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Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association

A Message from the Chair

As this newsletter goes to press, our anguish and concern caused by the national tragedy of September 11th has been heightened by the acts of a madman sniper who has randomly killed defenseless men, women and a child, thereby inflicting untold horror and calamity on individuals and family members.

Moreover, at the national and state level we have been cautioned by a bleak economy, in part, caused by corporate malfeasance and the threat of war. Large numbers of employees as a result have lost their jobs and, through no fault of their own, their families have been severely impacted.

We as lawyers must be concerned as to what may befall our Constitution, our Bill of Rights, our legal institutions in the future, in this so-called, technological age. And yet, if these are lost or even diluted, we will have lost all that is precious to us.

We are all subjected, at one time or another, to the vicissitudes of life, but we can find some solace in the words of that great legal mind, Benjamin Cardozo. At a dinner in his honor, he said:

> *Sometimes in hours of dejection we say to ourselves that the travail has been wasted, that the good is not worth its cost in pain, that the world is blind, and dull, and unreceptive and indifferent. Then, of a sudden, there comes a revealing glare of light. An illness, misfortune, an anniversary . . ., brings vividly before us the scores and the hundreds, and even indeed the thousands, who have perceived and understood . . . what we were doing through all the years of silent drudgery; and in that moment we know that our misgivings were uncalled for, that the life, toilsome as it may have been, was not an unnoticed spasm of effort, a futile pulse of motion in the midst of a merciless infinity, but that it counted after all.*

On a good note, I want to re-emphasize that our Section experienced a most successful Summer Meeting that was held in Saratoga Springs. We were delighted to have our distinguished President of the

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State Bar Association, Lorraine Power Tharp, in attendance.

Lorraine not only attended our Executive Committee meeting, but she also attended our Program presentations. Immediately following our four-day meeting, I received a most gracious letter from our President extending her warm remarks about the excellent presentations of our Program participants and the genuine good feeling of our attendees throughout our four-day meeting.

Finally, I look forward to a wonderful response to our Annual Meeting in New York City. We have scheduled a joint dinner meeting with TICL at the Rainbow Room on Wednesday, January 22, 2003.

We also have a most exciting joint program with TICL on Thursday, January 23, 2003. The program, consisting of a complete mock trial involving a judge and jury, will be presented by the American Board of Trial Advocates (The Masters in Trial). Following testimony you will be able to observe the jury deliberation.

Seymour Boyers

2003 New York State Bar Association

ANNUAL MEETING

January 21-25, 2003

New York Marriott Marquis
New York City

Trial Lawyers Section Meeting
Thursday, January 23, 2003

(Joint Meeting with TICL Section)

Defending Damages in a Personal Injury Case

By Richard Enclerico

Virtually every personal injury case requires a defense to non-economic damages. The real concern, however, is whether that defense is thoughtfully prepared and skillfully presented.

A successful defense is not the result of the articulateness of a trial attorney. It is the result of formulating the correct defense themes, obtaining the necessary ammunition to substantiate those themes and then skillfully presenting them at trial.

Basically, plaintiff's job is to establish the necessary building blocks to construct a legally sufficient, and factually persuasive, damage case. The defendant must undermine that case (hopefully block by block) and also present affirmative proof in support of its defense. To do so takes the right stuff.

The Right Stuff

Designate the Appropriate Medical Expert

Defendant is at a distinct disadvantage in preparing its medical defense. An effective plaintiff's case is presented through the testimony of treating physicians who have "built-in credibility" because of their involvement in plaintiff's care and treatment. A juror's natural tendency is to believe those who actually treated the patient and counsel will be sure to remind jurors of the uniqueness of their medical role. In contrast, defendant is only allowed to conduct one or more medical examinations[1] which are necessarily tied to the litigation process. This reality provides fertile ground for plaintiff's cross-examination of the defense expert.[2] The defense doctor's vulnerability is enhanced if he or she has a heavy litigation background, has not reviewed all relevant medical records and tests, performed a limited physical examination, or has shown a bias by not conceding the truths of plaintiff's case.

The designation of an appropriate medical expert is therefore critical. While one school of thought prefers a "litigation-savvy doctor," it is recommended, particularly in cases of significant injury, to select highly credentialed medical specialists who can provide insight into the vulnerabilities of plaintiff's claims and a positive perspective on plaintiff's rehabilitative potential. For example, in cases of (conceded) orthopedic injuries, a physiatrist (Doctor of Rehabilitation Medicine) may be effectively used to testify how a prescribed program of rehabilitation can maximize plaintiff's recovery and functioning; despite the severity of the injuries.

In preparing any defense medical expert, counsel must provide the expert:

1. all records pertaining to plaintiff's past medical care;
2. all diagnostic films and studies;
3. all hospital records and doctor's notes; and
4. have all pertinent medical literature in the field reviewed.

Preparing for the Cross-Examination of Plaintiff's Expert

1. Investigate the background of plaintiff's medical expert.
   (a) *Directory of Medical Specialties*: provides background information on the doctor's education, area of specialty and current practice. This information can also be found in Marquis' *Who's Who* or by logging into www.ama-assn.org.
   (b) A doctor's professional certification can be verified at www.certifieddoctors.org.
   (c) *New York Jury Verdict Reporter*[3] provides information regarding trials and verdicts involving a particular expert.
   (d) *IDEX*:[4] provides expert research and transcripts for defense members.
   (e) *The New York State Education Department, Professional Licensing Division*[5] provides information regarding a doctor's license including suspensions, revocations and disciplinary proceedings. The information can also be accessed at www.health.state.ny.us.
2. Research medical literature on the issue.
   (a) Familiarize yourself with the specialized area of medicine involved in the case.
   (b) Research different "schools of thought" as to etiology, prognosis . . .
   (c) Develop positive medical points for cross-examination.
3. Obtain a complete set of medical records for impeachment purposes; including all treatment

notes of plaintiff's doctors, the complete hospital records, the actual diagnostic tests, the plaintiff's Worker's Compensation file, employment medicals . . .

4. Research background of plaintiff to undermine the medical expert's assumptions.
   (a) Central Index Bureau Search (CIB)
   (b) Worker's Compensation files [prior injuries, contrary medical reports, history of accident]
   (c) Surveillance[6]
5. Develop a vocational rehabilitation "profile" which assesses plaintiff's capabilities for alternative employment.
6. Prepare demonstrative evidence, i.e., excerpts of hospital/doctor notes, blow-up of deposition pages, anatomical charts . . .

Voir Dire: Medical Defense

Although it is important to start workshopping the themes of your medical defense early, it is even more important to learn enough about a juror's background to determine whether he or she has any bias rooted in his or her personal experiences. Such feelings are hard to overcome and may dominate a juror's view of the damages case. Inquiry should be made as to:

- Whether any juror, or close relative or friend, has had experience with a (similar injury); or any injury or accident for that matter.
- Whether the juror has any medical background or training [particularly in the medical specialty involved in the case]; or has practiced in the medical or health fields, i.e., hospital, nursing facility, HMO.
- Whether any juror has training, background or experience in psychiatry or psychology, or social work.

The defendant must also confront the fact that the juror will ultimately be asked to disbelieve, at least to some extent, plaintiff's treating doctors or other medical experts. Acclimate the jury to this concept and ascertain if they are capable of doing so.

- Does any juror have a doctor in their family or circle of close friends?
- How do you feel about doctors?
- Have you ever had surgery?
- Can you accept, or reject, a doctor's opinion depending on what you believe to be the truth, considering all the facts and circumstances of this case?
- Please understand (the defendant) will present a different medical perspective on plaintiff's injury. Basically, the defendant disagrees with certain of plaintiff's medical claims and anticipated proof; and will present its own medical evidence. Is it conceivable that doctors may differ in their views? Can you keep an open mind to these differing viewpoints?

Jurors should also be introduced to defendant's case in jury selection through pointed questions. The goal is to have the jurors begin thinking about the defense's themes early on. For example:

- Is it conceivable that plaintiff may not be as badly injured as he claims in this action for money damages?
- Although we agree that plaintiff has been injured, is it conceivable that he (she) has substantially recovered and will continue to recover in the future?
- Can you keep an open mind to the fact that while Mr. P may not return to work as a _____, he can still work and be productive?
- Can you keep an open mind to the fact that bones may heal, that a person can recover from an illness or trauma, that a person can get on with his or her life and be productive despite the injury?

Cross-Examination of Plaintiff's Medical Experts: Some Thoughts

(a) **Listen.** Anxious to make his or her points, the cross-examiner frequently does not truly listen to what the medical expert is saying. A preoccupation with making "your points" should not take precedence over listening to plaintiff's medical experts.

I learned this lesson early in my career. In a homicide prosecution, the defense psychologist [who was quite professorial in his appearance and presentation] testified that the defendants lacked the intellectual wherewithal to understand and waive the *Miranda* warnings, therefore warranting suppression of their confessions to a heinous crime. After jousting with the psychological expert on more technical grounds, I then simply listened to what he was saying and realized that the low IQ test results which formed the basis of his opinions were obtained as a result of administering the intelligence tests in English. The only problem with the IQ test

results was that the defendants spoke only Spanish. After the psychologist conceded that the defendants may not have understood "a word of what he was saying" the judge expressed an inclination to arrest the expert rather than ignore his conclusions. Simply listening to what the expert was saying was the key to developing a successful cross-examination.

(b) **The most fertile grounds of cross-examination are the records and notes of plaintiff's medical treatment.** Whether those records consist of the doctor's own treatment notes, the notes of other treating physicians, hospital records, employment/personnel files, the Worker's Compensation file, the "raw data" of the expert's testing, . . . there is usually ample ammunition in these documents to prove that plaintiff's condition is not as bleak as the doctor claims.

In a case involving an injured construction worker who sustained severe compression fractures to his thoracic vertebrae necessitating future fusion surgery, the office notes of a prior treating physician (in the same medical group) provided a different and more favorable view of the sequellae of plaintiff's injury.

Q. Mr. K was first treated in October of 1997, am I correct?

A. Yes.

* * *

Q. And when was the first time you treated Mr. K?

A. I believe it was in September of 1999.

Q. So from October of 1997 until December of 1999, over two years, who treated Mr. K?

A. Dr. A.

Q. And would you agree that as to his condition during that two year period of time, Dr. A would be a better judge of the patient's condition than you who saw him two years later; would you agree with me?

A. No.

* * *

Q. But Dr. A believed—based upon your review of his notes—that Mr. K's rehabilitation shouldn't have been any more than three to six months?

A. He believed that Mr. K might get better within three to six months.

Q. In fact, he characterized Mr. K's disability as only temporary, am I correct?

A. He says that he is totally temporarily disabled.

Q. Temporarily disabled; so when Dr. A saw him, he didn't even believe Mr. K was permanently disabled [as you have testified], am I correct?

A. No, not really.

Q. But he did use the word temporarily, am I correct?

A. Yes, he put the word temporarily.

* * *

Q. And Dr. A never considered surgery as an option, am I correct?

A. He would likely not consider surgery at this stage, no.

* * *

Q. Did Dr. A mention any symptoms that were consistent with a disc problem at all?

A. You mean radiculopathy?

Q. Whatever it may be, did he note any problem with plaintiff's vertebral discs in that report?

A. This one?

Q. Yes?

A. No.

Q. If there was something that suggested a disc problem, would it have been good practice to note it on his orthopedic report?

A. Yes.

Q. Yet he did not note anything at all when he saw Mr. K about a disc problem?

A. I don't see any comments.

Q. Nothing; so there is nothing to even suggest to you that Dr. A felt there was anything wrong with the discs in the two years that he saw the patient.

A. There is nothing in his notes to say that.

Q. And if there was something to indicate such a problem, he should have put it in, do you agree, yes or no?

A. Yes.

* * *

Q. If there is any problem with his discs, it may show itself on a neurological exam, am I correct?

A. It's very—that's very simplified and a lot of these are not yes/no questions, so I don't know how to answer them, but you can have herniated discs that don't cause neurologic injury, you can have herniated discs that do. In this case, you had no neurologic injury.

* * *

Q. So, in other words, they tested in the hospital every muscle down his legs and found no problem at all, am I correct?

A. Yes.

Q. And he had full strength in his legs, am I correct?

A. Yes.

Q. And then what is the last line?

A. It says, no evidence of myelopathy or radiculopathy.

Q. And would that suggest to you if you were reading this, Doctor, there was no problem with any of his discs at all at that time when he was being examined, yes or no?

A. No.

(c) **Prepare a complete chronological chart of plaintiff's medical treatment.** Usually, there is something in those records, i.e., a doctor's report, radiological study, treatment notes or other significant entry which plaintiff's expert did not review or consider in his findings. [The expert's report should note each significant medical record which was reviewed in support of the expert's opinions.] If a record contains favorable findings which were not factored into the expert's opinions, inquiry should be made whether those records are "medically relevant" to the plaintiff's treatment [or at least "helpful"] and whether having now been made aware of this information, the expert's opinions have changed in any way. The doctor's credibility will be adversely affected by failing to consider the relevant record and, even more so, by his intransigence in re-evaluating his opinions.

(d) **Explore alternative causes or explanations of plaintiff's injuries.** An example of this line of cross-examination occurred in a case where plaintiff's neurologist, a regular testifier, failed to admit that there were alternative explanations for an elderly plaintiff's unstable gait.

Question: Doctor, you testified that Mrs. K's instability in walking was due to the striking of her head against the windshield during this vehicular accident, am I correct?

Answer: Yes. . . .

Question: Doctor, how old was Mrs. K at the time of this accident?

Answer: Eighty-two.

Question: Doctor, could the aging process alone have caused Mrs. K some instability in her gait?

Answer: No, not necessarily.

Question: Could the fact that Mrs. K had recently undergone an operation for intestinal ulcers have possibly caused the weakness and instability of gait which you observed on your physical examination?

Answer: No, not necessarily.

Question: Are you aware that at the time you examined Mrs. K that she was suffering from cancer?

Answer: Yes, she mentioned it.

Question: Could the weakness from that disease have caused some instability in her gait?

Answer: Not necessarily.

Question: Doctor, were you aware at the time you examined Mrs. K that that cancer had metastasized throughout her body[7] and was found in two other locations?

Answer: Not really.

Question: Doctor, from a medical perspective, could a metastasizing cancer, for which she was receiving chemotherapy three times a week, cause some instability in her gait?

Answer: Possibly.

Question: Doctor, so that we're clear, is it your opinion that Mrs. K's advanced age, intestinal surgery, metastasizing cancer and chemotherapy did not cause her instability in walking—but rather it is solely attributed to her having struck the windshield on this particular occasion which is the subject of this lawsuit?

Answer: Yes, that is my opinion.

(e) **Compare the findings of plaintiff's versus defendant's medical experts.** Consider confronting plaintiff's medical expert with the particular findings [not conclusions] of the defense experts; particularly if the defense findings are credible in the context of the case.

Of course, if there are contradictions in the findings and conclusions of plaintiff's own experts, these contradictions should be capitalized on when cross-examining each of plaintiff's experts.

(f) **Bias: Collateral attack.** Do not necessarily begin with this line of cross-examination. Wait until the expert takes a position which suggests that he is, at least to some degree, an advocate for plaintiff rather than a neutral observer. At this point, develop his relationship with the plaintiff's counsel, the percentage of his practice which is devoted to litigation-related matters, his earnings from litigation, his fee for consultation and testimony, the conferences with counsel, any correspondence which has been exchanged between them, the consistency of his findings in similar matters, any inconsistent injury (based on prior transcripts). This line of attack is largely dependent on the ammunition which is available to establish that plaintiff's expert may have a financial or professional bias which would influence his or her objectivity.

(g) **Use the "raw data" obtained from the doctor's file to develop favorable defense points.** A typical example is the neuropsychological expert who has tested a brain-damaged plaintiff and determined that there are severe and global cognitive deficits. Oftentimes the actual test results show strengths in areas that are masked by the expert's conclusions.

Also, certain tests involve the examiner's subjective interpretation of the responses which may compromise the objectivity of the tests.

In one case, the neuropsychologist's interpretation of a plaintiff's psychological drawings provided a fertile ground for cross-examination and, as the initial point of attack on cross-examination, caused the jury to question the interpretative conclusions of an otherwise credible and highly qualified neuropsychologist.

(h) **Attempt to "normalize" plaintiff's functioning**. Establish that there are things that plaintiff can [and does] do. Hopefully, these points have been adequately developed during deposition or by surveillance and can now be used on cross-examination to portray to a jury that plaintiff is capable of performing and enjoying normal life experiences.

In the same way, defense counsel should prepare a profile of plaintiff's vocational capabilities. On cross-examination, defense counsel should attempt to establish that plaintiff's injury will not prevent him from developing those skills which will maximize his vocational potential. In one case, a service technician who was physically disabled from returning to that line of work admitted that he spent considerable time on his home computer and had refined his computer skills. His orthopedist was hard-pressed to deny that plaintiff's injury should not affect his ability to work in this sedentary occupation.

(i) **Plaintiff's treating doctors customarily prescribe a course of treatment designed to maximize the patient's functioning and recovery.** In the typical case, plaintiff's doctors formulate a treatment plan which, whether by surgery, physical therapy, rehabilitation or other means, is geared to maximize plaintiff's recovery. On cross-examination, plaintiff's medical expert should be examined as to how such future treatment has and will benefit the plaintiff. It is a rare case where there is no avenue of hope available to the injured plaintiff.

Evidentiary Considerations

1. Failure to comply with the rules governing the exchange of medical reports may result in preclusion.[8] The disclosure should address each of the conditions and sequellae which will be the subject of the medical experts' findings and opinions. Courts do allow certain leeway in this regard, particularly if there is no surprise or prejudice.[9]

   Likewise, CPLR 3101(h) applies to medical experts and the inadequacy of such disclosure may be the basis for preclusion.[10]

   In defending damages, it is essential that the expert disclosure provide meaningful information concerning the findings and factual basis for the expert's proposed opinions.[11]

2. **Plaintiffs Beware:** In order to recover for lost earnings, a plaintiff must establish, with reasonable certainty, the amount of the earnings by submitting documentary evidence in support of this claim.[12]

   In *Razzaque*, the First Department dismissed the jury's award for past and future lost wages, finding it speculative. The court stated that the plaintiff's testimony concerning his employment was "vague and unsubstantiated by any tax returns or W-2 forms." The lack of documentary evidence substantiating plaintiff's claim was a fatal flaw in his proof.

3. **Expert Testimony Based upon Medical Hearsay**

   Traditionally, opinion evidence is based on facts in the record or personally known to the witness. However, courts have recognized an exception to this rule where an expert witness bases his or her opinion upon materials accepted in their profession as reliable or upon a witness who is subject to full cross-examination at trial.[13] In *Hambsch*, the Court, while adhering to the *Stone-Sugden* rule (and rejecting the medical testimony because the out-of-court data had not been established as reliable) held that a physician's medical opinion may be based on "facts that are accepted in the profession as reliable in forming opinions." The exception is not without limits. A doctor's reliance on such professionally accepted material must assist the examining or treating physician in the diagnosis and treatment. Also, such evidence will not be admitted if it is unreliable,[14] serves as the "principal basis" for the expert's opinions on crucial issues[15] or when the data has never been produced.[16]

   The courts have not always been consistent, however. In *Freeman v. Kirkland*,[17] the court allowed into evidence "the complete medical file of plaintiff's treating osteopathic physician, including records, reports and correspondence generated by other medical specialists and laboratories where the treating physician's testimony at trial established that the medical records related to the diagnosis and treatment of plaintiff's injuries," but in *Serra v. City of New York*[18] the Court excluded the actual MRI report and records.[19] Recently in *Wagman v. Bradshaw*,[20] the court excluded a chiropractor from testifying as to the contents of an MRI report contained in his office file because he failed to produce the original films.

4. **Admissibility of Physician's Office Records**

   In *Williams v. Alexander*,[21] the Court sustained the admissibility of hospital record entries which "relate to diagnosis, prognosis or treatment" (or are otherwise helpful in understanding the medical and surgical aspects of the hospitalization) as within the business record exception[22] to the hearsay rule. In 1987, the Court likewise held that items in a physician's office records pertaining to the diagnosis or treatment of a patient are admissible: "Similar to hospital records, it is the business and duty of a physician to diagnose and treat a patient's illness. Therefore, entries in the office records germane to diagnosis and treatment are admissible, including medical opinions and conclusions."[23]

   A witness familiar with the record-keeping practices of the business is sufficient to lay the proper foundation.[24] However, a physician may be needed to explain medical terms[25] and establish the records' relevance to diagnosis and treatment.

More often, the treating physician provides the basis for the admission of his own office records.[26] Physicians are required "to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient."[27] The failure of a doctor to maintain proper records is a viable ground for cross-examination.

Reports of other physicians contained in a doctor's record are also admissible.[28]

Endnotes

1. CPLR 3121.
2. *See* B. Rabinowitz & E. Torgan, *Cross-Examination of a Medical Expert*, N.Y.L.J., July 25, 2000, Aug. 22, 2000.
3. Moran Publishing Co., (800) 832-1900.
4. (800) 521-5596.
5. Records Access Unit, Albany NY 11230.
6. *See* CPLR 3101(I).
7. Medical records regarding this treatment had already been placed in evidence.
8. Uniform Rules for the New York State Trial Courts § 202.17(b), (g), (h); *see*, *e.g.*, *Baden v. D.L. Peterson Trust*, 190 A.D.2d 705, 593 N.Y.S.2d 311 (2d Dep't 1993); *Berson v. Chowdhury*, 251 A.D.2d 278, 674 N.Y.S.2d 384 (2d Dep't 1988).
9. *Kellner v. DeBushey Coach Ltd.*, 138 A.D.2d 460, 526 N.Y.S.2d 115 (2d Dep't 1998); *Rhoden v. Montalbo*, 127 A.D.2d 645, 511 N.Y.S.2d 875 (2d Dep't 1987).
10. *Hubbard v. Platzer*, 260 A.D.2d 605, 688 N.Y.S.2d 672 (2d Dep't 1999); *Holder v. Bowery Savings Bank, Inc.*, 250 A.D.2d 813, 673 N.Y.S.2d 460 (2d Dep't 1998).
11. *See Busse v. Clark Equipment Co.*, 182 A.D.2d 525, 583 N.Y.S.2d 243 (1st Dep't 1992); *Chapman v. State of New York*, 189 A.D.2d 1075, 593 N.Y.S.2d 104 (3d Dep't 1993) ("the responses were wholly inadequate and in fact so general and nonspecific that the [State] has not been enlightened to any appreciable degree about the content of this expert's anticipated testimony"); *Oden v. Bolton*, 137 A.D.2d 878, 880, 524 N.Y.S.2d 562 (3d Dep't 1998) (preclusion a proper remedy for non-compliance with CPLR 3101(d)(1)); *Barzaghi v. Maislin Transport*, 115 A.D.2d 679, 497 N.Y.S.2d 131 (2d Dep't 1985), *appeal dismissed*, 67 N.Y.2d 852, 501 N.Y.S.2d 660 (preclusion of expert testimony was proper where plaintiff had never mentioned the basis of liability to be discussed by the expert); *Broissoit v. O'Brien*, 169 A.D.2d 1019, 565 N.Y.S.2d 299 (3d Dep't 1991) (economist's expert disclosure must provide grounds for his opinions).
12. *Razzaque v. Krakow Taxi Inc.*, 238 A.D.2d 161, 656 N.Y.S.2d 208 (1st Dep't 1997); *Poturniak v. Rupcic*, 232 A.D.2d 541, 648 N.Y.S.2d 668 (2d Dep't 1996); *Papa v. City of New York*, 194 A.D.2d 527, 598 N.Y.S.2d 558 (2d Dep't 1993); *Nelson v. 1683 Unico Inc.*, 246 A.D.2d 447, 668 N.Y.S.2d 375 (1st Dep't 1998).
13. *Hambsch v. New York City Transit Auth.*, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984); *People v. Stone*, 35 N.Y.2d 69, 358 N.Y.S.2d 737 (1974); *People v. Sugden*, 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1975).
14. *See Hambsch*, 63 N.Y.2d 723.
15. *See Borden v. Brady*, 92 A.D.2d 983, 461 N.Y.S.2d 497 (3d Dep't 1983); *Brown v. County of Albany*, Lexis 4417 (3d Dep't 2000); *Schwartz v. Gerson*, 246 A.D.2d 589, 668 N.Y.S.2d 223 (2d Dep't 1998).
16. *See Holshek v. Stokes*, 122 A.D.2d 777, 505 N.Y.S.2d 664 (2d Dep't 1986) (Court permitted plaintiff's treating doctor to give testimony based upon his examination of the plaintiff, his reading of an x-ray and the report of another doctor since material ". . . is of a kind accepted in the profession as reliable in performing a professional opinion" and ". . . while not in evidence, the defendant had a copy of both the x-ray and the report, and accordingly, he was not foreclosed from effective cross-examination.").
17. 184 A.D.2d 331, 584 N.Y.S.2d 828 (1st Dep't 1992).
18. 215 A.D.2d 643, 627 N.Y.S.2d 699 (2d Dep't 1995).
19. *See also Ebanks v. New York City Transit Auth.*, 118 A.D.2d 363, 504 N.Y.S.2d 640 (1st Dep't 1986) (where the court excluded the testimony of plaintiff's medical expert with respect to a pelvic fracture in the absence of the x-ray upon which the expert relied).
20. 292 A.D.2d 84, 738 N.Y.S.2d 421 (2d Dep't 2002).
21. 309 N.Y. 283 (1955)
22. CPLR 4518.
23. *Wilson v. Bodian*, 130 A.D.2d 221, 519 N.Y.S.2d 126 (2d Dep't 1987).
24. *Trotti v. Estate of Buchanan*, Lexis 4955 (3d Dep't 2000); *McClure v. Baiers Automotive Service Center*, 126 A.D.2d 610, 511 N.Y.S.2d 50 (2d Dep't 1987).
25. *See Wilson*, 130 A.D.2d 221.
26. *Napolitano v. Branks*, 141 A.D.2d 705, 529 N.Y.S.2d 824 (2d Dep't 1988).
27. 8 N.Y.C.R.R. § 29.2(a)(3); *see Osowicki v. Young*, 140 A.D.2d 898, 900, 528 N.Y.S.2d 716 (3d Dep't 1988).
28. *Fanelli v. Lorenzo*, 187 A.D.2d 1004, 1005 (4th Dep't 1992); *Cohen v. Haddad*, 244 A.D.2d 519, 520 (2d Dep't 1997).

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Presentation of Damages in a Personal Injury Case—The Plaintiff's Perspective

By Anthony H. Gair and Howard S. Hershenhorn

I. The Starting Point

In order to maximize the eventual recovery on behalf of a plaintiff, a solid foundation supporting the damages claimed must be built. The construction of this foundation begins at the first interview with the plaintiff.

The following areas should be explored during the first interview:

a. All current treating physicians, hospitals and other health care providers.

b. Complete details concerning plaintiff's medical history and injuries.

c. Family medical history in cancer and brain damaged baby cases.

d. Educational background.

e. Employment history.

f. Collateral source providers.

g. Prior and/or current lawsuits.

h. Criminal record.

Medical Records

Obtain complete hospital records not merely abstracts. The urge to save money must not outweigh the fact that if the plaintiff's attorney does not have complete hospital records he will be at a distinct disadvantage at trial. Nurses' notes, for example, provide crucial information regarding a plaintiff's day-to-day condition in the hospital and are indispensable in supporting the plaintiff's claim for pain and suffering. Such notes must be gone through diligently in order to properly prepare the Bill of Particulars so that the defendant is made aware of the magnitude of the injury claimed. They are also essential for questioning of the plaintiff's physician at trial and to incorporate into plaintiff's summation.

All pertinent X-rays, CT scans and MRIs must also be promptly obtained. There is nothing more disheartening than attempting to obtain these years later only to learn that they cannot be located by the hospital.

A well-known trial attorney once answered, when asked at what point he began preparing his summation "When I first meet the plaintiff." The point is the plaintiff's attorney must always have his eye on the trial and what evidence will be required to maximize his client's recovery. As another sage said, "Cases prepared to be settled are tried. Cases prepared to be tried are settled."

II. Demonstrative Evidence

Depending on the injuries sustained by the plaintiff, there are various types of documentary evidence which are crucial to presenting the damages at trial.

Photographs

In an auto accident case, photographs of damage to the vehicles are important to show the violent nature of the crash. In a scarring or traumatic amputation case, photographs of the plaintiff are essential. In a products liability case, photographs of the product which caused the injury are, of course, necessary to explain to the jury the mechanism of injury. The plaintiff's attorney must use his imagination and constantly ask: How can I best convey what has befallen the plaintiff to a jury?

Anatomical Models

Models of every part of the body are available at a minimum cost and are highly effective in conveying to the jury the debilitating effect of the injury to the plaintiff. These models can be obtained from, among others, the Anatomical Chart Company, 8221 Kimball Avenue, Skokie, Illinois, 60076-2956. Phone number 847-674-0211.

Medical Illustrations

The best known medical illustrator of our time was the late Frank H. Netter, M.D. whose medical illustrations are contained in his *Atlas of Human Anatomy*, Noratis, East Hanover, New Jersey. Relevant illustrations should be blown-up for use at trial in conjunction with the testimony of the physician testifying on behalf of plaintiff.

Medical Illustrations of Injuries

If the severity of the injury justifies the expense, the plaintiff's attorney should consider retaining a medical illustrator. Working with the physician who will testify as to the injuries, as well as the medical records and X-rays, the illustrator can prepare medical illustrations depicting the injuries sustained which emphatically bring home to the jury the devastation wrought upon the plaintiff.

Surgical Hardware

In a case in which hardware has been utilized to repair fractures, the plaintiff's attorney should obtain exemplars of the hardware used to show the jury what has been required to be placed in the plaintiff's body. Photographic reproductions of X-rays should also be made.

Blow-Ups of Hospital Chart

Significant pages of the hospital chart, such as the operative report and X-ray reports, should be blown-up to be used at trial.

Day-in-the-Life Videos

In catastrophic injury cases, day-in-the life videos are compelling evidence and demonstrate the suffering the plaintiff must endure on a daily basis. The plaintiff's attorney must work with the videographer to edit these to no more than ten minutes. Obviously the unedited and edited versions must be exchanged with the defendant.

Accident Reconstruction Animations

Assuming a competent reconstruction and detailed scene and vehicle dimensions survey, a very effective way of presenting your version of an accident scenario is through an animation. For an animation to be effective as well as admissible, it must be based upon a sound factual basis. Infrared cameras can be utilized to perform an accurate scene survey, including plotting vehicle crash damage. The reconstructionist must work on the animation together with the animator to lay a proper foundation for admissibility.

III. Learning the Medicine

The days in which a plaintiff's attorney could get up and merely do a collateral attack upon the defendant's expert physician are long gone. It is essential for the plaintiff's attorney to have an intimate knowledge of the area of medicine involved. The following are basic textbooks on various areas of medicine:

A. Orthopedics

1. **Campbell's Operative Orthopedics**
   Mosby-Year Book, Inc.
   11830 Westline Industrial Drive
   St. Louis, MO 63146

2. **Rockwood and Green's Fractures in Adults**
   Lippincott, Williams & Wilkins
   530 Walnut Street
   Philadelphia, PA 19106

3. **Depalma's The Management of Fractures and Dislocations, an Atlas**
   W.B. Saunder's Company
   West Washington Square
   Philadelphia, PA 19105

B. Obstetrics

1. **Williams Obstetrics**
   McGraw-Hill

2. **Danforth's Obstetrics and Gynecology**
   Lippincott, Williams & Wilkins

C. Neurology

1. **Merritt's Textbook of Neurology**
   Lippincott, Williams & Wilkins

D. Psychiatry

1. DSM-IV-Diagnostic and Statistical Manual of Mental Disorders
   American Psychiatric Assoc.
   Washington, D.C.

E. Other Sources

1. The *current* series published by Appleton & Lang, 800-423-1359, publishes one-volume paperback editions in the following areas of medicine:

   i. Medical Diagnosis and Treatment
   ii. Pediatric Diagnosis and Treatment
   iii. Gastroenterology
   iv. Orthopedics
   v. Cardiology
   vi. Vascular Surgery
   vii. Surgery
   viii. Surgery
   ix. Obstetrics and Gynecology
   x. Critical Care
   xi. Emergency Medicine

2. Internet

   i. **PubMed**, a service of the National Library of Medicine, provides access to over 12 million MEDLINE citations.

   ii. Online medical dictionary—www.cancerweb.ncl.ac

   iii. Food and Drug Administration—www.fda.gov

IV. The Expert

1. Treating Physicians

All treating physicians should be contacted in order to determine whether they will testify. It is always preferable to have the treating physician testify as to the plaintiff's injury. It avoids collateral attack and, conversely, sets up the collateral attack on the defendant's hired expert.

2. The Consultant

If the treating physician or physicians refuse to testify, a consultant must be obtained. It is imperative that the plaintiff see the physician more than once. In a significant injury case the plaintiff should be directed to see the consultant on a regular basis.

3. Life Care Planners and Economists

In catastrophic injury cases it is important to retain a life care planner who will determine the annualized costs of medical treatment required by the plaintiff. An economist will then be retained to project these costs into the future. The economist will also project future lost earnings.

4. Vocational Expert

In a significant injury case the plaintiff's attorney should consider retaining a vocational expert to evaluate the effects of the injuries on the plaintiff's future vocational capacity, employability and earning capacity.

V. Direct Examinations of Plaintiff's Expert Physician

1. The great Henry Miller said, "If cross-examination is the art of destruction, then direct is the art of construction. A good direct is a conversation." When the plaintiff's physician is on the stand, plaintiff's counsel should step back and allow the expert to speak to the jury, to educate them. The focus should be on the physician, not the attorney. The questions should be such as to allow the expert to fully explain the area of anatomy involved, the injury, the treatment and the effect of the injury upon the plaintiff's life.

2. Basic Areas Of Direct

   (a) **The Expert's Qualifications**

   Have the expert fully describe his professional background. Never accept a stipulation from the defendant as to the expert's qualifications. You want the jury to hear the qualifications.

   (b) How the physician came to treat the plaintiff. If the physician is a consultant you retained, bring that out on direct. For example: "Pursuant to my request, did you on several occasions examine the plaintiff?"

   (c) **Fee for Testimony**

   Don't leave this for cross. People expect professionals to be paid. Bring this out and the fact that the physician has had to take time away from his practice to be in court.

   (d) **Hospital and Medical Records**

   Go through these in detail with the physician. Don't be a minimalist. Remember you are not only trying the case for the jury but making a record for the Appellate Division.

   (e) **Demonstrative Evidence**

   This is where the aforementioned medical illustrations, anatomical models, etc. come into play. Use them to have the physician educate the jury as to the parts of the body involved and the effects of the injuries thereon.

   (f) **Pain and Suffering**

   The physician must be extensively questioned as to the pain-producing nature of the injuries. The nurses' notes should also be utilized to confirm the pain suffered by the plaintiff as a result of the injuries.

   (g) **Proximate Cause and Permanency**

   Don't forget these two mandatory questions. For example:

   Causation: Have physician assume facts of accident, then:

   > I want you to assume the findings in the hospital record and your treatment as you just testified to, the findings in your office records maintained by you in the course of your professional practice and as testified to. Having all that in mind, Doctor, in your opinion, with a reasonable degree of medical certainty, was the accident of (date of accident), the competent producing cause of the injuries you have testified to?"

   Permanency

   > Now, Doctor, I want you to assume all of that which I just asked you about; also—assuming all those facts and also that it's now some years subsequent to this accident, and based upon your testimony of the treatment you gave to the plaintiff, based on numerous examinations and your office records, Doctor, in your opinion, with a reasonable degree of medical certainty, are the con-

ditions, injuries that you have described as being permanent, of a permanent and lasting nature that the plaintiff will suffer from for the rest of his days?"

VI. Direct of the Plaintiff

The goal is for the jury to like your plaintiff and for his or her story to sound credible. Recognize and deal with the particular areas of cross during your direct. Take care of the liability issues before discussing the injury. Ask direct questions regarding pain and suffering. Show the jury scars when appropriate but make sure not to overdo it.

VII. Cross-Examination of Defendant's Expert

(a) **Collateral Attack**

The defendant's expert will usually be an expert who has testified many times. It is incumbent upon the plaintiff's attorney to have obtained all available information on the expert. A jury verdict search should be done in which all of the cases in which the expert has testified are obtained. The attorneys in those cases should be contacted in an attempt to obtain transcripts of his prior testimony for use as impeachment.

The following is an example of a basic collateral attack:

Q. Doctor, you're no stranger to the courtroom, are you?

A. That is true.

Q. You have been in the courtroom many times over the years?

A. True.

Q. You have been coming into Court well over 10 years now, true?

A. Yes.

Q. As I understand it, you now testify two to three times a month?

A. Approximately.

Q. Not including testifying, is it fair to say you examine about 25 plaintiffs a week on behalf of defendant's law firms?

A. I examine about 25 people a week who are being sent to me by the defense for an evaluation.

Q. Now, these plaintiffs that you examine, such as the plaintiff, you don't render any treatment to them, correct?

A. No.

Q. You examine them, and give defense attorneys a report?

A. True.

Q. Is it correct for these reports you charge $900?

A. Yes.

Q. Now, Doctor, is it fair to say you earn approximately $10,000 per week examining plaintiffs in lawsuits on behalf of defendant's attorneys?

A. Yes.

Q. Now, is it fair to say, Doctor, for examining plaintiffs for defendant's attorneys and also testifying in court, you make about $1,500,000 a year?

A. Yes.

Q. Now, Doctor, you mentioned you're board certified, true?

A. True.

Q. Doctor, a physician goes to take the boards, there are two parts to those boards, yes or no?

A. Yes, there are.

Q. There is a written part, correct?

A. Yes.

Q. And there is an oral part?

A. Correct.

Q. You failed the board examinations a number of times?

A. Yes.

(b) **Impeachment with Prior Testimony**

Should you be fortunate enough to have obtained prior testimony which is inconsistent with the defendant's expert on a material issue, the prior testimony should be used to impeach the expert. Do not ask the expert if he recalls testifying in the case, rather ask him as follows:

Q. Doctor, you testified in the case of *Jones v. Day*, true?

A. I don't recall.

Q. (Showing transcript) That is you, Dr. Smith, is it not?

A. Yes.

Q. You were retained by the plaintiff's attorneys in that case, were you?

A. Yes.

Q. You testified at page 5 line 7 as follows, did you?

(Read pertinent questions and answers)

Q. Doctor that was your testimony at that time when you testified for the plaintiff, yes or no?

A. Yes.

(c) **Cross-Examination on the Merits**

If the plaintiff's attorney has learned the medicine, there is no reason he should not have the confidence to attack the testimony of the defendant's expert on the merits. The following is an example of a portion of a cross-examination of defendant's orthopedic surgeon in a trimalleolar fracture case:

Q. Do you agree that a fracture as sustained by the plaintiff is a serious physical injury?

A. Yes.

Q. In fact, not only was the mortise disturbed, which is that pocket of bone made up by the lateral malleolus which is the end of the fibula, but also the medial malleolus, which is the distal end of the tibia, and the posterior malleolus, true?

A. Yes.

Q. The talus fits into this cup, and that is what gives the ankle stability?

A. That's right.

Q. More than the knee that relies more on ligaments and tendons.

A. Exactly.

Q. The problem with a trimalleolar fracture is that all those three bones anchoring the ankle are fractured?

A. That's correct.

Q. As a result of that, the talus, which is that lump of bone that fits into it was dislocated?

A. That's correct.

Q. The talus articulates or proximates the distal and or the far end of the tibial, is that correct?

A. Yes.

Q. Normally?

A. Yes.

Q. The problem with a dislocation, certainly a posterior dislocation of the talus, as we had here, is that it can have an impact on the articular surface of the tibia.

A. It certainly does.

Q. And the articular surfaces of bone, no matter what part of the body, is that smooth area of bone that allows an easy movement of one bone over the other, is that correct?

A. Yes.

Q. When the articular surface is displaced, we have the precursor of traumatic arthritis.

A. You may.

Q. In this case we do.

A. Yes.

VIII. Summation

(a) It is important to speak with the jury about the nature of the injury and pain and suffering and the devastating effects upon a person. People naturally do not like to dwell on another's pain and it is difficult for them to understand how an injury and pain can deeply and permanently affect a person's life. The plaintiff's attorney must develop themes for communicating this to a jury. The late Moe Levine was famous for the "Whole-Man" theme which he used to great effect over the years. Whatever the theme chosen, it must feel comfortable to the attorney. Once thought out, it may be used over and over again. The following are general themes which we have found useful in assisting a jury to understand the calamity which has befallen the plaintiff:

You know, there is no yardstick. There is no magical formula to measure the pain and suffering of another human being. It's a fact, I think, well-known that all of us shy away from focusing on the pain of another person. And I think it's very understandable. It's almost a defense mechanism. It brings us, when we have to do that, closer with our own mortality and our own fears about this type of pain, 'cause let's face it, we all have that. We don't focus on it. We couldn't get by each day if we did. It's difficult.

But in these last few minutes I am going to sit down soon and my role in this case is over. I am going to sit down soon and it will be up to you. Because the plaintiff can never, ever come back to court again. Ever. No matter what happens to him. He can never ever come back. And in these last few moments that are left to us it is our duty, it is your oath to focus on the pain and suffering that the plaintiff has endured and will continue to endure for the rest of his days.

* * *

It's your decision, and it's a grave responsibility, for your decision is *it* for the plaintiff. It's up to you to make sure that he receives just compensation. What is pain? You know the law says that we can put a person to death. We can put a person to death who legally is convicted of certain crimes, but we cannot cause that person pain because the infliction of pain is cruel and unusual punishment.

* * *

Drug companies, as we know, make billions of dollars a year on pain medication. All you've got to do is walk into Duane Reade. We've all been there. Row after row after row of pain medications. Advil, Aspirin, Anacin, Motrin, you name it, to give relief for the slightest type of pain. Think about that. Pain is a condition, and pain is a condition of the type the plaintiff had which is not only debilitating, it's terrifying, and the type of pain he suffered in that hospital is all-encompassing. And the pain he will continue to suffer for the rest of his days is debilitating. He is a tough kid. He wants to work and he is. He is doing what he can do, but that pain will always be with him. A pain like this which is unremitting deprives someone of their God-given right to enjoy life. And the plaintiff was robbed, by the negligence of the defendant, of his God-given right to the enjoyment of his life. It's all of our rights. We take pleasure in things. There are certain things all of us do that we really take pleasure in. Recreational type of things. He can't do them anymore. And he never will be able to do them. It's taken away from him and it's only in a courtroom such as this where we would even equate that type of pain with a sum of money. 'Cause I'll tell you something right now, the plaintiff would give every nickel he has, his last dime, if he could turn the clock back to prior to this accident. Give everything he had. So it's only in a courtroom where we can even equate this type of pain with money. It's been six years—and I am going to wrap it up. It's been six years since this catastrophe. As I told you before, he can never ever come back into court again. This is it. It's your responsibility.

(b) The jury should also be reminded at the end of the summation of their commitment to render a verdict based on the evidence and that it is their responsibility to render a just verdict. The following is one of many methods of doing so:

> Back when we first met during jury selection—it seems we've been together a long time, and you'll get rid of me soon, but it's been a pleasure, really. But I asked each of you—and I tell you, I don't ask questions for no reason—I asked each of you, should the evidence justify—and I told you it's a tough question at that time, but now you know, now we're all in the same position. I asked you, should the evidence justify, would you have any hesitancy in returning

a substantial verdict for the plaintiff. And I recall all of you telling me, if the evidence justifies it, we can do it. And I submit to you, members of the jury, the evidence justifies nothing less. Verdicts aren't large and verdicts aren't small. Verdicts are either just or they are unjust. And a just verdict is a verdict based upon the evidence.

I've had the responsibility for this case for a good many years. As you all know—it's always hard to sit down—but shortly, his Honor is going to charge you on the law, and you're going to retire to deliberate, and that responsibility will pass to you to render a verdict. A fair verdict, a just verdict based upon the evidence, a verdict of which you can say when you leave here we have done justice. For your verdict will stand for our time. This is *it* for the plaintiff. And on behalf of him, I thank you.

(c) Countering the defendant's plea not to be guided by sympathy:

The defendants have said to you don't let sympathy guide you, be harsh, be cold. I say to you, be just. Use your common sense, your sound judgment, your understanding and comprehension as to what these defendants have caused and render a just verdict.

An excellent compendium on asking the jury for damages is "Asking the Jury for Money: How and When to Lay the Foundation," Harvey Weitz, Esq., New York State Trial Lawyers Institute, 132 Nassau Street, New York, NY 10038.

Conclusion

This article is meant to be an outline of important areas in presenting damages on behalf of the plaintiff. To successfully try plaintiff's cases and effectively present damages, a complete mastery of a file thoroughly prepared is required.

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