Feb. 1990

Practice Tips...

Preexisting Injuries

Cases involving preexisting injuries require special care. Since a preexisting injury may make the case more difficult to evaluate, settle, or try, it makes sense to give a little extra thought on how you will handle the plaintiff's case. Here are a few suggestions.

Robert Dawson

CASE EVALUATION

Where the client has had a prior injury, it makes sense to obtain those records at the start of the case. Obtaining the prior medical records is necessary in order to evaluate the case and to accurately advise the client. Having access to prior records will help prevent unrealistic client expectations. It will also make it less likely that you'll have to lower your case evaluation because of information that turns up in the prior records.

Your client's medical experts should have full information about prior injuries or treatment before they write their reports. If the client has not told his treating physician about a prior injury, you should consider providing him with the prior medical records so that his report and trial testimony will be credible.

NEGOTIATION

Some attorneys will submit a demand letter without disclosing a prior injury to the insurance carrier. Those attorneys hope that the insurer will not find out about the prior injury and feel that they will be able to negotiate a better settlement if the insurer acts out of ignorance. In my experience, insurers will usually find out about prior injuries through your client's current medical records or through their own investigation.

I believe that you will negotiate better settlements by disclosing prior injuries in a straight-forward manner. Building a reputation for honesty, fairness, and full disclosure will build your credibility with adjusters and insurers. If you disclose the prior injury in your demand letter and deal with it in a positive manner, you can take much of the sting out of that information. It is more professional to send out a demand letter that contains the prior medical records and your analysis of any preexisting injury.

INSURERS REQUIRE EXAM

If you decide to take the deposition of the defense medical expert, you may be able to have the defense expert make favorable concessions regarding preexisting injuries. Before taking the deposition, it makes sense to review the jury instructions concerning preexisting conditions.

WPI 30.17 requires that there be preexisting *pain* or *disability* for the instruction to be given. Ask the conservative defense expert "Would you say that the plaintiff was disabled before this collision?" Also ask the physician if there is any evidence that the plaintiff was in any significant pain prior to the collision. If there is no evidence of pain or disability, then evidence of the prior condition is not admissible under WPI 30.17. *Sutton v. Shufelberger*, 31 Wn. App. 579, 643 P.2d 920 (1982).

WPI 30.18 discusses preexisting bodily conditions which made the plaintiff more subject to injury than a person in normal health, and allows recovery for those injuries. I have had some success on soft tissue cases asking defense physicians the following question.

> Now doctor, you are aware that the plaintiff was involved in a prior automobile collision that was not the fault of the defendant in this case. Would you say that *because of the prior auto collision* that the plaintiff's injuries in this collision were greater than those which would have been suffered by a normal person under the same circumstances.?

If the doctor answers "Yes," then you have expert testimony supporting recovery for enhanced injuries.

If you run up against a very conservative defense doctor, then you may be able to use his conservative testimony to minimize any issue of a preexisting injury. Here is how that works. Create a hypothetical that matches the facts of the prior injury and treatment received. Ask the doctor if he would expect a person receiving an injury of that type to heal without residuals. A conservative physician will probably say "yes". If so, he may have just eliminated from the case any issue of a preexisting condition.

Preexisting injury cases

TRIAL CONSIDERATIONS

If the case is tried, it may be possible to exclude evidence of prior accidents or injuries, unless there is evidence that shows on a more probable than not basis that the prior accident or injury caused or contributed to plaintiff's current pain. *Irrigation & Dev. Co. v. Sherman,* 106 Wn.2d 685, 724 P.2d 997 (1986). *Supanchick v. Pfaff,* 51 Wn. App. 861, 756 P.2d 146 (1988). If the court denies your motion in limine seeking to exclude evidence of prior accidents or injuries, then be sure to fully disclose those matters to the jury before the defense has an opportunity to do so.

If the defense is permitted to ask questions inferring that a prior accident or injury "might have caused" pain to the plaintiff, then be sure to remind the jurors that the defense is asking them to speculate and is trying to bias or prejudice them rather than rely upon facts and the judge's instructions.

However, if there is some evidence in the record that shows that the plaintiff was having pain or disability from a prior injury, then you need to face the issue head on. There are generally two ways that you can prove aggravation or preexisting injuries. You can have a physician testify concerning how the plaintiff's medical condition was worsened because of the defendant's wrongful act. The physician may be able to express this as a percentage. A second way to show aggravation is to compare the plaintiff's symptoms and level of activity before the accident compared with after the accident.

In a soft tissue case imagine that the plaintiff had a prior auto collision where s/he reported low back pain to his family physician on six occasions over a five year period and on two occasions Ibuprofin was recommended for pain. After the second auto collision the family physician gives the patient Feldene and Flexeril and orders physical therapy. The patient also misses five days of work and has restricted cervical motion on six visits to the doctor shortly after the second collision. The patient also sees a chiropractor 15 times. The client says that his second injury was more serious, but how do you prove it?"

You can ask the defense expert to compare the specific facts from each injury, and to tell for each fact whether it tends to show that the second injury is more serious or not. To do this you can ask whether "all things being equal," would the following facts tend to show that the second accident was more serious than the first.

"Doctor, comparing an injury where a non-prescription pain killer was recommended versus an injury where a prescription pain killer was ordered, which one would be more serious?" You can have the doctor compare a situation where no muscle relaxant was used versus the second case where a muscle relaxant was prescribed. You can ask him or her to compare a situation where there were no days off from work with an injury that was bad enough to miss work. You can ask the doctor "which is more serious, a case where the family notices no problems with the person's physical ability, or a situation where the family notices pain and difficulties (moving, stiffness, etc.)?" You can ask, "which is more serious, a case that involves no report of pain to the plaintiff's friends versus one where pain is reported to his or her friends?" "Which is more serious, a case where co-workers notice no work-related problems versus one where co-workers notice the plaintiff having difficulty doing his or her job?" You can ask, "Doctor, where there are six pain entries in a physician's records over a five-year period versus 15 entries in a three-month period, which condition is likely more serious?"

You can also ask the physician specific questions related to how often certain symptoms show up in the records. You can point out that in five years there was no mention in the doctor's records of any restricted range of motion but after the second injury the range of motion was restricted on six occasions. You have five years of visits to the doctor with no physical therapy or chiropractic treatment ordered. After the accident there is physical therapy and 15 visits to the chiropractor.

Gathering the prior medical records early helps you evaluate and settle cases involving preexisting injuries. For those preexisting injury cases that must be tried, do the research to see if evidence of the prior injury is admissible. If admissible, then carefully review the facts so that a comparison of the two injuries will show which was more serious.

Robert K. Dawson is a partner in the Seattle firm of Pence & Dawson; his practice is limited to plaintiff's personal injury cases.