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HEADLINE: **Trial Advocacy, The Trial of a Soft Tissue Injury Motor Vehicle Case**

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BODY:

The trial of a soft tissue motor vehicle case has become a dangerous battleground for the plaintiff's attorney.

The courts are attempting to do what the Legislature could not: putting an end to soft tissue injury cases no matter how serious.

On the strength of the now infamous Court of Appeals case of [Pommells v. Perez](#) [FN1] and its progeny, the courts are dismissing these cases either on summary judgment or at the close of the plaintiff's case. Care must be taken when preparing and trying a case involving pre-existing conditions, gaps in treatment, intervening medical problems or difficult issues involving causation. With proper trial techniques, these issues can be overcome and actually used to the plaintiff's advantage.

Pre-Existing Conditions

Many motor vehicle cases involve a serious injury known as a disc herniation where, at the same time, there is a clear indication that there was a pre-existing arthritic condition. For example, take the situation where a plaintiff is taken to the emergency room, has an X-ray of his neck or cervical spine and is quickly released. The X-ray typically shows osteophytes or arthritic changes at levels above or below the disc herniation. Yet the subsequent MRI shows a disc herniation at a specific, yet different, level. A knowledgeable plaintiff's lawyer can nonetheless demonstrate that the herniated disc was caused by the accident and that the herniation is the cause of the plaintiff's pain and disability, rather than the pre-existing arthritis.

These issues first must be dealt with in jury selection with the following type of questioning of individual jurors:

Q: It is our claim that Mr. Jones suffered both original injuries caused by this accident, as well as what the law calls an aggravation of a pre-existing condition. Do you agree that if someone has a previous condition and it is made worse by the defendant's negligence, that this person is entitled to compensation for that aggravation of their prior condition?

Q: Why do you agree with that?

Q: It is also our claim that although Mr. Jones had an unknown, yet pre-existing condition to his neck, he suffered what we claim is an additional injury to his spinal column that has nothing to do with his pre-existing condition. Can you keep an open mind as to which problems pre-dated the incident and which problems were caused by it?

Q: Would you be willing to make a determination as to the difference?

By questioning the prospective panel this way, you can prepare the jurors for a favorable verdict either way: at best, a full award for original injuries caused by the accident; at worst, an award for an aggravation of a pre-existing condition.

The pre-existing condition must also be addressed in opening statement. After giving a thorough description of the anatomy, be forthcoming about the pre-existing condition in the neck and show why that prior condition is not the cause of the plaintiff's herniated disc, pain or his present disability:

What is important to know is that Tom Jones never had any known problems with his neck prior to the accident. On the contrary, Tom never missed a day of work for any problem with his spine at any time prior to the accident.

He was always able to play with his children, drive them to school and go to work. Now, because Tom was already into his forties at the time of the incident, like many men his age, his spinal column was already showing some changes on X-ray that revealed the beginning of osteoarthritis. But those changes were merely changes on X-ray. They showed up on the emergency room X-ray in one isolated level of his spinal column but had no clinical significance whatsoever. On the contrary, the bone spur or osteophyte as it is called, was one level up from the area that we later learned had herniated. And that osteophyte was small and anterior to the spinal cord, meaning it did not impinge or touch on either the cord or any nerve roots, and to this day is clinically insignificant. The herniated disc at C5-C6 is new and caused by this accident. This is confirmed by an MRI, which showed that the disc herniation was recent. It revealed no loss of height, no loss of water content and no arthritic change. More importantly, the herniated portion of the disc is leaning directly into the cord. This causes pain that radiates down the back of Tom's neck, into both shoulders and into the thumb, index and middle fingers in both hands. Pain that he never had before this accident and pain that he has had and will continue to have for the rest of his life. The bone spur at C4 is nowhere near the cord, caused no prior pain, and has caused no subsequent pain.

This line of reasoning should be followed up by the plaintiff's testimony showing he had no prior problem with his neck. This is necessary so that the lawyer can lay the appropriate foundation for the requisite medical testimony on this very issue:

Q: Mr. Jones, prior to the day of this accident, had you ever had any pain in your neck?

Q: Prior to the accident in question, had you ever been treated for neck pain by any medical provider?

Q: Mr. Jones, before the day of the accident had you ever lost any time from work for any problems with your neck?

Q: Before the day of the accident, had you ever been unable to care for your children because of any physical injury whatsoever?

Obviously, the plaintiff's testimony is not enough. Competent and persuasive medical testimony must support this line of inquiry. If you are not calling a radiologist, establish the clinician's credentials in reading radiological studies, both based upon his education, training and experience reading these types of films for his patients. Have him evaluate the plain film X-rays taken in the emergency room, demonstrating the irrelevant bone spurs at the level above the plaintiff's herniated disc. Have him explain why that spurring is of no clinical significance. Have him explain the difference in technology between the X-ray that will only show bone injury and never soft tissue damage and the MRI which will show soft tissue damage, including herniated discs. Then have him show the MRIs to the jury, carefully distinguishing between the levels of the cervical spine where the bone spur and the disc herniation appear. Question the doctor on the history taken from the plaintiff when he first came in to the office; demonstrate that his patient denied prior pain, disability or injury to the cervical spine. Then pose thoughtful hypothetical questions to elicit the expert's opinion on the injury, disability and causation:

Q: Doctor, I'd like you to assume that the following is true based on the testimony in this case: That Tom Jones was in a rear-end collision on March 2, 2003. That he was restrained by a seat belt. That as a result of the impact, his head and neck were thrown backward and forward. That prior to that incident he had never missed a day of work for any problem, pain or injury to his neck. That he was taken to the emergency room at Bellevue Hospital where they took X-rays, prescribed Motrin and released him to the care of his private physician. That those X-rays showed straightening of the lordotic curve consistent with muscle spasm and an anterior osteophyte at the body of C4. That he came under your care one month later and you diagnosed muscle spasm and radiculopathy bilaterally. That based upon those clinical findings you referred him for an MRI. That the MRI, which you displayed in court, showed a herniated disc at C5- C6 that was both protruding posteriorly and into the spinal cord. That the disc protruded on the descending nerve roots emanating from the cord causing pain, weakness and numbness down his neck, shoulders and into the thumb, index and middle fingers of both hands.

Q: Do you have an opinion, to a reasonable degree of medical certainty as to whether the pre-existing osteophyte at the body of C4 had any clinical significance to Tom Jones?

Q: Why do you say that the prior condition on X-ray had no significance with Tom's disability?

Q: Doctor, do you have an opinion, to a reasonable degree of medical certainty as to whether the accident in question was a substantial factor in bringing about Tom Jones' injury, including the herniated disc at C5-C6?

Q: Please explain why the disc herniation was caused by the accident and not by the prior arthritic changes in the cervical spine?

Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether the pre-existing osteoarthritis caused Tom's pain, or whether the herniated disc caused his pain and disability.

Gaps in Treatment

A common thread running through motor vehicle cases is that many have substantial gaps in medical treatment or complete cessation of treatment altogether. This is not surprising since the no-fault carrier is charged with the responsibility of paying for the plaintiff's medical treatment. It therefore makes economic sense for them to deny payments as soon as possible. Toward that end, the carriers hire physicians of their own choosing whose sole purpose is to determine whether the injury is causally connected to the accident and whether the claimant is in need of further treatment. It follows logically that most gaps in treatment occur as a result of the carrier denying further medical payments.

The Pommells court has made this reality relevant to the trial of a case by mandating that the plaintiff's lawyer explain gaps in treatment. In cases where the gap is caused by the plaintiff's inability to pay for treatment or the termination of benefits by the carrier, the plaintiff and treating physician will have to combine forces for the appropriate explanation:

Q: Tom, could you please explain to the court and jury why you hadn't returned to physical therapy or to your neurologist for two and one-half years?

A: Yes. I have a wife and two children and could not afford to pay for my own medical treatment.

Q: But, Tom, after having intensive treatment for the first six months after this accident, what, if anything, occurred to make you stop going for treatment?

A: My insurance benefits ceased. The company suddenly stopped making payments, and none of the medical offices would treat me without a source of payment.

The physician must also explain the gap in treatment:

Q: Why did you stop seeing Mr. Jones, Dr. Schwartz?

A: Because although Tom needed treatment, the visits were expensive. The physical therapy he needs costs \$175 per session, and each visit to me costs \$250. Unfortunately, his insurance company subsequently denied any further payments for the medical care for his neck injury.

Q: How do you know that?

A: I have a letter from the insurance company in the chart [offered as a business record] denying any further payment, and they refused to pay my last three bills.

Q: Are there any other reasons he stopped his medical treatment?

A: None. Tom was a highly motivated patient, who wanted to get better so that he could continue taking care of his family.

If the denial of no-fault benefits is not the reason for the gap in treatment, the plaintiff's lawyer must still prove a reasonable explanation for that gap.

Q: Doctor, can you explain why your patient did not return for treatment for two years?

A: Yes. Although he was doing physical therapy three days per week, it was not helping him. He was not improving at any significant rate. As a result, I prescribed home exercises for him to perform every other day.

Q: What did those exercises consist of?

A: Stretching the lower back and hamstrings for 45 minutes every other day. Alternating ice packs and heat on those days that he is not stretching.

Q: Why did you stop prescribing medications during that two-year period?

A: Because prior to that time, I had been prescribing Motrin 800 milligrams, twice a day. Motrin is merely ibuprofen, the same thing as Advil, an over-the-counter medication, but in higher dosages. The patient could basically get the same benefits by taking Advil in higher quantities.

Q: Is it your position he does not need further medical treatment?

A: No. Not at all. But the only thing that would really help him is surgery and, after explaining the risks and benefits and that there were no guarantees of a good outcome, he made the reasonable decision not to undergo invasive surgery.

Do not forget that in any motor vehicle case, you must prove the plaintiff meets the no-fault threshold. Do not leave that decision to chance. Specifically track the language of the insurance law found in the Pattern Jury Instructions. Although you are asking the expert to give his opinion regarding an ultimate issue in the case, this is permissible under the authority of [Dufel v.Green](#) [FN2] and [Moreno v. Chemtob](#) [FN3] and their progeny:

Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether, as a result of the accident, Mr. Jones has permanently lost the use of a body organ, member, function or system?

Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether, as a result of the accident, Mr. Jones sustained a significant limitation of use of a body function or system?

Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether, as a result of the accident, Mr. Jones has sustained a permanent consequential limitation of a body organ or member?

Conclusion

Recent case law has apparently made the trial of a soft tissue motor vehicle case even more difficult than it had been previously. The courts' dismissal of cases where there are pre-existing conditions, intervening medical issues and gaps in treatment have become the rule rather than the exception. However, with appropriate proof, the trial attorney can use the existence of pre-existing medical conditions and gaps in treatment to his advantage. By demonstrating the irrelevance of the pre-existing medical conditions, the immateriality of intervening medical conditions and legitimate reasons for gaps in treatment, the plaintiff can easily overcome the recent line of cases and persuade a judge and jury of the seriousness of his case.

FN1. [4 NY3d 566 \(2005\)](#)

FN2. [84 NY2d 795 \(1995\)](#)

FN3. [271 AD2d 585 \(2d Dept. 2000\)](#)