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TRIAL NEWS

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Handling the Cervical Fusion Case

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I was asked recently to set forth how I evaluate and prepare cervical fusion cases. The request came from an attorney who was surprised that I typically evaluate cervical fusion cases in the \$400,000 to \$600,000 range. The attorney seemed to think that my evaluation was higher than the average settlement of such cases in this area. While every case is different, I believe that many lawyers settle cervical fusion cases for amounts that are too low.

DEVELOP THE RIGHT MINDSET

I learned personal injury work from watching how great lawyers work up their cases. Paul Luvera, Tom Chambers, and Paul Stritmatter to name a few. They don't settle their cases for the "average" amount. Somehow they get larger settlements and trial results than other lawyers. I wanted to know how. I watched, asked questions, and stole every good idea I could from these lawyers, and others.

I learned that you have to really know your client. You have to care. You have to know how the injury affects their daily lives. You have to work hard. You don't try the case on the insurance company's turf. These are not "herniated disc" cases. These cases involve a "spinal injury".

Cervical fusion cases usually aren't low impact cases where the jury is suspicious of the claim right from the start. Cervical fusion plaintiffs have a serious injury the jury will understand, if educated. These are cases where even the defense will probably have to admit that the plaintiff is "really hurt".

The mindset that I try to have on each case is that I will determine what is a fair amount for the client to receive. I will convey to the jury what it is like to have one or two levels of your spine hacked away by instruments not much removed from a medieval torture chamber. I will explain what it really means to have spinal discs removed and your spine fused. I will convey to the jury what the client's life was before and after the injury. If the insurer does not offer what we feel is fair, then we go to trial. As will be set forth below, the way we work up a case should leave no doubt that the case will be tried if not settled for a fair amount.

WORK UP LIABILITY AND IMPACT

This is obvious. You need to obtain the relevant police reports, interview the appropriate people, take pictures, and document what happened. You need to be able to prove fault. You need to be

able to prove the impact. If the impact seems low, then assume that you will have to work even harder to show that the collision caused the injury. WSTLA has many seminars on how to sharpen your skills on proving liability.

KNOW THE RELEVANT ANATOMY AND MEDICINE

The spine is a wonderful part of the body. You need to know the parts of the spine and how they work. Read everything you can. Look at videos. Talk to the treating physician after you have done your homework. Doctors know which attorneys have done their homework.

You need to be able to explain how a normal spine works and how it needs to hold us upright for a lifetime. You need to know what parts of the spine have been injured. Can you explain what parts of your client's spine is injured, and why it makes a difference in his or her life? If you cannot, then you are not ready to settle or try the case.

Spend some time getting acquainted with the medical literature. Buy the commonly used orthopedic and neurology texts. Have a medical researcher find the literature that is relevant to your case, or to rebut the opinions of the defense medical examiner.

SPEND TIME WITH THE TREATING PHYSICIAN/SURGEON

Doctors don't much like lawyers. Sometimes it is easy to see why. We don't tell doctors what we are doing and why. We don't keep them up to date. We seem surprised when doctors don't understand the litigation system that we feel comfortable in. We disrespect their busy schedules. Some attorneys don't pay for physician services that the attorney specifically asked for. You have to fight through the doctor's suspicion or hostility and make friends with the doctor. The doctor has to see your commitment to the client, that you have no desire to exaggerate, and that you will persevere.

You have to spend whatever time with the doctor is necessary for the case. The doctor has to be able to prove the medical issues in your case. The doctor has to be aware of the other relevant evidence and records. If you have a low impact case show the doctor the photos before the deposition. Don't let the defense attorney spring that on the doctor at deposition, or worse yet, at trial. The doctor has to know the defense medical examiner's opinions and be able to address them. I frequently use the treating doctors to prepare me for the defense medical examiner's deposition.

LAY WITNESSES

Lay witnesses are important. They are your client's friends, family, and coworkers. Effective lay witnesses testimony is typically short and poignant. Lay witnesses let the jury know how your client was before the injury, and after. It is a judgment call as to how many lay witnesses to call but I often call 6-8, with each person's testimony lasting no more than 10-15 minutes.

I have heard that Tom Chambers once called a developmentally disabled box boy who worked at the grocery where the plaintiff shopped. After showing that the witness knew the plaintiff before

and after the surgery the testimony went something like this:

Q: What was Mrs. ___ like before the collision?

A: Well, she always carried out her own groceries.

Q: And after?

A: She tried to carry them out, but she couldn't. I always carry them for her now.

Q: No further questions.

Good testimony doesn't have to belabor the point.

GRAPHICS

You can't get a fair result in a cervical fusion case if the jury doesn't understand the injury. The jury can't understand the injury unless they can see it. They can't see it unless you illustrate it for them. I don't believe that you can do justice to a cervical fusion case without case-specific custom drawings of the injury and the surgery. It is possible to find illustrations of a "typical" cervical fusion surgery for few hundred dollars. However, I like to have the graphics artist draw the injury and surgery. Then the graphics artist and I meet with the surgeon to be sure that the drawings are accurate.

But don't overlook the inexpensive graphics that might be available. Make copies of the relevant x-rays and MRI's. Often there will be some spinal cord compression on the pre-surgical MRI. Is there anything more painful to look at than that? Blow it up so the jury can see it. Don't forget to obtain the post surgical MRI or X-ray so the jury can see what your client's spine looks like after it has been "fixed".

Figure that you will spend a fair amount of money on graphics. I typically spend between \$3,000 and \$5,000 for graphics on a cervical fusion case.

WEAKEN OR NEUTRALIZE THE DEFENSE MEDICAL EXPERT

I see a lot of traffic on the Eagle List Serve seeking the "dirt" or finances of one defense medical examiner or another. While that information can be useful in some cases, it does not substitute for knowing the medicine and being ready to do battle on the key issues in the case.

With a cervical fusion case there is much that the defense will have to admit. For example, the defense medical examiner will have to admit: 1) the anatomy and complexity of the spine, 2) that the parts of the spine work in extremely close proximity, 3) that the parts of the spine have to work together, 4) that the injury and surgery have altered the spine, 5) that the spinal alterations are permanent, 6) that this person's spine will never again work the way that it was intended, 7) that a fusion puts more stress on the segments above and below the spine. With a little medical research you can probably put together a larger list of basic medicine propositions that the defense

medical examiner will have to admit, or look foolish denying.

Remember, although it is fun to administer a knockout blow to the defense medical examiner, that isn't necessary to win the case. Your case is proven by your medical evidence, by the lay witnesses and graphics, but also by your client and, more importantly, by the life your client has lived. It is often fun to create a chart for the jury showing what evidence you brought to court, and what the defense brought, or failed to bring. You brought the police, the photos, the medical records, the treating doctors, the surgeon, the physical therapists, 6-8 lay witnesses, and your client's life. The defense brought in a hired doctor and nobody else. It is kind of fun to hold up a subpoena and explain to the power the defense attorney had to bring in other documents and witnesses. "But the defense didn't do that, now did they?"

EVALUATE THE CASE

Every case is different. Some clients will make a great impression on the jury. Some won't. Sometimes there are liability or causation issues in the case. There can be many reasons to compromise in order to settle a cervical fusion case. However, what I call the "typical" cervical fusion case ought to be worth between \$400,000 and \$600,000, sometimes more.

What I call a "typical" cervical fusion case involves: 1) clear liability, 2) a pretty significant impact, 3) the immediate onset of symptoms, 4) a visit to the doctor or emergency room within two days, 5) diagnosis of the herniated disc(s) soon after the collision, 6) surgery after the failure of conservative treatment, 7) a doctor that is solid on causation, 8) approximately \$35,000 in medical bills, and 9) two months of lost wages. I believe that such a case probably has a settlement value between \$400,000 and \$600,000.

To settle cervical fusion cases for that amount you have to absolutely believe that your client's life has been significantly impacted. You won't feel that unless you really know your client and know your case. Once you have the case worked up consider doing a focus group. Despite the negative information we have read recently about juries, you might be surprised at how they react to cases involving spinal surgery. I have recently had several focus groups make almost the identical comment that goes like this: "This is a pretty serious injury and involves surgery on the spine. Shouldn't we be talking about at least a million dollars?" I recently evaluated a lumbar injury involving a two level fusion as being worth about \$600,000. However, both focus groups came back solidly at \$1,000,000 and \$1,100,000. Because of our confidence in the focus group information we finally compromised and settled the case for \$800,000. If you feel the need for help determining case value on a significant case there is no reason not to do a focus group. You can do two effective focus groups for about \$2,500.

HAVE A LITIGATION BUDGET

That brings me to money. It takes money to put the case on well. Graphics, focus groups, expert witnesses, depositions, literature searches, and more. Expect to spend in the neighborhood of \$20,000 to \$30,000 to try the typical cervical fusion case.

MEDIATE WELL

Recognize that much of what you do on the day of mediation will have no effect on settling the case. Most adjustors and defense counsel come to the mediation with a set amount of authority. The question is how close you get to their maximum authority. To get to their maximum authority make sure that you have sent the other side all the information necessary to for them to evaluate the case well before the mediation. In addition to the medical reports, bills and other evidence you send to the other side, consider sending them copies of your graphics. Or you might put in your mediation letter that you will have \$4,500 in trial graphics available for view at the mediation. By the time of mediation the adjuster and defense counsel know that I have done the work to go to trial, that I have spent the money to try the case right, and that I am looking forward to it. By the time of mediation I am so pumped to go to trial that I have mixed feelings when a settlement occurs.

You have to make it clear though your words, acts, and reputation that the case will not settle for the "average" amount. The jury verdict reporter is full of cases with problems. You have a good client and a good case that the jury will understand. Every time the mediator says that what we are asking for is more than the average I say "I hope so, and we expect to obtain more than the average result when I do my job right".

TRY THE CASE IF NECESSARY

When the offer is too low then try the case. You have to try cases to get superior settlements. I tried a cervical fusion case a few years ago and received a verdict of \$550,000. When I was entering judgment on the verdict the judge called me up to the bench to make a comment about the trial. He said, "Every time I turned around you made the jury wince". I'll take that as a compliment.

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