

**PUTTING THE MEDICINE TO WORK:
Tips for Proving Damages in the Cervical Injury Case**

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I. INTRODUCTION

Trial is a complex process. You present evidence in a courtroom, a setting that is foreign to most regular people. You present evidence under odd rules that make sense to lawyers and judges, but which confuse or even make jurors mad. You face bias and prejudices created by decades of insurance company advertising and news reports on usual cases that make no sense to jurors. No wonder the public is suspicious of personal injury claims, suspicious of plaintiffs, and suspicious of their lawyers. To overcome these biases and suspicions we need to put on a good case.

An effective trial requires considerable pretrial preparation. There must be an adequate investigation. Liability issues are worked up. And then you come to damages. The focus of this presentation is to use medicine to help your case.

II. PREPARATION

To use medicine effectively for your case you have to go to work. You have to read your client's medical records, and read about the medicine involved in your client's case. There are many standard medical textbooks that can tell you about your client's injuries. A few years back I went to the University bookstore on the University of Washington South Campus and spent \$1200. For that price I picked up standard orthopedic, neurology and physical medicine and rehabilitation textbooks. I purchased textbooks on the spine and treatment of traumatic injuries.

I picked up an atlas of human anatomy. Lastly, I picked up the four-volume set of Campbell's Operative Orthopedics. While we will often supplement our medical research from other sources, it is amazing how much we can learn about a traumatic injury case with just a basic set of texts.

I agree that it is sometimes a mistake to do battle on the medicine with the defense medical expert. The defense medical examiner is a physician after all, and probably knows more about medicine than you will as the lawyer. However, over the years I have enjoyed spending more time on the medical aspects of a case. What follows are some areas of inquiry, or approaches, that you might find useful in your injury cases.

III. WHAT IS THE INJURY?

To represent an injured person you should know the nature and extent of the injuries, and how the injury affects your client. That is obvious. However, for years I struggled to know what questions to ask of my clients' own doctors, and of the defense medical examiners. I have come up with some areas of inquiry that are useful for me. I put these categories in all capitals in my outlines for direct exam and cross exam of medical experts. These categories are: FORM, FUNCTION, RELATIONSHIP, CHANGE IN FORM, and CHANGE IN FUNCTION.

FORM: In this section I ask the doctor, whether plaintiff or defense, to describe the various parts of the body that are involved. I want the parts described in detail so the jury can appreciate how magnificent the human body is in all its complexity.

FUNCTION: What does the injured body part do? It seems to me every body part has a function. It is supposed to do something. By the way, this applies even to the spleen and to the appendix. Research now seems to indicate that both of these organs, once thought to have very minor function, now play a more significant part in the body's operation than originally thought.

The point is that I want the jury to understand that body parts have a function which they are supposed to carry out, and did carry out well before injury.

RELATIONSHIP: How does this body part work with nearby body parts? For example, ligaments and muscles and cervical vertebrae and discs all work together. They operate in very close quarters.

It was many years before I thought to ask a defense medical examiner how close the tolerances are in the cervical spine, how close the vertebrae are to other structures that they work with such as ligaments and muscles. How close are the nerves to the parts of the body that are damaged? I want the jury to understand that the neck is a very complex place where many parts work together in very close proximity in order for your neck to function the way it was intended.

CHANGE IN FORM: As a result of trauma certain body parts of your client are injured. How have these body parts changed? Are they bigger or swollen? Are they less resilient? Are they less stretchy? Are the nerves irritated? Has scar tissue formed? Have the nerves been altered? How has the body part been changed as a result of the injury? I want the jury to understand how the body parts have changed.

CHANGE IN FUNCTION: How does the injured body part work with other body parts that are close in proximity? Is the function altered? For example, is the function better or worse? Is the part stronger or weaker? Is the part bigger or smaller? Is the part more painful or less painful? Is there more range of motion or less range of motion?

I want to set forth very clearly what the differences are between the treating doctors and defense medical examiner. In some cases the defense medical examiner will agree that all these various body parts are changed in form and changed in function. The defense medical examiner just doesn't believe that this change causes pain. Well, at least we know the areas in dispute.

IV. CASUATION FACTORS

How many times have you had a defense medical examiner say that your client had an injury but that it was caused by something else other than trauma? I believe it is helpful to have the defense medical examiner, and the treating physician set forth what factors should be considered when you are determining what caused the injury. I have asked defense medical examiners for a complete list of causation factors and had them come up with only one or two. Presumably the treating physician will have a longer list.

You might find it a good idea to set forth a list of causation factors and ask the defense medical examiner whether the factors support the proposition that the traumatic event caused injury, or whether the injury was pre-existing. Some typical causation factors are listed as follows:

1. Is the event the TYPE likely to cause the injury your client suffered?
2. TIMING – did the onset of the symptoms match the timing of the traumatic injury?
3. HISTORY – both from the patient and from others. Typically a defense medical examiner will not interview anyone other than the patient. I think it is important to see whether other persons in the patient's family, or his co-workers or member of his church, can testify that the history is consistent with the traumatic event causing the injury.
4. What can the clinical EXAM tell us? Sometimes the clinical exam can tell us something about causation, sometimes it cannot.
5. What do SCANS AND TESTS tell us? I will always ask the physicians on a case whether the scans and testing can tell us anything about causation. Sometimes the scans can and sometimes they cannot. Sometimes there are scans that can be ordered which will help with causation. You can ask whether the defense medical examiner thought there were any scans that should be done that could help determine causation, and whether that doctor requested them. Make sure your treating physician does whatever scans and tests can be done to help with causation.

6. What do the **PRIOR MEDICAL RECORDS** tell us? If somebody has significant pain or symptoms you would expect them to report that in the prior medical records. Did your client?
7. **ANY OTHER FACTORS?** I think it's helpful to ask all of the physicians whether there are any other factors that can help determine what the cause of the injury is, and if so, to obtain that information.

V. TREATMENT

I think many attorneys start out too quickly with the jury talking about things that the client cannot do. If you jump to that discussion too quickly the jury is not ready to hear it.

I believe it is better to talk about the bodies' healing powers. Some doctors can speak eloquently about the many amazing things your body does to respond to trauma. There is the response of white blood cells, of hormones that are released into the blood, involvement of the spleen, involvement of bone marrow. The body's healing powers are really quite wonderful.

I think it is helpful to have doctors describe how the body repairs damaged tissue. How does the body repair broken bones? How does the body repair ligaments, joints, and muscle? The physician is going to have to describe a process whereby the body part is not the same as it was before. The defense medical examiner may try to minimize this difference, but probably won't totally deny that the body part has changed.

It may make sense to next talk about treatment goals. Typical traumatic treatment goals are to repair damaged tissue, to reduce pain and stiffness and aching. To increase strength and range of motion. These are things that doctors have done since the time that medicine began. And they do this treatment because the tissue is different, it is damaged.

So what are the treatments? The basic ones are pretty straightforward. They include painkillers, anti-inflammatories, muscle relaxers, steroid injections, physical therapy, heat, and cold. And sometimes surgery.

After you've talked about the body's healing powers, the treatment goals, and the treatment that was rendered, now the jury is ready to listen to you. Ask the doctor whether these healing powers continue forever. Medical texts will tell you how long the body will typically try to heal a specific injury. Common sense tells you that the body's healing powers are at their strongest early on because that is when you get the most relief. Even a hardcore defense medical examiner should admit that the body's healing powers diminish over time.

VI. WHAT ARE THE SYMPTOMS AND WHAT IS THEIR EFFECT ON THE CLIENT?

I think it is important to have the treating doctor commit to what specific damaged body part is causing the symptoms the client experiences. I believe it is important that you be able to tell the jury what part was damaged, to show it to the jury graphically, and to explain logically why this injured body part causes the types of symptoms that the plaintiff has. This logical and specific testimony can be quite affective in rebutting the defense medical examiner who has no idea why the patient is hurting more than six weeks after the collision.

I think it is important to determine that the symptoms are reasonable given the injuries to the plaintiff. Sometimes we just have doctors testify about the symptoms and that the symptoms were caused by injury. Most of the time the treating physician will testify that the symptoms are reasonable given the injury that the plaintiff has sustained. The jury needs to hear that.

David Ball talks about how to quantify the injuries to your plaintiff, and you must quantify the injuries if you are going to give a reasonable basis for your pain and suffering damages. The Washington pattern and jury instruction on pain and suffering says that there must be a reasonable basis for the jury's computation of pain and suffering. As the plaintiff's lawyer you need to give them that basis. So how does David Ball suggest that you quantify the nature and extent of your client's injury? Three ways.

1. How **BAD** is the injury?
2. How **LONG** will the injury last?
3. How will the injury **AFFECT** the plaintiff?

The evidence you put on a trial needs to answer those three questions so you can quantify how serious the injury is. Juries want some roadmaps, they want some standards if you will, for determining pain and suffering. You can talk to them about a fairly minor neck sprain or strain that heals fairly quickly, compared with a neck injury requiring surgery, compared with a paralyzing neck injury. Quantify how bad the injury is.

The next question is how long will the injury last. I am amazed at how some attorneys look at a neck injury that is permanent, but perhaps not excruciating everyday, and conclude that that case is worth only \$10,000 to \$20,000. My God, the injury is permanent. It will affect the person for the rest of their life. A permanent injury, even a so-called “minor” one, deserves a fair verdict which compensates for injuries that will affect the person for the rest of their life. You can discuss injuries that heal in a few weeks, or a few months, and let the jury know that most injuries fall under that category. Common experience tells us that most injuries heal and if the client’s injury had healed in a couple months we wouldn’t be here in court taking your time. We are here because the injury is permanent.

Lastly, you need to quantify how the injury will affect the plaintiff. Gerry Spence talks about reversing roles with your client so that you can better understand how the injury affects your client. Role reversal is a good and low cost process. You can do a role-reversal in your office, or better yet, in the client’s home. You can have the client literally show you how they are affected. They can go and lie down on their bed and try to get up as they do in the morning. They can walk over to the shower and show how they now spend 10 minutes under the hot water trying to get their neck to loosen up so that they can go to work and get through the day. You

can have your client show you how they move around at work and what kind of symptoms they have from lifting, sitting, using a computer, etc. You can have your client show you how they take part in recreation, and the symptoms that they have.

Doing the role reversal with the client means to trade places with them. You become the client as best you can. The client will watch you re-enact their story. The client can tell you when you have got it right, when you really understand what they are going through.

I have had lawyers ask. "How can you possibly explain to a jury what it's like to be injured?" The answer is: when you have role reversed with your client, and when you truly understand what your client has gone through, then you will do just fine in front of the jury.

VII. GRAPHICS

I saved graphics for last. I think there has been a tendency over the years for speakers at seminars to demonstrate fancy graphics and medical illustrations. I'm not against graphics, I believe they can be incredibly effective. They can also be overused to the point where they lose some of their effectiveness.

The question might arise as to what to illustrate in your case. The answer is that once you have done the hard work on the medicine, know the records inside and out, know what specific body parts are injured, and how they were damaged, then you will know what to illustrate.

I like to have graphics done from scratch. I have a medical illustrator review the medical records and illustrate the injuries as he believes they have occurred, based on his experience and review of the medical records. Then I schedule a meeting with the doctor where the doctor can go over the graphics with the medical illustrator, and make changes to make those graphics more accurate. Such a meeting demonstrates to the doctor that you actually care something about the

medicine. The doctor may become a bit more invested in the case because he sees it being accurately and well illustrated.

After the meeting with the doctor I have the graphics illustrator revise the graphics and then show it to the doctor again. They often do this by email. I am often not even present during this discussion. The point is that the doctor will make sure that the graphics illustrator gets the illustration right.

There are other graphics or evidence that can be used, such as surgical videos, or the actual tools that are used to perform the surgery. It is amazing how crude some surgical instruments are. Some surgical instruments are pretty similar to the chisels and mallets that my carpenter father used to use when making cabinetry. It's a judgment call. You decide whether to use videos or surgical instruments or not. I tend avoid surgical videos, feeling that the judge will keep them out as being too prejudicial or overly graphic. I like to stick to illustrations that the doctor approves as accurate.

VIII. CONCLUSION

Medicine is a part of your injury case. But with careful preparation the medicine can be a powerful part.