noted a disturbing trend in the snow and ice cases. In the thirty-four cases published prior to 2007, the highest verdict was \$205,000. However, of the ten cases published in 2007 and 2008, four of them exceeded \$250,000. Although there appeared to be nothing factually distinctive about these cases, the gross verdicts were much higher in 2007 and 2008 than in previous years. In addition, two of these ten cases resulted in pure plaintiff verdicts, with no comparative fault assessed. This trend seems to be subsiding. Of the nine snow and ice cases reported since the 2008 seminar, plaintiffs recovered in two. The highest verdict was \$70,000, with no fault apportioned to plaintiff. In the other case, plaintiff recovered \$8,212 after a thirty-five percent reduction for plaintiff's comparative fault.

Overall, the average verdict was \$69,632, or \$49,313 after comparative fault. The data reflect a 14.8% decrease, or 14.4% after assessing comparative fault, from the 2008 data. The average plaintiff's verdict, when defense verdicts were omitted, was \$147,619, or \$104,453 after reducing for comparative fault. These figures reflect almost a six percent

decrease from 2008. Although the current averages are less than those reported in the 2008 seminar data, they are still more than the 2006 figures due to the four unusually high verdicts in 2007 and 2008. Therefore, we will continue to monitor the 2007-2008 trend. We are pleased, however, to note the turnaround in 2009 and 2010.

B. Foreign or Unexpected Substances

In 68 cases, plaintiffs alleged that they fell on slick or unexpected substances on the ground, usually indoors and while shopping. Among these, there were 33 defense verdicts (48.5%) and 29 cases (42.6%) in which plaintiffs were assessed fault. Only six cases (8.8%) resulted in no fault apportionment to plaintiff.



Only six cases (8.8%) resulted in no fault apportionment to plaintiff.

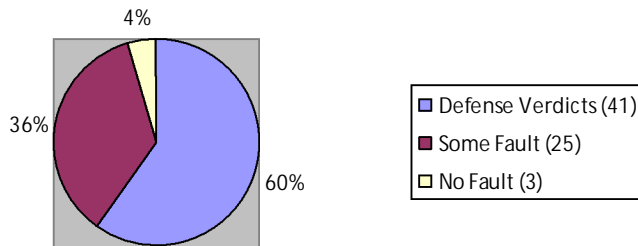
The verdicts in these cases ranged between \$0 and \$600,000. The average verdict was \$60,846, or \$45,338 after reducing for comparative fault. Excluding all defense verdicts, the average

plaintiff verdict was \$118,216, or \$88,085 after comparative fault. In 2008, we noted that all of the figures had decreased by eight to ten percent from the 2006 jury verdict data analysis. The decrease from 2006 now ranges from thirteen percent to twenty-five percent, reflecting a steady decline over the past four years.

C. Structural Defects

For the purposes of this discussion, we have grouped several types of incidents into the category of “structural defects.” They include crumbling stairways and sidewalks, holes in the ground, poorly marked stairs or curbs, and the like. In each case, the plaintiff alleged injury due to the property owner’s failure to adequately maintain the premises or

identify a danger. There have been 69 such cases to date covered in the IJVR. In 41 cases (59.4%), jurors entered defense verdicts. Another 25 (36.2%) yielded a fault apportionment to plaintiff. In three cases (4.3%), plaintiffs were not assessed any fault.



The average verdict was \$73,667, or \$50,230 after a reduction for

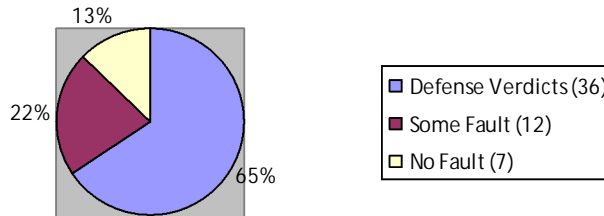
comparative fault. Considering only cases where plaintiff’s verdict resulted, the average award totaled \$168,467, or \$118,281 after comparative fault was assessed.

We caution a markedly different trend for the structural defect cases. Since the 2008 seminar analysis, there have been ten published cases where plaintiffs alleged structural defects caused injury. Of these ten cases, six plaintiffs recovered, representing sixty percent of the 2009-2010 structural defect cases. Pre-2009, defense verdicts accounted for sixty percent of the total verdicts in this subcategory. Since 2008, three juries have returned gross awards over \$300,000, with the highest gross award totaling \$921,000. There seems to be nothing particularly distinctive about this case. While entering Pizza Hut, the plaintiff tripped over a small lip on the sidewalk raised one and a half inches above the pavement. While large, the gross verdict was still only one-third of plaintiff's wage claim according to his testifying vocational economist.

Including the three high verdicts, the average gross award has increased by 36.3%, and 31.3% after excluding for defense verdicts. After accounting for comparative fault the increase ranges from 23.8% to 16.1%. However, when these three large verdicts are excluded, the 2010 figures are slightly less than the 2008 data. After omitting the three large verdicts, the gross verdict average was \$50,940, or \$38,532 after reducing for comparative fault. Plaintiff's gross verdict average was \$119,843, or \$95,567 after assessing comparative fault. As we have noted with other trends, ten cases are not a large enough group to constitute a statistically valid sample, so we cannot conclusively determine whether juries are returning higher verdicts to more plaintiffs. Therefore, we will continue to monitor this trend.

D. Obstacles

We have analyzed data from 55 cases in which obstacles fell onto plaintiff or in which a plaintiff tripped over them. Of the 55 cases analyzed, 36 (65.5%) led to defense verdicts. Twelve plaintiffs (21.8%) were allocated some fault, but not enough to bar recovery. The remaining seven plaintiffs (12.7%) bore no fault. This is a substantial increase in the likelihood of defense verdicts over our 2008 data, when 59.0% of cases led to such a verdict. Indeed, of the sixteen trials in this category in 2009 and 2010, thirteen were defense verdicts.



The average gross verdict, without fault, was \$108,129. After reducing for plaintiffs' fault, the average net verdict was \$79,071. Excluding the defense verdicts, the average was \$297,326 (\$234,539 after fault reduction).

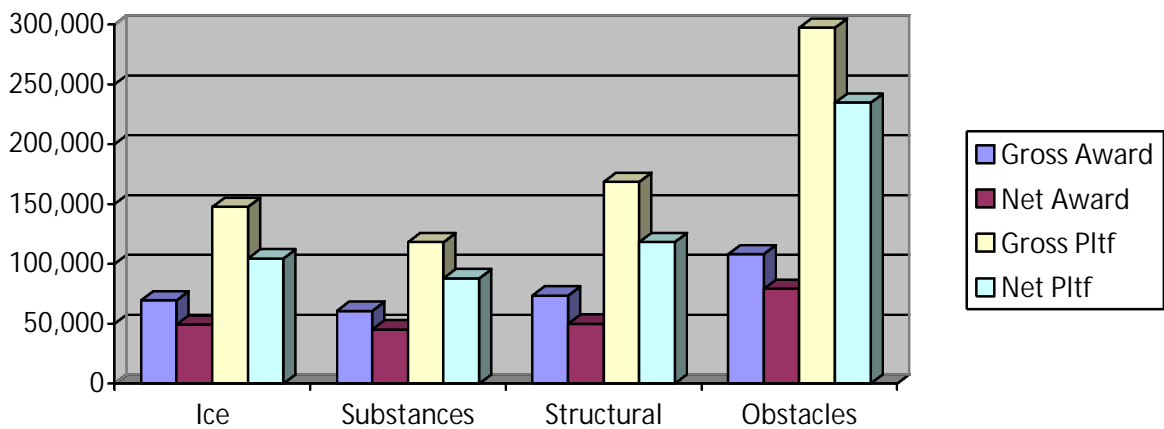
At the last seminar, we observed that the verdicts in the obstacles cases were substantially higher than in any of the other three categories. In 2008, excluding defense verdicts, the average was substantial: \$329,488. Currently, the average is still substantial at \$297,326, but this average reflects almost a ten percent decrease. Including defense verdicts, average awards have decreased by almost twenty-five percent.

E. Summary

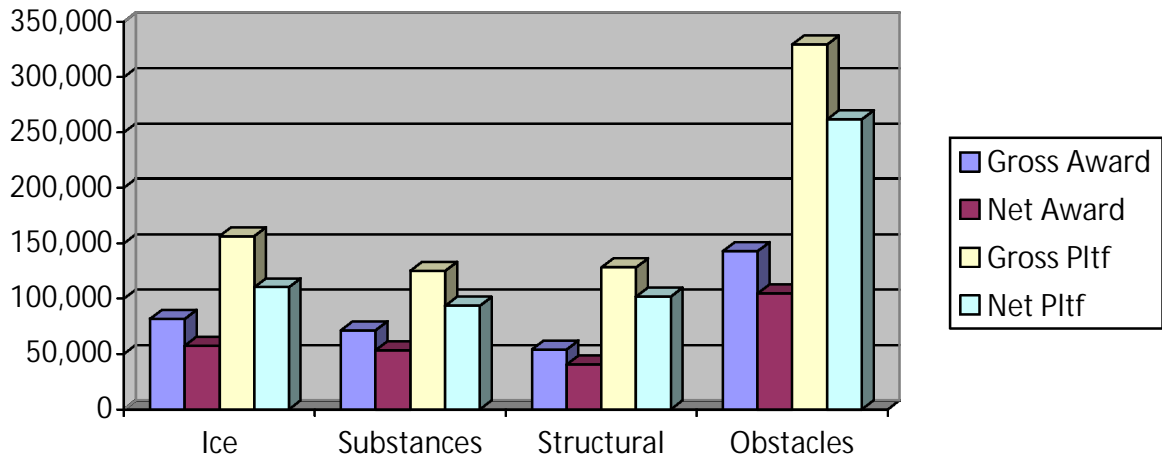
In the past, data analysis has indicated that plaintiffs in obstacle cases fare the best, as a general rule. Considering pure-plaintiff awards and the amounts of awards, this is still true. Plaintiffs in obstacle cases are the least likely to have their awards reduced by comparative fault, and they claim the highest recovery. However, 2010 data analysis reflects a shift: Plaintiffs in obstacle cases are now also the most likely to have a defense verdict entered against them, with a total of 65.5% resulting in defense verdicts. Structural defect cases are a close second, with almost sixty percent resulting in defense verdicts. Conversely, cases involving unexpected spills or foreign substances are the least likely to result in defense verdicts, which is consistent with past trends. This distinction is due, in large part, to how readily apparent the hazard would have been to the plaintiff.

Additionally, some fault apportionment shift has occurred over the past two years. The prevalence of defense verdicts has increased in ice and snow cases and obstacle cases. On the other hand, the likelihood of defense verdicts is trending downward slightly in structural defect cases. There has been no noticeable shift in the unexpected substances cases.

As previously noted, the average verdicts in obstacle cases are substantially higher than in the other three subsets. However, structural defect cases are the only category that has experienced an increase in awards since 2008. The following table demonstrates awards by subsets for 2010:



By comparison, our 2008 chart is below:



The same factors we have discussed at past seminars remain true today. Several critical factors must be asked in slip and fall and premises liability cases. How long has the substance, defect, or obstacle been present? Can the plaintiff establish that the defendant knew of its presence? If so, what steps did the defendant take to correct the problem, or at least, warn guests and customers of its existence? If the condition has not been present for very long and the defendant did not know about it, juries will typically find for the defendant. If the defendant was aware of the condition but posted warnings or took other affirmative steps, then juries will most likely apportion some fault to the plaintiff, if not more than fifty percent. Most importantly, was plaintiff caught completely unaware, or had he or she seen it before? Should the plaintiff have known it was there? If the plaintiff knew – or, after using reasonable caution or diligence should have known – that the substance, defect, or obstacle was there, but fell anyway, juries are reluctant to award damages. Such an awareness on plaintiff’s part will typically yield a defense verdict.

IV. UNINSURED AND UNDERINSURED MOTORIST

The IJVR has reported a total of 132 UM/UIM cases. Of these, 63 involved UM claims, and the other 69 were UIM cases. There have been two verdicts, one UM and one UIM, which have yielded seven-figure verdicts. The UM case involved an inland marine policy and produced a \$1,400,000 verdict. The UIM trial, also involving an umbrella policy, led to a \$1,080,000 verdict. The next highest UM and UIM verdicts were \$211,000 and \$638,000, respectively. Excluding the seven-figure verdicts, the average UM verdict was **\$35,863**, while the UIM verdict average was substantially higher, as one might expect, at **\$110,541**. As we will see in Part V of these materials, the average gross verdict in a third-party auto negligence case is \$31,193. This figure is closely in line with the average UM verdict, but less than one-third of the average UIM verdict.

Unfortunately, not all UM/UIM case summaries identified the medicals incurred by plaintiffs, but when the medical specials is identified, generally, the jury's verdict exceeded the incurred medical expenses. The following table illustrates the applicable multipliers of the incurred medicals awarded to plaintiffs in UM and UIM cases:

Multiplier	# UM cases	% UM cases		# UIM cases	% UIM cases
0 (defense verdict)	7	14.9		6	10.7
0.01 to 0.99	3	6.4		2	3.6
1.00 (medicals)	0	0.0		1	1.8
1.01 to 2.50	10	21.3		12	21.4
2.51 to 5.00	13	27.7		12	21.4
5.01 to 10.00	7	14.9		10	17.9
10.01 or more	7	14.9		13	23.2

On average, verdicts awarded in UM cases were **4.91** times the medical specials. In 2008, we noted a slight decrease in the UM multiplier over the past few years. However, at 4.91 in 2010, the UM multiplier has reached an all-time high since we began tracking multipliers in 2004. By comparison, it was 4.44 in 2008. In 2006, the multiplier was 4.5.

In UIM cases, the multiplier was even higher than the UM average, with verdicts equaling **6.34** the medical specials, but this figure has been decreasing over the past few years. The UIM multiplier for the fall of 2004 was 6.8. Two years later, it peaked somewhat at 7.6. A 2007-2008 average UIM multiplier of 4.27 and a 2009-2010 average UIM multiplier of 5.54 has helped bring the average down to 2003-2004 levels. There was one atypically high multiplier for both the 2007-2008 average and the 2009-2010 average: 17.22 and 26.43, respectively. If these multipliers are omitted, the 2007-2008 average is 3.10, and the 2009-2010 average multiplier is 3.21, a much more palatable figure.

V. AUTOMOBILE NEGLIGENCE

A. In General

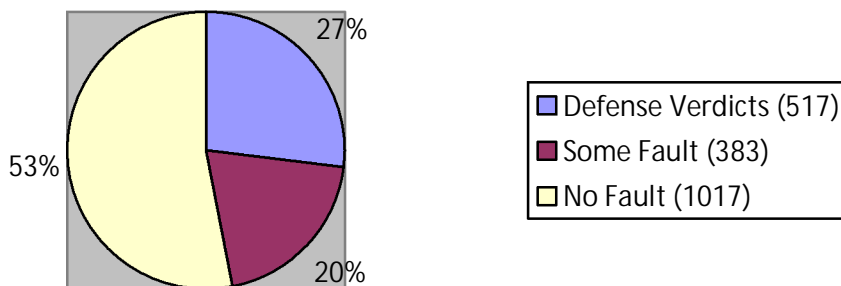
We have extrapolated data and trends from 1,917 auto negligence jury trials which were reported in the IJVR between February 2000 and September 2010. We have excluded from our analysis a handful of additional trials, in which juries awarded seven- or eight-figure verdicts. Indeed, these cases typically bear very unusual facts, and unduly overinflate our statistical results. In general, there has been a downward trend in the number of trials reported on over the years, although it is unclear whether fewer cases are being tried or whether the IJVR staff is less diligent in its efforts to locate and report on trials. We tend to suspect the latter. Indeed, several trials defended by attorneys from

our firm have yet to be included, despite the passage of considerable time and direct contact from our firm to the IJVR staff to report our results. In any event, only 121 cases were reported in 2008. Likewise, 2009 reached an all-time low with only 105 auto negligence cases reported. So far in 2010, 89 auto negligence verdicts have been reported. This would put 2010 on track to have a total of 119 cases in the reporter. By comparison, in 2000 through 2003, an average of 236 cases was reported yearly. No year since 2003 has exceeded 193 reported auto negligence trials. We have not seen such a profound drop in the number of tried cases in our own practice.

B. Verdict Types

Of the 1,917 total auto cases, a defense verdict occurred in 517 cases (27.0%). Defense verdicts typically resulted from three possible fact scenarios: (1) the defendant was not liable; (2) plaintiff bore more than fifty percent of fault for the accident; or (3) defendant prevailed on causation. In 2000, the IJVR did not set forth a basis for defense verdicts, but it has begun to do so since that time. According to the IJVR's year-in-review analysis, between 2001 and 2009, defense verdicts were entered based on the absence of causation 98 times. In another 152 cases, plaintiff's own comparative fault precluded recovery entirely. These two categories account for 50.2% of all defense verdicts in auto negligence cases in the 2001-2009 period. Most other defense verdicts were attributable to the jury's conclusion that defendant simply was not at fault. The other cases involve defense verdicts caused by a plaintiff's inability to prove any damages (a relatively rare outcome), or did not identify the basis for the defense verdict.

In another 1,017 of the total auto cases (53.0%), plaintiffs received a verdict unreduced by comparative fault. In the remaining 383 cases (20.0%), plaintiffs were apportioned some fault, but no more than fifty percent.



Several trends can be seen in looking at these figures over the past eleven years. Each year, the number of cases bearing no comparative fault was easily the greatest of the three categories. The percentage of such unreduced verdicts has generally grown, while the other two categories have generally decreased. **The percentage of defense verdicts has**

decreased from approximately one-in-three cases in the first several years of data collection, to closer to one-in-five cases in the past few years. The breakdown of verdict types is demonstrated in the following table, which illustrates the percentage of each category of verdict:

Year	Defense Verdict	No Comparative Fault	Some Fault Reduction
2000	30.0	48.5	21.5
2001	29.8	48.2	22.0
2002	31.0	46.3	22.7
2003	29.5	47.2	23.3
2004	23.3	52.3	24.4
2005	27.3	55.3	17.3
2006	21.8	61.8	16.4
2007	26.3	60.5	13.2
2008	21.5	59.5	19.0
2009	24.8	64.8	10.5
2010 (YTD)	21.8	57.5	20.7
TOTAL	27.0	53.0	20.0

C. Verdict Size

As indicated previously, there were a number of seven- and eight- figure verdicts which unduly skewed any data analysis. Those verdicts have been excluded. Our analysis of all other auto negligence cases published between February of 2000 and September of 2010 showed that the **average gross jury verdict was \$31,193**, and the average net jury verdict was \$28,774.

After excluding the 517 cases in which defense verdicts were entered, the gross average plaintiff's verdict was \$42,123. After factoring in comparative fault, the average verdict was \$38,830.

We have seen a steady increase in these values over the past few years. By way of comparison, the average auto verdict for 2000 through 2004 was \$25,743. The comparable figure for 2005 through 2010 was \$36,348. While the 2010 figure has decreased, totaling \$30,177, the 2009 average auto verdict reached \$41,118. Notably, however, the 2010 average verdicts, both with and without reducing for plaintiff's own fault, are at the lowest levels since 2003. Similarly, looking at plaintiff's verdicts only, both gross and net figures, the 2010 figures are also lower than any year since 2003. As previously discussed, we have noticed a trend in fewer cases reported each year, and that some of our favorable results have not been published at all. We tend to suspect that the IJVR staff is continuing to report the larger verdicts, but not all the verdicts more

favorable to the defense. Such a reporting trend would explain a gradually increasing verdict. It does not explain, however, the decreased 2008 and 2010 verdict size.

In any event, the annual state-wide average verdicts are set forth in the following table:

Year	Avg. Verdict	Reduced C.F.	Plaintiff Verdicts	Plaintiff – C.F.
2000	19,158	16,629	27,487	23,859
2001	26,707	23,269	38,153	33,242
2002	23,145	22,314	33,546	32,342
2003	21,310	17,979	30,238	25,510
2004	38,395	33,788	50,070	44,061
2005	32,989	30,713	45,398	42,266
2006	39,087	36,926	49,994	47,232
2007	41,259	38,756	55,995	52,597
2008	33,456	32,448	42,612	41,328
2009	41,118	39,604	54,650	52,639
2010 (YTD)	30,177	28,400	38,609	36,335
TOTAL	30,617	28,095	41,532	38,078

There is always much talk among personal injury attorneys – and sometimes, mediators and jurors, as well – about the rule of threes. Namely, attorneys will sometimes suggest that cases are worth three times the medical specials. For the present discussion, under such a rule, three times the specials would be referred to as a “multiplier” of 3.0.

It is our experience that this is not the case. Of course, it is logical to assume that more painful injuries (i.e. displaced fractures) or injuries leading to a permanency claim will yield a greater multiplier than will transient, soft-tissue injuries. Unfortunately, there is no easy way to determine multipliers in auto cases by injury type. However, we have culled our notes from the IJVR data from 2004 through September 2010 and arrived at average multipliers for all auto negligence cases.¹

Between 2004 and September 2010, 666 of the published auto negligence cases identify the amount of medical specials admitted to evidence. The average multiplier in those cases was **2.67** times the medical specials. Four cases yielded peculiarly high multipliers, all in excess of fifty times the medical specials. When those four cases are excluded, the average multiple in an auto case was 2.11. Even including the four high multipliers, the average multiplier is substantially lower than in UM and UIM cases discussed previously in Part III (4.91 in UM cases and 6.34 in UIM cases).

¹ Unfortunately, some of the notes needed to accurately track this data back before 2004 are no longer available.

The following chart displays the average multiplier by year:

Year	Avg. Multiplier
2004	2.07*
2005	1.66
2006	1.77
2007	2.28
2008	3.57
2009	1.88*
2010 (YTD)	1.54
TOTAL	2.11*

* These figures exclude multipliers exceeding fifty times the medical specials.

In 2008, we noted that the multiplier had increased in 2007 and 2008. However, 2009 and 2010-to-date have experienced marked decreases, with 2010-to-date reaching an all-time low of 1.54. It should also be noted that of the 666 cases where the medical specials were identified, 351 juries (52.7%) entered verdicts equal to or less than the medical specials. There is ample evidence to challenge any personal injury attorney who insists that “three times specials” is the rule.

D. Verdicts by County

We have examined jury verdicts in 34 southern Indiana counties, and found 430 reported cases occurring there. This number represents 22.4% of the auto negligence cases reported statewide during the pertinent time period. As we have seen fewer trials reported, we also note a decrease in the number of southern Indiana verdict reports. For comparison purposes, we note that 35 southern Indiana cases were reported in 2006. In 2007, there were 29 such reports. The IJVR contained 17 southern Indiana cases in 2008 and then again in 2009. To date, there have been 19 cases for 2010. We do not believe that these numbers reflect a decrease in the actual number of cases tried in southern Indiana. To the contrary, we question the thoroughness and uniformity of the IJVR data gathering process.

For each of the 34 counties examined, the number of trials, verdict ranges, and average verdict are listed below. Several counties have an additional figure in parentheses. In each of those counties, an atypically large verdict unduly affected the calculations. The first number is the average of all reported cases in that jurisdiction. The number in parenthesis is the adjusted average, omitting the single high verdict. The figures below are gross verdicts and do not account for comparative fault deductions.

County (# auto verdicts)	Verdict Range	Average Verdict
Bartholomew (47)	0 - 665,000	63,314 (34,554)*
Brown (3)	0	0
Clark (43)	0 - 463,775	35,775 ² (25,336)*
Clay (8)	0 - 196,221	37,417 (14,731)
Crawford (2)	0 - 250,000	125,000
Daviess (1)	4,215	4,215
Dearborn (5)	0 - 40,000	11,2126
Dubois (1)	4,169	4,169
Floyd (28)	0 - 312,500	36,650 (26,434)
Gibson (0)	-	-
Greene (1)	22,000	22,000
Harrison (3)	0	0
Jackson (4)	0 - 51,930	14,483
Jefferson (4)	0 - 43,800	18,003
Jennings (5)	0 - 139,000	30,818 (2,830)
Knox (13)	0 - 85,800	9,835 (3,505)
Lawrence (15)	0 - 194,100	23,375 (11,180)
Martin (0)	-	-
Monroe (91)	0 - 600,000	27,250 (20,887)
Ohio (0)	-	-
Orange (3)	0 - 100,000	35,000
Owen (4)	0 - 28,287	9,804
Perry (0)	-	-
Pike (0)	-	-
Posey (0)	-	-
Ripley (1)	12,500	12,500
Scott (10)	0 - 176,000	41,974 (24,941)
Spencer (0)	-	-
Sullivan (17)	0 - 400,000	38,851 (16,279)
Switzerland (0)	-	-
Vanderburgh (40)	0 - 127,385	21,648
Vigo (72)	0 - 170,000	17,344
Warrick (4)	0 - 64,000	27,315
Washington (5)	0 - 95,000	25,169 (7,711)

*This figure represents the average after excluding two particularly large verdicts, rather than just one.

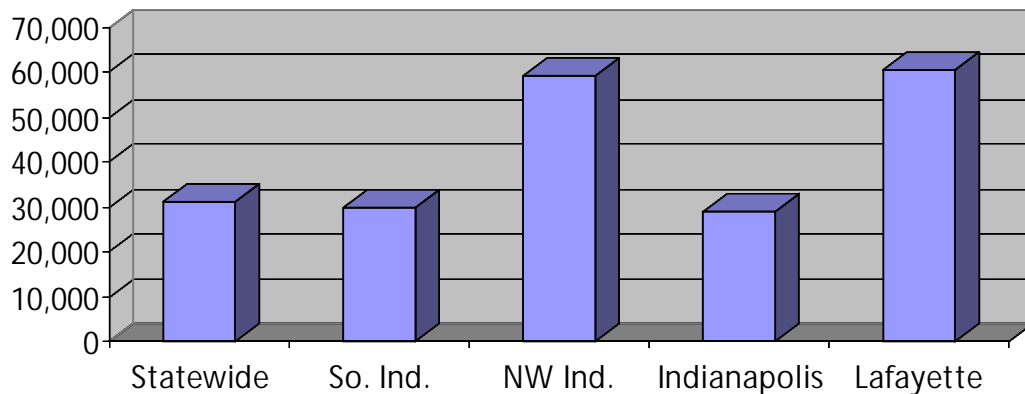
Taken together, the average gross award (*including* the atypically high verdicts referenced above) for the southern Indiana counties was \$29,920. This figure is lower than the statewide average auto verdict of \$31,193. Both the statewide and southern

² One plaintiff's award is not included in these figures. In this case, liability and damages were tried separately. At the time of the IJVR's publication, the second part of this bifurcated trial had not occurred, but plaintiff had received a favorable verdict on the issue of liability.

Indiana averages are slightly higher than their 2008 levels. The following southern Indiana counties have average verdicts below the statewide figure: Clark,³ Clay, Daviess, Dearborn, Dubois, Floyd, Greene, Jackson, Jefferson, Jennings, Knox, Lawrence, Monroe, Owen, Ripley, Scott, Sullivan, Vandenburg, Vigo, Warrick, and Washington. Bartholomew County is the only southern Indiana county with an active trial docket which appears to consistently award verdicts in excess of the statewide average.

Southern Indiana counties tend to be conservative in terms of the size of jury awards. By contrast, according to the IJVR’s 2009 year-in-review publication, the average auto verdict for auto cases reported between 2000 and 2009 in northwest Indiana was \$59,105, and the average verdict in Lake County was \$47,192. South Bend had an average verdict of \$58,403, and the average verdict in Lafayette was \$60,635. The average reported for Indianapolis was closer to the statewide average and slightly lower than southern Indiana’s average: \$29,136. All averages exclude seven- and eight-figure verdicts. Northwest Indiana and Indianapolis have reported averages only slightly higher than they were at the time of our last seminar in December 2008, but South Bend’s average has increased by \$21,980. Both Lafayette and Lake County have experienced decreases in their averages.

Average Verdict by Region



E. Independent Medical Examinations, Accident Reconstructionists and Biomechanical Engineers, and Surveillance

Three tools that defendants often use at trial are independent medical examinations or utilization reviews (collectively referred to in this overview as “IMEs”), accident reconstruction or biomechanical analysis, and surveillance videos or photos.

³ For the purposes of this particular comparison, we are using the figures in parentheses in the preceding chart, which are believed to more accurately represent the average verdict in the particular county. Some counties where such an adjustment was made, we note, would have both figures fall beneath the statewide average, such as Knox, Lawrence, and Monroe.

1. *Surveillance*

Surveillance was used in six reported cases, none since 2003. Generally, it seems to produce lower verdicts, as there is nothing more persuasive than seeing an allegedly debilitated plaintiff performing physical tasks that he or she testified under oath could not be done. In two of the six cases, a defense verdict was entered. In three others, plaintiffs received verdicts under \$10,000. However, in the sixth case, plaintiff effectively controlled the effect of a surveillance tape, convincing the jury that the video had been spliced in an attempt to distort plaintiff's post-accident condition. The jury rejected the evidence and awarded plaintiff \$463,775 (reduced by 25% comparative fault on other bases). Excluding that verdict, the average award in a surveillance case was \$4,667. While surveillance can be used effectively to obtain a small verdict, if not used properly, it can potentially backfire and inflame a jury.

2. *Accident Reconstruction and/or Biomechanical Analysis*

Accident reconstructionists or biomechanical engineers were used by defendants in 59 cases and by plaintiffs in 28 cases. When used by defendants, such experts appear to be a highly valuable tool in disputing plaintiffs' causation claims. Of the 59 cases in which a defendant used a reconstructionist or engineer, 35 (59.3%) resulted in a defense verdict. The remaining cases yielded, not surprisingly, figures either very low or very high. Eight cases resulted in verdicts of \$95,000 or more; the other sixteen were no higher than \$25,000.

The average verdict in a case in which the defense employs a reconstructionist or engineer was \$48,759. However, this figure is skewed by the eight large verdicts, particularly three worth \$750,000, \$662,248, and \$638,000. If the three largest verdicts are eliminated from the calculation, the average drops to \$14,759. If all eight disproportionately large verdicts are excluded, the average plummets to \$2,672. This figure is compelling.

Curiously, the 28 plaintiffs who used reconstructionists or engineers did not have much financial benefit from doing so. In fourteen of the cases (50.0%), a defense verdict was entered against them. The verdicts in the other cases ranged, after comparative fault, from \$2,013 to \$300,000, with five very high awards. Excluding the five unusually high awards, the average verdict was \$9,239. Factoring in the large awards, the average verdict was \$34,346. This is only slightly greater than the statewide average gross auto verdict.

3. *IMEs*

Independent medical examinations and/or utilization reviews (also known as records reviews) are used much more frequently than are reconstructionists or biomechanical engineers. Between 2000 and September 2010, IMEs were employed in 324 reported cases. The average gross verdict in IME cases, without accounting for comparative fault, was \$44,401. Excluding three disproportionately high verdicts which exceeded

\$500,000, the average was still \$38,833. This figure was higher than the average unreduced auto verdict of \$31,193.

This prompts the question: how would the average verdicts in IME cases compare to the incurred medicals in each case? Frequently, IMEs are used in more serious cases with more extensive treatment and greater exposure, which might yield higher verdicts either with or without the IME. Indeed, a case with low medicals and a low risk of exposure would not justify the cost of an IME. Accordingly, we have compared the verdict size with the incurred medicals in the IME cases. Unfortunately, in 81 of the cases, the amount of incurred medicals was not published in the record. Of the remaining 242 cases in which medicals were known, the verdicts were almost evenly divided between less than and more than incurred medicals.

Percentage of Medicals	Number of Cases	Percentage of Cases
0 (defense verdict)	59	24.4
0.01 to 0.50	37	15.3
0.51 to 0.99	29	12.0
1.00 (equals medicals)	3	1.2
1.01 to 2.50	44	18.2
2.51 to 5.00	39	16.1
5.01 to 10.00	18	7.4
10.01 or above	14	5.8

In 52.9% of cases in which an IME doctor testified, the verdict equaled or was less than the medical specials. This figure is holding steady from 2008, when 52.5% of IME cases had multipliers of 1.0 or lower.

On average, plaintiffs in IME cases received 3.17 times their incurred medicals. There were two recent cases with disproportionately high multipliers of more than 80 times medicals. When those two cases are excluded, the average multiplier for all IME cases is 2.46. We have seen a decrease in the multiplier over the past four years. Excluding the one disproportionately multiplier, the average for 2009 and 2010 is 1.35. The average for 2007 and 2008 was 1.94, also excluding the disproportionately high multiplier. The average multiplier for 2000 through 2006 was 2.85.

We note a correlation between multiplier size in the general auto multiplier and the IME multiplier over the past two years. Indeed, the 2009 and 2010 multiplier, both in general and when IMEs are employed, were substantially lower than in 2008. However, the multipliers do appear to be trending smaller in IME cases.

F. Bicycles, Motorcycles, and Pedestrians

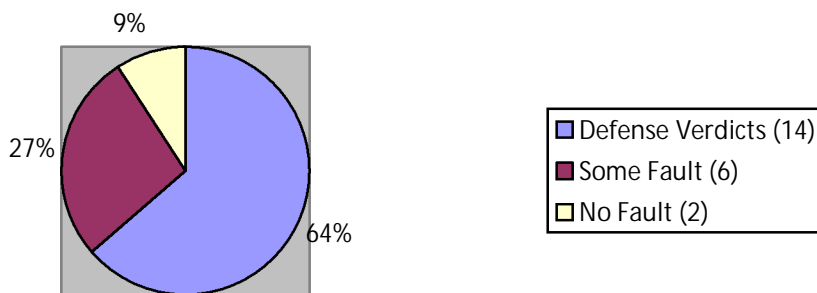
Between 2000 and September, 2010, the IJVR reported 23 cases in which plaintiffs were operating bicycles, and 35 cases involving plaintiffs on motorcycles. In addition, IJVR has summarized 31 cases where plaintiffs have been on foot, in wheelchairs, or

rollerblading. Not surprisingly, juries are much more likely to apportion fault to these types of individuals than plaintiff vehicle operators.

1. *Bicycles*

One of the bicycle cases inexplicably resulted in a seven-figure verdict. That verdict has been excluded from analysis. Of the 22 remaining bicycle cases, 14 (63.6%) have led to defense verdicts, and in an additional six cases (27.3%), plaintiffs had comparative fault apportioned. Only two plaintiffs on bicycles received no fault apportionment, representing only 9.1% of the cases. Defense verdicts occur more than twice as many times for plaintiffs on bicycles than they do for plaintiffs in all auto negligence cases.

The average verdict in the bicycle cases, factoring in comparative fault, was \$8,975, almost one-third of the average auto verdict. If the defense verdicts are excluded from the analysis, the average verdict in a bicycle case was \$24,679.

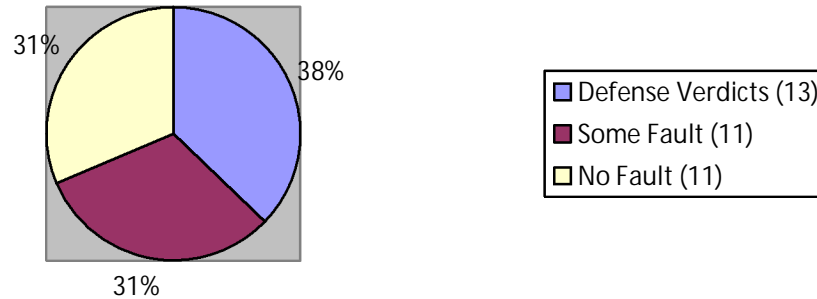


2. *Motorcycles*

Of the 35 motorcycle cases, thirteen (37.1%) resulted in defense verdicts. Plaintiffs were assessed some fault but not enough to preclude recovery in eleven cases (31.4%). An additional eleven cases (31.4%) had no fault apportionment.

Plaintiffs seem to be faring better in motorcycle cases. In 2000 through 2006, only four plaintiffs were assessed no fault. However, in 2007 alone, three plaintiffs were added to this category. Since the 2008 seminar, the IJVR has summarized six motorcycle cases. In all six cases plaintiffs recovered, with only two verdicts reduced for comparative fault.

Motorcycle cases have consistently yielded verdicts substantially larger than the average auto verdict or the average bicycle verdict. After comparative fault reductions, the average motorcycle verdict was \$91,250. The average plaintiff verdict, with all defense verdicts omitted, totaled \$145,170. While the average plaintiff verdict remained consistent from 2008, the overall average verdict has increased by almost fourteen percent. This increase can be attributed to the fact that there have been no defense verdicts reported for motorcycle cases since 2007.



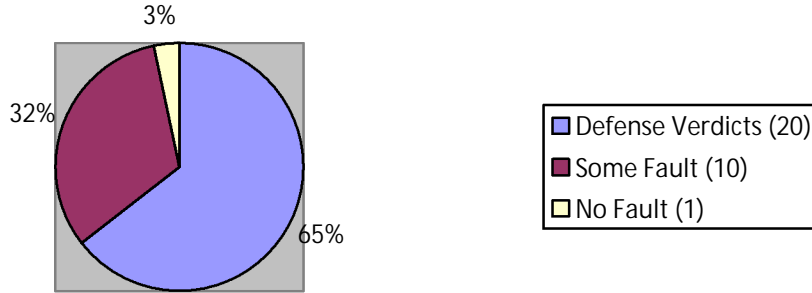
3. *Pedestrians*

This category covers vehicle-versus-person accidents. The term “pedestrian” encompasses not only people on foot, but also rollerbladers, skateboarders, people wearing “heelys,” and individuals in wheelchairs. These cases are even more likely than those involving motorcycles or bicycles to result in fault apportionment to plaintiffs. Of the 31 cases in this category, 20 (64.5%) resulted in defense verdicts. An additional ten (32.3%) plaintiffs were apportioned some fault. Only one case yielded a pure plaintiff verdict (3.2%). It should be noted that this particular pedestrian was a neurosurgeon (although there is no indication that he was on his way to perform surgery at the time). Apparently, neurosurgeons get a pass on the liability front! It should also be noted, however, that he was not wearing “heelys.”

One pedestrian case is intriguing. An intoxicated pedestrian crossed against a light and was struck by an SUV. The driver was not intoxicated, and there was no evidence that she was speeding. To the contrary, she observed plaintiff step into the street in front of her car. Defendant honked her horn, flashed her lights, swerved and hit her brakes in an unsuccessful attempt to avoid impact. Plaintiff sustained internal injuries and incurred medicals of nearly \$90,000. At the 2003 trial in the case, a Lake County jury assessed the fault 50/50 between the parties and valued total damages at \$350,276. This case could not be much more of an anomaly.

Excluding the Lake County case, the average verdict in a pedestrian case was \$15,404. After reducing for comparative fault, the average decreases to \$12,264. The average plaintiff verdict was \$46,212, or \$30,192 after assessing comparative fault.

We note that since 2008 there have been eight reported auto cases involving pedestrians. Of these eight plaintiffs, only one has recovered. This plaintiff recovered only \$2,800 after a thirty percent comparative fault reduction.



G. Dynamic Motion X-Ray

In 2008, we discussed videofluoroscopy, or motion x-ray, a tool that personal injury lawyers in southern Indiana often employed in soft tissue cases. A motion x-ray was used as a trial exhibit, typically introduced through live trial testimony from a radiologist. This was often Dr. Louis Kasden of Kentuckiana Motion X-Ray. Waters, Tyler, Hofmann & Scott has aggressively fought the admission of this evidence because, according to published literature, no quantification norm has been established, and the error rate associated with the procedure is unknown. Further, it is not established within the chiropractic community under the Mercy Guidelines, and orthopedic surgeons do not use it for diagnosis or treatment. We have been successful in excluding motion x-ray evidence through motions in limine filed in the Scott and Clark Circuit Courts, and the Jackson Superior Court.

The fight against motion x-ray has been largely successful, as no cases were reported in 2009 and 2010-to-date employing the technique. However, the discussion is still relevant because similar unscientific techniques are on the rise. Lately, we have seen several other techniques which might be the next motion x-ray. For instance, we have seen several cases involving “diagnostic spinal ultrasound.” It is our understanding that spinal ultrasound is viewed by imaging organizations as merely investigative, as the low-power machines used offer low resolution and little detail. This technology is new enough, however, that cases involving it do not appear to have reached the trial stage. You should expect to hear more about this procedure in the future.

If motion x-ray evidence or similar evidence is admitted, it can have a very powerful effect on juries. Through 2008, we found nine cases tried to verdict in which motion x-ray evidence was admitted at trial. The average verdict of these cases was more than seven times greater than the average unreduced auto award for that same time period, and more than five times greater than the average plaintiff verdict (excluding all defense verdicts from the calculation). The verdicts in the motion x-ray cases ranged between \$11,478 and \$516,000. The average verdict, without reducing for comparative fault, was \$175,701. We are proud to note that the lowest verdict was one of the cases tried by our firm.

In three of the eight cases, the total incurred medicals were known. The verdicts in the remaining cases were 0.6 (our case), 3.1, 6.2, 15.8, 20.3 and 154.6 times the incurred medicals. The case with the most staggering result – a \$463,775 verdict with only \$3,000 in incurred medicals – is the same case discussed in the surveillance section of the materials, in which the jury was inflamed by a visibly spliced surveillance tape. It is probable, therefore, that the verdict in that case would have been much lower had the surveillance not been in evidence.

We expect that once cases involving spinal ultrasound begin to be placed before juries, there will be some high verdicts. Indeed, this procedure is intended largely as a trial tool. It will take some time to get trial judges to understand the reliability problem with the new procedure. If a case involves this type of procedure, it will be more expensive to defend, but must be defended aggressively, due to the substantially greater exposure presented.

H. Waters, Tyler, Hofmann & Scott, LLC, Auto Negligence Trial Results

As previously noted throughout these materials, we question the thoroughness and neutrality of the IJVR's data collection methods and case reporting. We have had repeated difficulty securing the publication of our own trial results. As such, we have compiled data from our own trial results since 2000, the same time frame that the IJVR has been in publication.

As we did with respect to the statewide calculations, we eliminated several cases which skewed the analysis. Of the 51 auto jury trials, two resulted in substantially large verdicts of \$400,000 and \$350,000. No other verdicts exceeded \$194,000. The two large verdicts involved substantial medical bills, and had multipliers between 2.0 and 3.0. When the large lost wage claims were figured in, both verdicts ended up close to the total specials introduced to the jury. As these two cases would unduly inflate the average figures, they have been excluded from our computations involving average verdict size.

Similarly, three of our cases involved abnormally high multipliers – 100.00, 27.48 and 25.57. The next highest multiplier in any case was 4.85. No other case had a multiplier greater than 3.0. We have eliminated the cases with the three largest multipliers from those calculations.

With that understanding, the comparison between our firm's results and the statewide averages are as follow:

	Indiana average auto verdict	WTHS average auto verdict
Number of trials	1,917	51
Likelihood of defense verdict	27.0%	43.1%
Average gross verdict	\$31,193	\$19,946
Average plaintiff verdict	\$42,123	\$36,199
Multiplier	2.11	1.10
Likelihood multiplier 1.00	52.7%	72.3%

If the two cases discussed above are included in the analysis, our firm's average gross verdict is \$35,148. If the three cases with the high multipliers are considered, our firm's multiplier is 1.46.

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A Brief Overview of Life Care Planning

I. What Is Life Care Planning?

Life care planning is a relatively new field which has grown considerably in the last 30 years. This rapid growth can be attributed, in part, to the utilization of life care plans within the rehabilitation, insurance and legal professions. When properly prepared, life care plans can be a legitimate and valuable tool to help manage catastrophic injury or illness, both in terms of anticipating future treatment and associated expenses. However, life care plans can also be improperly used as a means to inflate damage claims during the claims process or litigation. For this reason, it is important to recognize potential problems with life care plans and develop corresponding claim handling and defense strategies.

Life care planning has applicable standards outlined by the International Academy of Life Care Planners (“IALCP”), *Standards of Practice*, available at <http://www.rehabpro.org/ialcp/ialcp-focus/standards/ialcp-standard-of-practice>. Many of the tenets and methodology of life care planning can be traced to case management practices and catastrophic disability research during the 1970’s. Life care planning methodology provides professionals with a consistent process for analyzing the needs of patients as a result of a catastrophic injury or the onset of a disability. Paul M. Deutsch, *Introduction to Life Care Planning*, International Encyclopedia of Rehabilitation, available at <http://www.paulmdeutsch.com/httpdocs/lcp.htm>.

A. Life Care Planning Defined

Life care planning is generally defined as:

A consistent methodology for analyzing all of the needs dictated by the onset of a catastrophic disability through to the end of life expectancy. Consistency means that the methods of analysis remain the same from case to case and does not mean that the same services are provided to like disabilities.

Deutsch, P., Raffa, F., *Damages in Tort Actions*, *supra*; Deutsch, P., Sawyer, H., *A guide to rehabilitation*, Ahab Press, Inc (2002). The critical components of this definition are the need for a consistent methodology and need-driven recommendations.

B. Accepted Life Care Planning Methodology

According to Paul Deutsch, the life care planner is intended to be an educator – not an advocate. In the course of developing a plan, the life care planner must maintain objectivity and base all recommendations upon research literature, the opinions of physicians, therapists, consulting team members and the patient’s specific data. The basis for each recommendation should be clear with no questions as to why specific recommendations were made. Only the treating physicians or a consulting doctor can recommend aggressive future medical care or surgical intervention. Each associated cost, replacement schedule, date of medical treatment implementation or suspension, and the name of each professional making relevant recommendations must be clearly identified. Specifically, a medical doctor must substantiate the necessity for any invasive procedures, diagnostic testing, laboratory testing, prescription medications, surgical

interventions, or the like. According to the industry's standards of practice, a life care planner may not assume decision-making responsibility beyond the scope of his or her professional discipline, and case managers are not qualified to make medical recommendations.

II. Admissibility of Life Care Plans

A. Hearsay and the Qualifications of a Life Care Planner

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted in that statement. The Indiana Rules of Evidence permit experts to rely on hearsay statements if they are "of the type reasonably relied upon by experts in the field." IND. R. EVID. 703. "The rule allowing an expert's reliance upon hearsay cannot be employed simply as a conduit for placing . . . another person's statement before the jury." *Faulkner v. Markkay of Indiana, Inc.*, 663 N.E. 2d 798, 801 (Ind.Ct.App. 1996)(quoting 13 Robert Lowell Miller, Jr., *Indiana Practice, Indiana Evidence* §703.109, 437). It does not permit the expert to simply spout the unsubstantiated hearsay to the jury.

In *Faulkner*, a chiropractor was not permitted to testify about medical opinions he read in records while reviewing a case because he did not have the requisite expertise to do so. *Id.*, at 801 (noting "chiropractors are generally not qualified to serve as experts in cases involving physicians"). The Court reasoned that, though a chiropractor may be highly credentialed, he or she does not have the same education, training or experience as a medical doctor, all of which are necessary to assess the hearsay opinions of the doctor. *Id.* The same result was reached in *Brooks v. Friedman*, 769 N.E.2d 696 (Ind. Ct. App. 2002) (holding that chiropractors are not qualified to serve as experts in cases involving physicians; therefore, chiropractors can not testify concerning medical doctors' reports).

A similar conclusion was reached in *Duncan v. George Moser Leather Company*, 408 N.E.2d 1332 (Ind. Ct. App. 1980), *reh'g denied*. Duncan called a rehabilitation counselor as an expert witness in his worker's compensation proceeding. In reaching the conclusion that Duncan was disabled, the rehabilitation counselor had relied on medical reports and psychological test results. He admitted to having no educational or professional training in medicine or psychology, but incorporated the doctor's and psychologist's opinions into his findings. The doctor and psychologist did not testify, and their written reports were not introduced as exhibits. Duncan's employer objected to the proffered testimony of the rehabilitation counselor in which he was expected to testify about the opinions upon which he had relied.

The *Duncan* court cited a three-prong test to determine whether an expert can testify about hearsay opinions contained in reports not offered at trial.

In order for the opinion to be admissible (1) the expert must have sufficient expertise to evaluate the reliability and accuracy of the report, (2) the report must be of a type normally found reliable, and (3) the report must be of a type customarily relied upon by the expert in the practice of his profession or expertise.

Id. at 1343. It concluded that the rehabilitation counselor lacked the necessary expertise to testify about the medical and psychological opinions.

Although parts two and three of this test are met here, part one is not. The witness relying upon or using the information must have some expertise in evaluating the content. [] Albright admitted he had no expertise to verify the reliability or accuracy of the reports. At trial an expert in one field cannot be a conduit for the opinions of an expert in another field. . . .

The primary purpose for requiring an expert to have the ability to evaluate the hearsay reports is to afford to the non-presenting party the right to meaningfully cross-examine the witness both as to his actual opinion and the reports and hearsay information upon which he bases his opinion. . . .

Id. (citing *Capital Improvement Bd. of Mgrs. v. Public Serv. Comm'n*, 176 Ind.App. 240, 375 N.E.2d 616 (1978); E. W. Cleary, McCormick's Law of Evidence § 15 (1972, 2d ed.)).

In cases involving life care planners, it is critical to ascertain the areas in which the expert is qualified to testify. In the unusual case where a life care planner is a medical doctor, he or she likely would be allowed to testify about medical opinions relied upon in arriving at the life care plan. Otherwise, Indiana law suggests that the life care planner – and his or her opinions about future medical costs – should be excluded. Whether such evidence would be admissible at trial, therefore, is critical when evaluating a case or claim in which the plaintiff has retained such an expert.

B. Future Medical Expenses

A life care plan will often include some estimate of the cost for future medical expenses. In Indiana, evidence of future medical expense requires a competent expert opinion. *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 278 (Ind. 2003). Medical bills already charged can usually be admitted under certain exceptions to the hearsay rule. However, the Indiana Supreme Court concluded that estimates of *future medical expenses* are different because they relate to events that have not yet occurred and may never occur. Estimates of future medical charges are not as reliable as medical bills already incurred because the amount of future medical charges is usually debatable, both as to the probability of the need for treatment and the method of estimating its cost. Consequently, evidence of future medical charges requires supporting testimony admissible under the doctrines governing hearsay and opinion testimony. In Indiana, claims of future medical expenses must be established by admissible testimony from competent witnesses.

A life care planner is not the same as a treating physician. As such, the life care planner is likely not qualified to testify about Plaintiff's need for future medical treatment. The holding in *Cook* says the need for future medical treatment and future medical costs must be introduced by

competent witnesses—which in most cases will be a medical doctor. According to Indiana Evidence Rule 413 and the Indiana Supreme Court’s decision in *Cook v. Whitsell-Sherman*, a life care planner who is not a treating physician should not be deemed competent to give opinions on future medicals.

C. Admissibility of Expert Opinion and Life Care Plan Methodology

Indiana Trial Rule 702 (emphasis added) reads as follows:

- (a) If *scientific, technical, or other specialized knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
- (b) Expert scientific testimony is admissible only if the Court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

This rule requires that the proposed expert witness have sufficient expertise in an area that his or her testimony would benefit a jury composed of laypeople. In addition, the method used by the expert must be scientifically valid. Essentially, the trial judge performs the role of gatekeeper, tasked with allowing expert testimony only if it is reliable and the witness offering it is qualified to explain it.

A life care planner should follow published standards in preparing and organizing the life care plan. A consistent methodology is essential to both the accuracy of the life care plan and admissibility under the *Daubert* standard. If the life care planner (or any expert, for that matter, fails to follow the standard methodology for their field, their opinions should be considered suspect and either discounted or targeted for exclusion at trial.

The following are examples of red flags to consider when reviewing the reliability of a life care plan:

- i All of the medical records and case materials used to prepare the life care plan were obtained from Plaintiff’s attorney, and the life care planner failed to request any records independently from Plaintiff’s treating physicians.
- i The life care planner did not meet with or speak with any of Plaintiff’s treating physicians during the actual preparation of the life care plan.
- i The life care planner was never told by any of Plaintiff’s other treating physicians that the treatment schedule described in the life care plan was necessary.
- i With regard to the diagnostic testing expenses listed in the life care plan, the life care planner testified the estimates were based on an *assumption* that the tests would continue, but admitted there were no physician recommendations to support that assumption.

- i The life care planner concluded that Plaintiff's entire prosthesis needed to be replaced every eighteen (18) months and calculated Plaintiff's future prosthetic cost based on an assumption that the entire prosthesis would be replaced at a regular interval. The life care planner did not consult with any other prosthetist concerning the cost estimate and was unaware if individual components of the prosthetic can be replaced as needed.
- i With regard to cost estimates, the life care planner testified she had no experience in medical billing, medical billing codes, and no background in accounting or economics. The life care planner also conceded she could not calculate the present value of future expenses. The extent of the methodology used to estimate future medical expenses was the simple multiplication of selected past medical bills by Plaintiff's generic life expectancy.

Methodology such as this is problematic and more likely to fail to meet the most basic standards to achieve consistency and arrive at needs-based recommendations.

III. Vocational Economics, Inc.: Work Life Tables and Loss of Earning Capacity

Since life care planners and vocational economists often go hand-in-hand, we wanted to briefly mention this latter issue. Vocational Economics, Inc. is a firm that frequently prepares life care plans and estimates of loss of earning capacity. Vocational Economics is a litigation firm, and is rarely seen outside of that context. Their life care plans and work life tables are the subject of significant scrutiny and criticism.

Many economists have criticized both the census data and its use to determine work life expectancy, and several published articles have rejected the Vocational Economics work life tables. First, economists such as Thomas Hale, an economist formerly employed at the Bureau of Labor Statistics, have argued that the census data was not intended to determine disability or to be used for work life expectancy purposes. (*E.g.* Thomas W. Hale, *The lack of a disability measure in today's Current Population Survey*, MONTHLY LABOR REV. 38, 39 (June 2001)).

The Census Bureau's website itself warns individuals to be careful about how to use the data, and strongly recommends that people **not** use the data for the purpose of determining work disability. In an article criticizing the Vocational Economics work life tables, three economists quoted the Bureau's website, explaining:

According to the Census Bureau, the questions underlying the CPS "were not designed or tested with the intent of measuring disability, and thus the reliability and validity of the estimates generated from these quantities is unknown."

Later, at page 3, the Bureau writes "it is important to note that these questions were not designed with a specific concept of disability in mind. The concepts measured by the questions are embodied in the questions themselves and may or may not be useful for any other specific purpose" The concluding sentence is "The user should assess the appropriateness of the 7-

question aggregate measure published by the Census Bureau (or derived from any subset of those questions) for their particular use and understand the limitations of these questions as measures of disability status overall, or of work disability in particular” Since the user is cautioned against using these tables for work disability, it is hard to see *any* use for these tables, or any tables or study which rely on them.

(James E. Ciecka, James D. Rodgers and Gary R. Skoog, *The New Gamboa Tables: A Critique*, J. OF LEGAL ECON. 61, 79-80 (Fall 2002)).

Similarly, various economists and vocational experts have criticized the method that Vocational Economics applies to the government data. In 2002, economists Skoog and Toppino wrote an article critiquing the work life expectancy tables. They concluded that Vocational Economics’ method was “demonstrably invalid and unreliable.” (Gary R. Skoog and David C. Toppino, *The New Worklife Expectancy Tables’ Critique: A Rejoinder*, J. OF FORENSIC ECON. 81, 96 (2002)).

By contrast, the only published articles we could locate supportive of the tables were written by people employed by or affiliated with Vocational Economics. As Mr. Skoog and Mr. Toppino noted, the fact “[t]hat only one organization would produce and promote Tables that are constructed with such invalid and unreliable methods speaks well of the rest of the profession and does not provide justification for their use.” Skoog & Toppino II. at 95.

In *Kempf Contracting and Design, Inc. v. Holland-Tucker*, 892 N.E.2d 672 (Ind. Ct. App. 2008), the court took the time to address the admissibility of expert testimony given by John Tierney of Vocational Economics, Inc. The *Kempf* court determined the plaintiff “failed to present any evidence to establish the scientific reliability of Tierney’s methodology in determining Tucker’s reduction in earning capacity and work life expectancy.” *Id.* at 678. As such, the trial court committed error when it allowed Tierney to testify.

Kempf, supra, at 678. A similar result was reached in *Ollis v. Knecht*, 751 N.E.2d 825 (Ind. Ct. App. 2001). The *Ollis* case did not involve Vocational Economics, but the Court was asked to exclude the testimony of an economist about the plaintiff’s limited work life potential. The economist was excluded because plaintiffs failed to meet their burden to show the methodology used was scientifically valid.

As in *Kempf* and *Ollis*, there is no evidence that Vocational Economics’ tables have been tested or subjected to rigorous peer review. Indeed, those peers who did review the tables (not counting those on Vocational Economics’ payroll) were uniformly critical of it. There is no evidence to show that the tables are used outside of the context of litigation, or that the data upon which the tables are based are reliable. Indeed, the author of the census surveys expressly recommends that the data not be put to the purpose to which Vocational Economics has put it. We believe any claim premised on lost work expectancy based on the opinion of Vocational Economics is worth viewing with a grain of salt and aggressively defending as inadmissible.

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Contesting Medical Expenses After *Sibbing*: No Fibbing!

On March 4, 2010, the Indiana Supreme Court tossed a bucket of ice cold water on the efforts of insurance companies and defense counsel to challenge claims involving unnecessary medical care by plaintiffs. In *Sibbing v. Cave*, 922 N.E.2d 594 (Ind. 2010), the Court held that the defendant could not challenge the plaintiff's request to recover for the costs of nerve conduction studies and passive medical care despite producing expert medical testimony that such care was unnecessary.

The facts of *Sibbing* may very well illustrate the common belief that bad facts make bad law. On October 27, 2005, in Indianapolis, Eric Sibbing, while travelling 45-50 mph and possibly higher, rear-ended a car operated by Amanda Cave and in which her daughter was a passenger. The Court made a point of including in its statement of the facts that Sibbing was adjusting his radio, was unaware that traffic had slowed ahead of him, and neither applied his brakes nor slowed his car before the forceful impact. The Court also noted that the vehicular damage was substantial.

Following the collision, Cave reported a headache but was able to drive herself home and to the ER three hours later. Two weeks later, Cave began a course of 14 treatments with Dr. Muhammad Saquib, Priority 1 Medical. She later underwent 40 treatments at Castleton Chiropractic.

Sibbing did not contest liability and called Dr. J. Paul Kern, a physiatrist, by video deposition. Prior to trial, the Court granted Cave's motion to strike portions of Dr. Kern's testimony that related to whether a nerve conduction study ordered by Dr. Saquib and all of Cave's chiropractic care was necessary. The jury returned a verdict of \$71,675 for Cave and \$325 for her daughter. The Court of Appeals affirmed and the Supreme Court granted transfer.

The Indiana Supreme Court first noted that Sibbing did not contest the "reasonableness" of the charges for Cave's medical treatment. Rather, Sibbing sought to convince the jury that the nerve conduction study and passive medical care Cave received four weeks after the collision was not necessary. The Court held that Sibbing could not contest the necessity of such care, even with expert opinion testimony.

The Court essentially reasoned that it would be unfair to second-guess the decisions made by a plaintiff's medical providers as well as the decision of plaintiffs as to which provider to seek treatment from. Accordingly, the Court interpreted the phrase "reasonable and necessary" as requiring (1) that the amount of expenses be reasonable; (2) that the medical treatment was the proximately resulted from the defendant's conduct; and (3) a medical provider's malpractice or overtreatment of a patient is within the "scope of liability" component of proximate cause.

Obviously, we must all be very concerned that *Sibbing* will embolden medical providers who engage in fraud and will spawn new such practitioners. However, there are reasons not to completely despair. First, as stated, *Sibbing* does not prevent a challenge to the reasonableness of medical charges. For example, a chiropractic bill with an adjustment charge of \$150 can still be challenged as unreasonable.

Second, medical treatment can still be challenged on proximate cause grounds. For example, if a plaintiff had a pre-existing condition similar to the condition treated for after the collision, an IME or peer review medical expert could find that the MVA was not the proximate cause of plaintiff's claimed injury. *Sibbing* permits such a challenge to a plaintiff's medical care.

Third, we hold out the hope that the Court would still permit a challenge of a plaintiff's medical care where it can be shown that plaintiff knew, or should have known, that the treatment administered was for fraudulent purposes. For example, there is a firm in Louisville which is being sued over collusive practices with medical providers. Of course, proving the fraud and plaintiff's participation in it will be very difficult in most instances. Nonetheless, the right set of facts may enable the Court to revisit and narrow the scope of its *Sibbing* decision.

The recent Indiana Court of Appeals decision in *Burton v. Bridwell*, 2010 WL 4546109 (Ind. Ct. App. 2010), a case our firm tried and defended on appeal, upheld another strategy for contesting the necessity of a plaintiff's medical care. *Burton* involved a T-bone motor vehicle collision in Bedford. We represented the UIM carrier which had paid \$100,000 in medical payments coverage. Bridwell's carrier paid her limits of \$100,000 before trial and Bridwell was dismissed. The trial proceeded against the UIM carrier with a stipulation that it would get a set off of \$200,000. The jury found for Burton but awarded just \$65,814 in damages which was reduced by 50% comparative fault. Since the UIM carrier had a \$200,000 set off, it was awarded a defense verdict and Burton appealed.

On appeal, Burton claimed, citing *Sibbing*, that the UIM carrier should not have been permitted to contest the amount of Burton's treatment (including eight surgeries) at Microspine, a Florida facility Burton found while vacationing nearly a year and a half after the accident. Utilizing Burton's own doctors who she consulted before seeking treatment with Microspine, the UIM carrier established that neither doctor thought she needed surgery. One of the doctors testified that the disc herniation for which he treated her had disappeared and there was nothing objective in Burton's spine that could explain her symptoms.

The Court of Appeals held that, unlike *Sibbing*, the UIM carrier had established a factual basis for the jury to conclude that Burton's decision to undergo the surgeries at Microspine was not reasonable in light of the recommendations of her two prior physicians that she was not a surgical candidate. The Court further noted that the UIM carrier was not contesting the necessity of care, but rather causation. One of Burton's physicians testified that the accident caused a right-sided disc bulge but not the left-sided degenerative changes. Additionally, one of the physicians testified that the right-sided disc bulge was gone before Burton underwent surgery and that her symptoms were not caused by her spine which was the injury she sustained in the accident. As such, the UIM carrier was permitted to challenge the Microspine treatment on causation as well as the reasonableness of Burton's decision to undergo the treatment.

Without question, *Sibbing* has made challenging the amount of medical expenses incurred by claimants more difficult in many cases. Expert opinion testimony critical of the type and duration of care will not be admissible in most instances. Going forward, therefore, the industry will need to focus more on the reasonableness of the medical expenses themselves, development of facts to

contest causation of the treatment rendered, and investigation into whether plaintiff's decision to choose a particular healthcare provider and/or treatment was, in fact, reasonable. As a firm, we have implemented some changes in strategy to avoid *Sibbing* problems for our clients, including educating the medical experts we utilize on the Court's decision in *Sibbing* and requesting that opinions be based on causation rather than the necessity of care. However, as *Sibbing* and *Burton* illustrate, whether medical care can be challenged is very fact-sensitive and requires vigorous analysis. As such, we remain available to evaluate the likelihood of a *Sibbing* problem and to offer recommendations for further investigation.

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UIM CASES

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Underinsured Motorist Trial Considerations

I. Is the jury entitled to hear evidence regarding either the tortfeasor's liability coverage limits or the plaintiff's UIM coverage limits?

Plaintiffs often seek to introduce evidence of coverage limits in a strategic attempt to increase recovery. However, Indiana courts have consistently held that evidence of whether a defendant carries liability insurance is not relevant to such issues as breach of contract or negligence and is, in fact, not admissible. Although liability insurance can be introduced to establish agency, ownership, control, bias, or prejudice of a witness, it is inadmissible upon the issue of whether the person acted negligently or otherwise wrongfully.

The rationale for excluding evidence of the tortfeasor's liability insurance is that the evidence will prejudice the jury against the defendant. Courts fear that if the jury knows the defendant carries liability insurance, the jury will be encouraged to award excessive verdicts, knowing that the defendant will not be the one who ultimately is obligated to pay the judgment. Consequently, evidence as to the existence of liability insurance or limits of the coverage is inadmissible. Personal injury attorneys seem to realize this, and rarely contest this issue.

A dispute frequently arises, however, with respect to whether evidence of a plaintiff's UIM limits is admissible. We have argued, successfully, that identifying the UIM coverage limits would also impermissibly interject insurance into the case and mislead the jury. Evidence regarding the amount of UIM coverage would inform the jury of three things – that the plaintiff has insurance coverage, that the defendant has insurance coverage (hence the identification of an “underinsured” policy, rather than an “uninsured” carrier), and that the defendant's limits were “inadequate.” When the tortfeasor remains a party at trial, this is arguably even more prejudicial to him or her than the introduction of the tortfeasor's own insurance limits. It implies that the tortfeasor was too cheap or irresponsible to procure adequate coverage limits.

Of course, neither the liability nor UIM coverage limit is relevant to the jury's fact finding mission. The only issues to be decided at trial with respect to the UIM claim are whether the tortfeasor was negligent and, if so, the amount to which the plaintiff is entitled due to the tortfeasor's alleged negligence. Coverage limits have no bearing on either determination.

In a case our firm tried earlier this year, plaintiff relied on *Allstate v. Hennings*, 827 N.E.2d 1244 (Ind. Ct. App. 2005), in an attempt to introduce evidence regarding policy limits. In *Hennings*, an uninsured motorist negligently rear-ended Krista Hennings' vehicle at a traffic light. Hennings sued Allstate to recover under her uninsured policy. The jury returned a verdict in excess of the coverage limits, and the court entered a judgment consistent with that amount. The trial court refused to reduce the judgment to the UM limits.

On appeal, the Indiana Court of Appeals held that the trial court erred when it rejected the UM carrier's tendered jury instruction, which informed the jury that it could not award the plaintiff more than \$100,000, the amount of her UM limits. The Court of Appeals reasoned that the instruction correctly stated the law, was supported by evidence at trial, and was not addressed by any other jury instructions.

Hennings evidences an old truism: one can win the battle, but lose the war. Indeed, the UM carrier's decision to propose such a jury instruction is inexplicable and was unnecessary. It is the role of the trial court to adjust a verdict to credit either party for any applicable credits or setoffs or limit it as needed. The trial court in *Hennings* committed reversible error when it refused to reduce the judgment to the applicable coverage limits. There was no reason to have the jury make such a limitation. In addition, the UM carrier could have entered into a coverage stipulation with opposing counsel, which will be addressed below.

Hennings is factually distinguishable from most UM/UIM trials in one primary way. It was the UM carrier – not the plaintiff – that sought to inform the jury of the policy limits. Presumably, evidence was introduced at trial (likely by the UM carrier) about the applicable limits. Accordingly, the instruction was consistent with the facts in evidence. It does not appear that there was an evidentiary dispute about the admissibility of the limits themselves. If the amount of UIM limits is not disclosed to the jury, then such an instruction would be outside the scope of the evidence presented. *Hennings* does not say that evidence of UM/UIM limits is admissible. Rather, it says that if the limits are in evidence, an instruction telling the jury that is the maximum recovery would be a valid instruction. This distinction is crucial. Unfortunately, *Hennings* remains good law and does provide a tool for plaintiffs to seek the admission of this prejudicial evidence. If the trial court does not understand the distinction, it could allow the introduction of UIM limits, which would likely result in an overinflated verdict.

II. Pre-Trial Stipulations

As previously suggested, Allstate could have sought opposing counsel's agreement to enter into a set of coverage stipulations. We have done so successfully in several underinsured motorist cases. In an attempt to timely and efficiently handle the above-stated issues, before trial of any UIM case, we seek to have plaintiff's counsel agree and stipulate to the following:

1. The applicable UIM coverage limit;
2. The applicable medical payments coverage limit;
3. The total medical payments made by the insurer to or on behalf of plaintiff;
4. The tortfeasor's liability coverage limits;

5. The total credit sum – reflecting the tortfeasor’s liability limits, the medical payments benefits paid, and any UIM advance payments – to which the UIM insurer will be entitled against any verdict;
6. That any information about medical payments coverage and associated benefits paid to or on behalf of plaintiff, and the existence or liability limits of the tortfeasor’s liability insurance, will be inadmissible at trial;
7. That the identity of the tortfeasor’s liability insurer and plaintiff’s UIM insurer will be inadmissible, and no reference to either insurer will be made at trial; and
8. That counsel for the UIM insurer will be referred to at trial in terms such as “an attorney for the defense” or “another attorney for the defense.”

Having these issues pinned down prior to trial alleviates the risk of having a judge who does not understand why a verdict in excess of policy limits must be reduced (as was apparently the case in *Hennings*). It also prevents the need from having a claim representative testify outside the jury’s presence at trial regarding the applicable limits and any MPC payments or advance payments made by the insurer. If plaintiff so stipulates, it also eliminates the need for lengthy and substantive motions in limine on the issue, reducing trial costs to the insurer. Sometimes, counsel are unwilling to stipulate, or will only stipulate on some of the above issues. In such a case, motions in limine are required to prevent the likelihood of an inflated verdict.

III. Even if the UIM coverage limits themselves are excluded, will the UIM carrier be identified as a party to the lawsuit?

The primary factor determining whether the UIM carrier’s identity can be disclosed to the jury is whether the tortfeasor is still a party to the action at the time of trial.

A. The tortfeasor is no longer a party to the action.

Not infrequently, the tortfeasor has been released from liability prior to trial. This occurs when the tortfeasor’s liability limits are offered, the UIM carrier waives subrogation and consents to the settlement, and plaintiff executes a release with respect to the tortfeasor. Once that occurs, the parties stipulate to the dismissal of all claims against the tortfeasor. In such a case, the only remaining defendant is the UIM carrier. In such a case, the jury is advised of the UIM carrier’s identity. Indeed, if the UIM carrier is not named, there will be no named defendant whatsoever.

In a recent case, a UIM carrier attempted to circumvent this by substituting the released tortfeasor as the named defendant. In *Brown-Day v. Allstate Insurance Company*, 915 N.E.2d 548 (Ind. Ct. App. 2009), Lobdell conceded fault for an automobile accident between herself and Brown-Day. Consequently, Lobdell’s liability carrier tendered her policy limits, and Lobdell was dismissed as a defendant with the consent of Brown-Day’s

UIM carrier. Two years later, Brown-Day's UIM claim went to trial. Fearing that the jury would return an excessive verdict if it was aware that an insurer was a party in the litigation, the UIM carrier filed a "Motion to Substitute, to Identify Michelle Lobdell as Sole Defendant," which the trial court granted. It also moved in limine to exclude reference to the insurer, the fact there was a UIM claim and the amount of UIM limits. The trial court granted the motion to substitute and motion in limine, and no reference to insurance occurred at trial.

The Court of Appeals reversed, holding that the substitution exceeded the parameters of the Indiana Rules of Evidence. "Evidence Rule 411 is not a mechanism providing for an outright substitution of parties so that the identity of a party as an insurer may be shielded. It does not contemplate the creation of a fiction to avoid possible prejudicial effects from a reference to insurance or an insurer." *Id.* It was not fair to drag Lobdell back into court two years after she had been released from liability. If it intended to keep Lobdell in the case, the UIM carrier should have objected to her dismissal and advanced funds so that she would remain a named party. The substitution of parties created a legal fiction, which the Court of Appeals would not sanction.

Clearly, once the tortfeasor has been released, the UIM carrier will be identified to the jury as the party defendant. In some cases, that is acceptable. Other times, however, such as where a particular trial judge evidences great antipathy for insurers (which would result in unfair rulings and might be apparent to the jury), it may be worth advancing the funds to keep the tortfeasor in the case to avoid such a result.

B. The tortfeasor is still a party to the litigation.

It is our position that, if the defendant is still a party to the litigation, the jury should not be informed that the plaintiff has UIM coverage for the same reasons previously stated – informing the jury will reveal that the plaintiff has insurance coverage, that the defendant also has insurance coverage, but that the defendant's limits were inadequate. Again, under Indiana law, the tortfeasor is entitled to have his or her trial conducted with no reference to insurance. Identifying the plaintiff's UIM carrier as a defendant violates Indiana law and unfairly prejudices the defendant.

However, while the UIM carrier should not be named, we believe that the UIM carrier's counsel should be entitled to participate in a manner which does not identify the UIM carrier's interest or involvement. We have customarily suggested (typically by agreement with opposing counsel, as described earlier in the discussion of pre-trial stipulations) referring to the UIM carrier's counsel as "another attorney for the defense," or something along those lines. In most cases, we have ultimately secured opposing counsel's agreement to go this route.

One could suggest that the UIM carrier should not be permitted to participate at trial at all because the alleged tortfeasor's attorney will defend the case. In *Westfield Insurance Company v. Axsom*, 684 N.E.2d 241, 243 (Ind. Ct. App. 1997), the Court of Appeals rejected such a limitation. In *Axsom*, the tortfeasor (Beard) had \$250,000 in liability

limits through Farm Bureau, while Axsom had UIM coverage in a greater amount with Westfield. The *Axsom* court held that Westfield's interests would not be adequately protected by having Beard's counsel defend the case alone. The court explained:

Westfield's interests may be adequately represented to the extent that Beard's liability does not exceed her policy limit of \$250,000.00. However, once that limit has been exhausted, neither Beard nor Farm Bureau has an interest in limiting Westfield's liability. Given the disparity in levels of coverage and exposure between the two policies, we conclude that Westfield has shown that its interests are not adequately represented by the existing parties to the lawsuit and that it is entitled to intervention.

Id. at 245. It further noted that the UIM carrier is entitled to "have a full and complete adjudication of the issues at a single trial." *Id.* at 243. In sum, the UIM carrier is entitled to participate actively at trial, but the involvement must be synthesized with the need to keep insurance out of the action against the identified defendant.

The same argument was adopted in *Wineinger v. Ellis*, 855 N.E.2d 614 (Ind. Ct. App. 2006). Wineinger sued Ellis under a negligence theory, and also named her own uninsured motorist carrier, Shelter, as a defendant in that same action. Prior to trial, Shelter asked the court for permission to exclude all reference to insurance, generally, and to Shelter, specifically. The trial court granted that motion, and the only defendant identified at trial was Ellis. Shelter's counsel acted on behalf of the defendant.

The Court of Appeals affirmed the court's exclusion of insurance. It noted that Wineinger's claim against Shelter was a contract action, and that her ultimate recovery from Shelter would be limited to what she would have recovered from Ellis if he had insurance, up to the policy limits, less any applicable setoffs. Under no set of circumstances would Wineinger be entitled to more from Shelter than Ellis was liable for. Essentially, Wineinger was allowed to be placed in the same position she would have occupied, had Ellis been insured. Since no further recovery could be had with respect to Shelter, the trial court's exclusion of all references to Shelter was proper.

III. Does payment of MPC benefits estop an insurer from contesting medical causation while defending a UIM claim?

Earlier this year, our firm tried a case which addressed this very issue. We defended a UIM claim by an insured. The insured's UIM limits were \$500,000, and the tortfeasor had \$100,000 in liability limits. The insured also received the benefit of \$100,000 in MPC benefits. The tortfeasor paid its liability limit and was released prior to trial.

Despite the payment of MPC benefits, medical causation was the primary dispute at trial. At trial, we introduced the testimony of two treating doctors and a treating physical therapist. Based on their testimony, we argued that less than \$9,000 of the medical bills

was caused by the accident in question. The jury agreed, and entered a gross verdict of approximately \$65,000, reduced by her comparative fault.

On appeal, Plaintiff argued that it was improper to suggest that any of the medical bills paid under MPC were not caused by the accident. Since the insurer paid the bills under MPC, Plaintiff argued, the insurer should be estopped from challenging them while defending the UIM claim. This issue was litigated extensively in the parties' appellate briefs.

In mid-November, the Court of Appeals issued its Order. *Burton v. Bridwell*, 2010 WL 4546109 (Ind. Ct. App. 2010). The Court discussed the other issues raised in the appellate briefs but, shockingly, failed whatsoever to address the question of whether it was permissible for State Farm to challenge causation under one coverage with respect to the same bills it had already paid under another, separate coverage. Intuitively, such a causation challenge must be permissible, or else the appellate court would have found error and remanded the case back to the trial court for a new trial. However, we would have liked greater clarity in its ruling since it was an issue of first impression in Indiana. The arguments we made in *Burton*, at the trial level and on appeal, follow.

A. Evidence of MPC payments is irrelevant to the UIM claim.

As you know, insurance companies follow different procedures when processing claims submitted under different coverages. Specifically, the standards under which insurance companies review and process bills under medical payments coverage is markedly different than in the context of a bodily injury or underinsured motorist claim. Insurers have an obligation to process bills under MPC coverage more quickly than they would if reviewing those same bills for a UIM claim. There is little, if any, opportunity to review the records thoroughly or secure an independent review of them. The fact that an insurer fulfilled its contractual obligation to expeditiously process and pay medical bills submitted under MPC cannot be used to prevent that same carrier from having an opportunity to demand that the defendant prove the elements of her case, namely that the accident proximately caused those injuries and damages. Allowing the plaintiff to tell the jury that the insurer paid the bills would gravely prejudice the defense.

Courts both in Indiana and in other jurisdictions treat multiple coverages under a single auto policy as separate from each other, and payment of benefits under one portion of the policy is not relevant to and does not waive an insurer's right to challenge another, separate coverage. For example, in *Fultz v. Cox*, 574 N.E.2d 956 (Ind. Ct. App. 1991), the court concluded that an insurer that paid MPC payments had not waived the right to raise coverage defenses under the liability section of the policy. The medical expenses were paid pursuant to the medical payment provision, not the liability provision under which the plaintiff sought recovery at trial. Similarly, an Indiana federal court determined that evidence of property damage payments did not estop an insurer from challenging and defending the plaintiff's underinsured motorist claim. *Barnhill v. Liberty Mut. Fire Ins. Co.*, 129 F. Supp. 2d 1192 (N.D. Ind. 2001).

Certainly, the fact that the UIM carrier might have also made MPC payments is not relevant to either of the two issues the jury was instructed it was to determine: (1) whether the plaintiff is entitled to recover from the defendant; and (2) if so, what amount the plaintiff would be entitled to recover.

Although no Indiana court had addressed the issue, courts in other jurisdictions have concluded that evidence of PIP or MPC payments is not admissible to suggest that the insurer has waived the right to challenge medical causation when defending a UM or UIM claim. For instance, in *USAA Casualty Insurance Company v. Shelton*, 932 So.2d 605 (Fla. App. 2006), reh'g denied, the plaintiff argued in closing that since USAA paid bills under its PIP coverage, it must have concluded that the bills were reasonable, necessary, and related to the motor vehicle accident at issue. The *Shelton* court explained that “actions taken by either party with regard to one coverage, i.e., PIP, do not bind that party with respect to other coverages under an automobile policy, i.e., UM.” It further noted that even if an insurer pays medical bills under PIP, it is still free to dispute the causal link between those bills and the accident when defending a UM or UIM claim.

Other courts have reached the same conclusion as did the *Shelton* court, including the New Jersey Supreme Court in *Bardis v. First Trenton Insurance Company*, 971 A.2d 1062 (N.J. 2009). The trial court allowed evidence of the insurer’s PIP payments at trial of the plaintiff’s UIM claim. Both the Appellate Division and Supreme Court disagreed, concluding that the PIP payments were irrelevant and holding that admission of evidence regarding PIP payments constituted reversible error. The *Bardis* court explained that an insurer’s decision to make payments under a PIP claim is not probative of causation. When a PIP payment is made, the insurer is not in a position to evaluate causation, as the insurer has not been afforded the discovery process involved in litigation. In addition, the PIP system seeks to ensure prompt medical care and prompt payment of those who provide the care. Allowing evidence of PIP as evidence of causation creates an incentive for the insurer to decline PIP payment, thereby undermining the goal of the system.

Although these cases are not binding on an Indiana court, they are consistent with *Fultz*. We will continue to present the argument that, since MPC and UIM are separate coverages, payment of bills under MPC should not waive the right to contest medical causation when defending an insured’s UIM claim. We are aware of no Indiana cases which would prevent an insurer from so defending the UIM claim.

B. Evidence of MPC payments is otherwise inadmissible.

We believe that there are several other reasons why evidence of MPC payments is not admissible at a UIM trial. First, payment of MPC benefits constitutes the “furnishing” of “valuable consideration” in attempting to compromise a claim. As such, evidence of such payments violates Indiana Rule of Evidence 408. We note that the same would be true, of course, of any advance payments made under the UIM coverage.

In addition, Indiana Rule of Evidence 409 provides:

Evidence of paying or furnishing, or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury, or damage to property is not admissible to prove liability for such injury or damages.

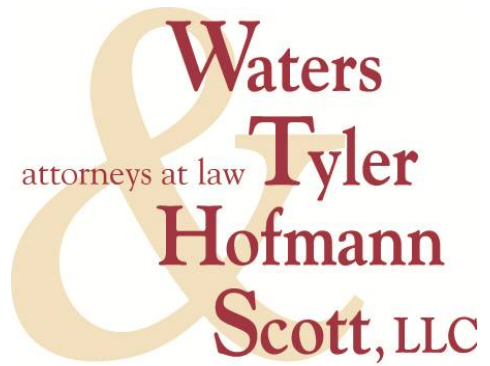
Even if the insurer pays the plaintiff's medical bills pursuant to the plaintiff's MPC coverage, liability for the accident often remains at issue, as do causation and the amount of damages, if any, occasioned by the tortfeasor's conduct. The insurer is entitled, under Rule 409, to litigate and contest liability, causation and damages, notwithstanding the fact of the MPC payments.

Finally, if the plaintiff is the one who pays the premiums for his or her auto policy, or the plaintiff's family does so, then the MPC payments would constitute collateral source payments, which are inadmissible under Indiana Code 34-44-1-2.

C. Evidence of MPC payments is damaging and must be prevented, either through stipulations or motions in limine.

Evidence that the UIM carrier paid bills under the plaintiff's MPC coverage can be particularly damaging. Jurors are not likely to understand how MPC and UIM claims are processed, and if they learn that the UIM carrier is disavowing bills that it had previously agreed to pay, they will likely view the insurer as disingenuous or attempting to avoid responsibility. It would be an uphill battle to educate the jury about the insurance claim-handling process, and likely one that would involve extensive testimony from the claims representative. To avoid this situation, and the likelihood of a substantially overinflated verdict, we strongly recommend attempting to procure opposing counsel's consent to a set of pre-trial coverage stipulations as addressed above. If counsel refuses to stipulate to the inadmissibility of MPC payments, then an aggressively-pursued motion in limine is necessary.

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Indiana State Bar Association

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Animal welfare issues, Michigan State football and basketball, gardening, cooking, genealogy, reading.

Sandra L. Heeke

Senior Staff Attorney

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Direct Dial: (812) 206-6048

Areas of Practice:

Insurance Defense

Insurance Coverage

Products Liability

Commercial Litigation

Construction Litigation

Labor Law

Civil Rights and Discrimination

Bar Admissions:

Indiana, 1981

U.S. District Courts, Northern and Southern Districts of Indiana

Education:

Indiana University (B.S., with highest honors, 1978)

Indiana University (J.D., cum laude, 1981)

Professional Associations and Memberships:

Floyd County Bar Association

Clark County Bar Association

Indiana State Bar Association

Christian Legal Society

Indiana Supreme Court Character & Fitness Committee

Fellows of Indiana Bar Association (1988 inductee)

Leadership of Southern Indiana

Personal:

Born 1955

Married to husband, Rick Bartlett, since 1978

Interests:

Tennis; golf; bicycling; member of Northside Christian Church, New Albany, Indiana

Chad M. Smith

Associate

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Direct Dial: (812) 206-6051

Areas of Practice:

Insurance Litigation

Personal Injury Litigation

Bar Admissions:

Kentucky, 2003

Indiana, 2006

Education:

DePauw University (B.A., 2000)

University of Louisville (J.D., 2003)

Professional Associations and Memberships:

Indiana State Bar Association

Kentucky Bar Association

Personal:

Born 1978

Married to wife, Renee

Children: Samantha and Genevieve

Interests:

Family, basketball, movies, games and college sports.

Eric T. Eberwine

Associate

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Direct Dial: (812) 206-6043

Areas of Practice:

Insurance Defense

Insurance Coverage

Fraud Investigation

Product Liability

Asbestos and Silicosis Litigation

Mold Litigation

Construction Litigation

Personal Injury

Bar Admissions:

Indiana, 2004

Education:

Capital University (B.A., cum laude, 1993)

New York Law School (J.D., cum laude, 2003)

Universität Salzburg, Austria 1991-1992

Westfälische Wilhelms-Universität Münster, Germany 2001-2002

Professional Associations and Memberships:

Indiana State Bar Association

Personal:

Born 1971

Married to wife, Shelley

Children: Anneliese and Brennan

Interests:

Photography, Ohio State football, landscaping, gardening, politics, history and music.

John R. Hofmann

Associate

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Direct Dial: (812) 206-6053

Areas of Practice:

Insurance Defense

Fraud Investigation

Personal Injury Defense

General Litigation

Bar Admission:

Kentucky, 1998

Education:

Western Kentucky (B.A., 1992)

Thomas M. Cooley Law School (J.D., summa cum laude, 1997)

National Moot Court Team

Associate Editor -- Law Review

Professional Associations & Memberships:

Kentucky State Bar Association

Personal:

Born 1969

Married to wife, Tricia

Children: Casey and Madison

Interests: Family, activities with the kids, guitar, camping, music and U of L basketball and football.

J. Scott Waters, IV

Member

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Direct Dial: (812) 206-6047

Areas of Practice:

Estate

Healthcare

Real Estate

Corporate

Regulatory

Bar Admissions:

Indiana, 1980; Texas, 1989; Kentucky, 1991

U.S. District Court, Northern District of Indiana

Education:

Purdue University (B.A., with distinction, 1976)

Indiana University (J.D., 1980)

Professional Associations and Memberships:

Floyd County Bar Association

Indiana State and Kentucky State Bar Associations

Southern Indiana Estate Planning Counsel (President, 2005-2006)

American Health Lawyers Association (past three-term board member; past member of the Audit Committee)

Board of Directors of Historic Locust Grove, Inc. (President, 2004-2008)

Speaker:

Various estate planning seminars annually

Real Estate Certification Program

Personal:

Born 1954

Married to wife, Anne

Children: Mallery, Megan, Michelle, and Molly

Interests:

Family activities, kayaking and fishing on the Blue River, golf.

Les D. Merkley

Associate

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Direct Dial: (812) 206-6050

Areas of Practice:

Family Law

Municipal Law

Zoning & Planning

Bar Admissions:

Indiana, 1997

U.S. District Courts, Northern and Southern Districts of Indiana

Education:

Indiana University (B.A., 1991)

Thomas M. Cooley Law School (J.D., 1997)

Professional Associations and Memberships:

Clark County Bar Association

Floyd County Bar Association

Indiana State Bar Association

Family and Juvenile Law Section, Indiana State Bar Association

Sherman Minton American Inn of Court

IU Southeast Alumni Board

Clark Co. Family Health Center Board

Floyd County Teen Court - Attorney Mentor/Advisor

University of Phoenix (Louisville Campus) - Faculty Member

Personal:

Born 1969

Interests:

The Green Bay Packers (Go! Pack! Go!), politics, history, fishing, cooking and country music.

Rick E. Bartlett

Senior Staff Attorney

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Direct Dial: (812) 206-6068

Areas of Practice:

Estate Planning

Estate Administration

Business Law

Real Estate

Bar Admissions:

Indiana, 1981

U.S. District Courts, Northern and Southern Districts of Indiana

Education:

Indiana University Business School (B.A., with highest honors, 1978)

Indiana University (J.D., cum laude, 1981)

Professional Associations and Memberships:

Floyd County Bar Association

Clark County Bar Association

Indiana State Bar Association

Southern Indiana Estate Planning Council (President 1988-1989)

Clark County United Way (past board member)

Leadership of Southern Indiana

Rotary Club

Personal:

Born 1956

Married to wife, Sandra Heeke, since 1978

Interests:

Travel; tennis; golf; bicycling; member of Northside Christian Church, New Albany, Indiana.