LENGTH: 1957 words

HEADLINE: Proving Liability Through Injuries

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BODY:

Scientific evidence is today more convincing than eye-witness testimony to a jury, a fact only reinforced by the many death-row inmates exonerated by scientific DNA evidence. Even in a seemingly straightforward motor vehicle accident case, objective scientific facts relating to the case must be analyzed with regard to their impact on liability. Specifically, oftentimes the injuries sustained by the plaintiff are inextricably intertwined with the determination of fault in the accident to the point that the nature and extent of a victim's injuries show how an accident actually occurred.

This type of proof is easy to offer in venues in which trials are unified: that is, where trials are joint on the issue of liability and damages, as in the First Department counties, Manhattan and the Bronx. In venues in which trials are presumptively bifurcated (everywhere except Manhattan and the Bronx), the only way to use the injury as proof of liability is to move for a unified trial. Where the nature and extent of a plaintiff's injuries have an important bearing on the issue of liability, it is reversible error for a court to deny the unification of the issues of liability and injury.1 In these situations, the plaintiff's attorney must make a motion to the court for a unified trial.

Take, for example, a case involving a truck/pedestrian accident where the plaintiff suffers a fracture of her knee and, more specifically, a fracture of her left lateral tibial plateau, requiring an open reduction and internal fixation. The plaintiff claims that she was crossing the street with the light in her favor while walking in the crosswalk when the defendant driver made a right turn, striking her in the left leg, knocking her to the pavement. The defendant, in turn, claims that he was crawling forward, going less than three miles per hour, when the plaintiff ran into the side of his truck while he was making a turn. Without the medical testimony, this case would be a classic "he said-she said" scenario. The best way to prove what actually occurred is to work with the location, extent and nature of the injuries suffered by the plaintiff.

The plaintiff's orthopedist is in the best position to state that the plaintiff's injuries are consistent with her version of the accident, and inconsistent with the testimony offered by the defendant truck driver. The direct examination of the doctor can demonstrate the tie between the injuries and the happening of the accident.

Direct Examination

First, your questioning of the doctor's credentials and experience should establish that the orthopedist has expertise in determining the biomechanical factors which cause orthopedic injuries that he treats every day, including force and position of impact. The doctor should be able to testify that his education and experience include determining the manner in which this type of orthopedic injury can occur.

Once that is established, you can bring out your specific point regarding liability:

Q. Did you examine the plaintiff at the hospital?

Q. What were her injuries?

A: She suffered a left lateral tibial fracture.

Needless to say, to bring this point home to the jury, anatomical exhibits including models and illustrations should be used to clarify the nature of the injury. Next, these same exhibits should be used to point out what areas of the knee and soft tissue were not injured to make clear that these areas would had to have been injured if the plaintiff was running and suffered an injury to the front of her knee. First, the attorney must lay the foundation for the admissibility of the model or illustration:

Q: Doctor, I show you what has been marked as Plaintiff's 10 for identification. Do you recognize it?

Q: Is Plaintiff's 10 an anatomically correct model of the human knee?

I offer Plaintiff's 10 in evidence.

Q: Doctor, using the model of the knee in evidence, show us where the injury occurred.

A: The side of her left knee known as the left lateral tibial plateau.

Q: What, if any, injury did Plaintiff suffer to the front of her knee?

This area of inquiry should continue making clear that plaintiff suffered no injury to her quadriceps tendon, patellar tendon or patella-all areas involving the front of her knee.

Q. Now, Doctor, from a biomechanical point of view, do you have an opinion with regard to the amount of force required to cause such an injury?

Q. I want you to assume that the defendant testified that he was moving approximately three miles per hour when the plaintiff ran into his truck. Do you have an opinion to a reasonable degree of medical certainty with regard to whether that could have caused the injuries she sustained in this case?

A: She could not have suffered a left lateral knee injury if the contact was made to the front of her knee while she was running forward.

Q: What is the basis of that opinion?

A: The impact, commonly referred to as a bumper injury, would have had to come from the left side to cause a fracture of the left lateral portion of the knee. Forward contact while running would have damaged the frontal structures of the knee including the kneecap and the tendons above and below it.

Q: I want you to further assume that the plaintiff testified that she was crossing the street when the truck turned into her, striking her left leg. Do you have an opinion as to whether or not her injuries could have been caused in the manner in which the plaintiff described?

A: Yes. In my opinion that is the only way in which this injury could have been caused.

Q: Explain your opinion.

Memory Issues

Similarly, even with a brain-injured amnesic plaintiff, the plaintiff's inability to recall the accident can be overcome through medical testimony of the treating physicians. By properly outlining the anatomy and having the physician detail the nature of the injuries, you can show the court and jury that the accident happened differently than the defense says.

Q: Dr. Jones, as Ms. Smith's treating neurosurgeon, please tell us the injuries that

you diagnosed in the emergency room.

A: The patient had facial fractures on both sides of her face, as well as fractures to the base of the skull.

Q: In addition to the fractures of the face and skull, what, if any, other injuries did your patient, my client, suffer as a result of the accident?

A: She suffered severe brain contusions bilaterally, or on both sides of the brain, as well as shearing injury to the brain's axons.

Q: Do you have an opinion doctor, to a reasonable degree of medical certainty, as to how the accident occurred?

A: Yes, I do.

Q: What is your opinion?

A: That the truck struck her in the face fracturing her facial bones, knocked her onto the back of her head and fracturing the base of her skull and the occipital bone in the back of her head.

Q: What is the basis for that opinion?

A: Because she had fractures on both sides of her face and fractures on the back of her head.

Q: I want you to assume that the defendant, after calling his dispatcher, told the police that his back wheel ran over your patient's head. Do you have an opinion, also to a reasonable degree of medical certainty, of course, as to whether that is true?

A: The accident could not have happened that way.

Q: Why do you say that?

A: Because the pedestrian had a shearing impact to his brain. By that I mean that a force went from one side of the brain to the other. That is how one gets a shearing injury or diffuse axonal injury. It occurs from high velocity impact to the head, not from a crushing injury like the tire of a six-ton truck going over one's head.

Oftentimes the defense will enlist an expert to back up its party line as to how an accident happened. For example, it may have its "Independent Medical Examiner" testify that the injuries were consistent with the plaintiff slipping on the sidewalk on snow and ice and falling head-first under the back passenger side wheel of the truck. The cross should go something like this:

Q: Sir, you testified on direct, that Ms. Jones' head was run over by the truck, didn't you?

Q: That these injuries to my client were caused by being run over by a 32,000-pound tractor trailer, right?

Q: Sir, I take it you've reviewed the CT and MRI scans done in the hospital, haven't you?

Q: And the MRIs of the brain as well, right?

Q: And you looked at the complete hospital record too?

Q: You would agree that if one's head and face were run over by a truck, the medical personnel would expect to see tire tracks on the skin, true?

Q: You'd agree with me that when you examined her, you saw no such injuries, did you?

Q: As a matter of fact, there were no such injuries in the Ambulance Call Report that you reviewed, correct?

Q: And no such injuries in the emergency room record, true?

Q: As a matter of fact, there are no injuries diagnosed as crush injuries, are there?

Q: On the contrary, the MRIs of the brain consistently were read as diffuse axonal injury, right?

Q: A brain injury that typically occurs from a high-speed motor vehicle accident or a blow to the head with great force, correct?

Q: Yet you rendered a report early in the case coming up with your theory that she slipped on snow on the sidewalk and dove head-first under the back wheel?

Q: By the way, could you read for the jury the intake by the emergency room physician, in the official, certified hospital record?

A: Pedestrian struck in face by truck.

Q: A lot different than your opinion, right, Doctor?

Summation

As with every trial, the testimony all should be offered with an eye toward summation. The summation should convince the jury that the scientific medical evidence is more persuasive than the testimony of the defendant:

Now let's talk about the defense case and why it is wrong. The driver-after talking to his dispatcher-tells the police that he felt his rear wheel go over something and the defense of the case is begun. But we know from the medical evidence that the accident did not happen that way. The tire could not possibly have run over Sheila's head. Had that been the case, her head would have exploded like a cantaloupe. Her face and head would either have degloving injuries or tire tracks. Rather than bilateral brain contusions on each side of her brain, she would have crush injuries to her brain that would have caused immediate herniation. Most importantly, she would not have shearing injuries that are found in high velocity deceleration accidents or rotational injuries. So we know that the doctors in the hospital got it right the first time: she was struck in the face by the truck.

In many cases, liability can be shown based upon the nature and extent of the injuries. The injuries can be used to show the speed of a vehicle, the direction of impact, the point of impact or the height of a fall. In venues that bifurcate trials, a motion must be made to allow the plaintiff to prove liability based upon injuries. Where unified trials are the norm, the testimony must be directed in such a way to prove how an accident happened by outlining the nature and types of injuries. Trying a case in such a manner can clearly mean the difference between winning and losing or justice and injustice.

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Endnotes:

1. Wright v. New York City Housing Authority, 273 A.D.2d 378 (2d Dept.

2000); Lind v. New York City Transit Authority, 270 A.D.2d 315 (2d Dept. 2000); Nauman v. Richardson, 76 A.D.2d 917 (2d Dept. 1980).

LOAD-DATE: April 12, 2012