

# New York Law Journal

## Use of Supporting Evidence With the IME Physician at Trial

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By **Ben Rubinowitz and Evan Torgan**

In most personal injury lawsuits, the defendant has the right to have the plaintiff submit to a physical exam by a doctor of the defendant's own choosing. As a matter of fairness, it is only right that the defense should be able to challenge the nature and extent of the plaintiff's claimed injuries by having their own physician conduct an exam of the plaintiff. To the extent the plaintiff claims the injuries are permanent and will be a source of pain in the future, the defense ought to have the opportunity to confirm or challenge that claim. If the defense claims that the plaintiff is exaggerating his injuries, the defense can call their physician at trial to offer proof in support of that position.

While the theory behind the need for an independent medical examination (IME) makes perfect sense, the reality is that there has been a history of deceit and abuse on both sides of the fence. There have been times when a plaintiff has exaggerated her injuries just as there have been times when an examining doctor has minimized his findings or offered an opinion that was less than honest. Regardless of whether one represents the plaintiff or the defendant, it is the responsibility of the trial lawyer to challenge the physician at trial to expose such deception.

### Defendant's Approach

A tactic often used by defense attorneys to expose exaggerated injury claims is to use supporting evidence to prove deceit. While surveillance videos have long been used to capture and prove what is commonly referred to as fraud, now, with social media sites such as Facebook and Instagram, defendants are using postings on those sites to offer contradictory proof at trial. There is no question that the introduction of such proof by itself can have a profound impact on the jury, but when the defense introduces the supporting proof and presents it with appropriate questioning of the defendant's examining doctor (the IME doctor), the result can be devastating.

Imagine the scenario in which a plaintiff claims a severe knee injury, a torn anterior cruciate ligament. Assume the plaintiff has testified that she has difficulty engaging in recreational and sporting activities such as skiing or running. There is, however, a video of the plaintiff posted on social media which was taken after the accident and shows the plaintiff skiing. Being very much aware of the video, the plaintiff's lawyer offered the video in evidence to try to defuse its impact and provide an explanation in anticipation of the cross. On direct, the plaintiff, testified that although she skied, she skied with great pain. On cross, the defense attorney uses the video to point out that the plaintiff's injuries are exaggerated:

Q: You told us on direct that since the accident you have been in constant pain, true?

Q: The pain limits your ability to move?

Q: It limits your ability to squat?

Q: It limits your ability to engage in many activities you participated in prior to the accident, correct?

Q: It has prevented you from engaging in sporting activities, true?

Q: You testified the injuries have prevented you from running?

Q: But the accident has not prevented you from skiing, true?

A: I have skied, but it is very painful.

Q: Can we agree the video shows you skiing after the date of the accident?

Q: It shows you turning?

Q: It shows you squatting?

Q: It even shows you jumping?

A: Yes, but with pain.

Although this type of cross-examination can undermine the plaintiff's claim of injury, the defendant, in this scenario, can truly deliver a knockout punch by using supporting evidence (i.e., the video) to support the IME doctor's findings and opinion. If done properly, the defendant's use of the video can discredit the plaintiff, build up the doctor's own credibility and challenge the nature and extent of the injuries being claimed.

To maximize the impact of such proof, a hypothetical question posed to the defendant's examining physician should serve to drive the point home to the jury. The use of a hypothetical question can be a very powerful tool that allows for a sort of mini-summation in the middle of the direct examination. But a word of caution is necessary. When counsel uses a hypothetical question, the question must accurately reflect the prior testimony and proof or it will likely result in a sustained objection.

Q: Doctor, I want you to assume that the plaintiff has testified that the pain from her injuries has limited her ability to move, to squat, to engage in certain activities that she enjoyed before the accident, and has prevented her from running. I want you to further assume that she claims a complete tear of her right anterior cruciate ligament. I want you to further assume that she has engaged in skiing following the accident as seen in this video (video shown to the doctor). My question is this: Based on that testimony alone as well as that video, do you have an opinion to a reasonable degree of medical certainty as to whether or not the plaintiff suffered a complete tear of the right anterior cruciate ligament?

A: I do have an opinion.

Q: What is your opinion?

A: She did not suffer a complete tear of the anterior cruciate ligament.

Q: What is the basis for your opinion?

A: As I explained earlier a complete tear of the anterior cruciate ligament would result in complete instability of the knee. It would severely limit range of motion, lateral, forward and twisting movements. In the video, you see the plaintiff skiing side to side and making twisting and forward-to-back movements that would be highly unlikely with such a complete tear. She would not be able to ski as is shown in the video with a complete tear of the ACL.

Next, to build up the credibility of the doctor's examination and further undermine the plaintiff's claimed injury, the questioning should continue by linking the medical examination performed by the doctor with the video:

Q: Doctor, tell us what your clinical findings were in comparison to the video you just viewed.

A: My findings during my examination were absolutely consistent with what she is seen doing in the video. I was able to reproduce each and every side-to-side, twisting, and forward to back movement on clinical examination. In the event there was instability in the knee and a tear of the ACL my clinical exam would have revealed that.

In this instance, the use of the hypothetical question serves as a technique to maximize the argument on summation. Clearly, the argument that the plaintiff is exaggerating her injury has been made stronger by weaving the supporting proof into the expert's testimony and examination.

## Plaintiff's Approach

The plaintiff also has the opportunity to expose deception or exaggeration by the IME physician. In the cottage industry that has developed regarding the so-called "Independent Medical Examination," physicians have been paid substantial sums of money to conduct IME exams. Indeed, it is not unusual for the collateral attack of such "experts" to point out that the expert's devotion to litigation has netted him earnings in excess of \$1 million a year. While this collateral attack can go a long way to discredit an expert, there are other effective avenues that must be explored as well. Just as the affirmative use of supporting evidence can go a long way to discrediting a plaintiff, the failure of the defendant's IME doctor to use available evidence (i.e., radiographic studies) can go a long way to undermining that doctor's credibility.

One of the most powerful areas of inquiry that can serve to discredit a defendant's examining physician is the inherent contradiction between the expert's legal work and his work as a treating physician. Experts conducting independent medical examinations are often vulnerable to attack for offering opinions in the courtroom that fail to conform to generally accepted rules for diagnosing a condition. Imagine the same set of facts as above, but assume an MRI was done following the accident. Assume further that the doctor never reviewed the MRI or the MRI report. The doctor's IME report, although rendering an opinion, states that he would like to review the MRI scans. One approach taken by some lawyers on cross is to move in for the kill immediately:

Q: Doctor, you never reviewed the MRI scans, true?

Q: You never reviewed the MRI reports either, did you?

Q: You offered your opinion based solely on your clinical examination, right?

While this type of questioning allows for a basic argument in summation, it is short-sighted in that it misses the opportunity to highlight the shortcuts taken by the physician in complete violation of the manner in which he would render a diagnosis for one of his own patients. As always, the examining lawyer should be patient. A complete set-up is essential and makes the knock-down even more effective. One of the best places to start is to build the expert up as a concerned physician who takes pride in his work when training his residents and treating his own patients:

Q: And in working at a teaching hospital you train younger, less experienced physicians known as residents, correct?

Q: You instruct these residents how to make orthopedic diagnoses, true?

Q: You train them to make use of available diagnostic tools like an MRI, correct?

Q: You train them that an MRI, when ruling out a torn ligament, can help make an accurate diagnosis, true?

Q: Knowing the importance of the MRI in ruling out a torn ligament, you train your students to read MRI scans, correct?

Q: At no point in time have you told a resident to ignore an MRI scan, have you?

Q: At no point in time would you ever tell them to ignore the MRI report, correct?

Q: Because you realize the MRI scan can provide information that a clinical exam can't provide, true?

Although it is rare, there are times that a low-risk, open-ended question is appropriate on cross:

Q: How many times have you told one of your residents assisting in the treatment of one of your patients to ignore an MRI scan?

A: Never.

Q: That's because you care about your patients, true?

Q: You want to provide them with the best care possible, correct?

Q: In providing them with the best care possible, you want to provide the most complete and accurate diagnosis, true?

Q: On direct exam you were asked questions about your clinical exam?

Q: You knew an MRI was performed, right?

Q: You knew there was an MRI scan of [the plaintiff's] knee, right?

Q: You knew there was an MRI report, true?

Q: But you never looked at that MRI scan, did you?

Q: You never reviewed the MRI report, did you?

Q: Doctor, did you tell anyone that you were not going to render an opinion until you were provided with the MRI scans?

Q: Did anyone force you to put your opinion in writing before you even took the time to look at the MRI scans?

Q: Here, you made a decision to go ahead and render your opinion without ever looking at the MRI scan or report, true?

Q: And that's exactly what you wouldn't do for one of your own patients, right?

A: This was not one of my patients.

Once again a low-risk, open-ended question might be appropriate here:

Q: Where did you learn that there were different standards for making a medical diagnoses for litigation as opposed to your own patients?

Next, in the same manner that a hypothetical question can be used on direct, it can also be used on cross:

Q: Doctor, I want you to assume that a radiologist at the hospital, having nothing to do with this litigation, wrote in his radiology report that Ms. Smith suffered a complete tear of her anterior cruciate ligament. I want you to further assume that the plaintiff's treating orthopedist testified that the MRI shows a complete tear of the ACL. My first question is this:

Q: You rendered an opinion without ever looking at the MRI scans true?

Q: Knowing that you never bothered to look at the MRI scans, are you stating to this jury that two doctors who actually took the time to look at the scans got it all wrong?

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## Conclusion

The use of supporting evidence, such as a video obtained through surveillance or social media, can greatly undermine a plaintiff's credibility if used properly with the defendant's medical expert. Similarly, that same doctor's credibility can be significantly undermined by bringing out his failure to review and consider supporting evidence such as an MRI scan which was available, but ignored.

Supporting evidence can be a powerful tool at trial when used appropriately with the questioning of a medical expert.

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