

## **Aggravation of a Pre-Existing Medical Condition**

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Familiar to most tort cases are standard defense themes that must be squarely addressed by the plaintiff's lawyer. Often, the defense case follows a routine, four-level pattern. First, the plaintiff was not injured. Second, if the plaintiff was injured, it was not as a result of the events surrounding this accident. Third, if the plaintiff was injured and it was as a result of this accident, then the plaintiff was injured as a result of his own fault or carelessness. Fourth, if the plaintiff was injured as a result of this accident and no comparative fault exists, then the plaintiff's injuries, pain and suffering were due solely to a pre-existing medical condition which has no relationship to the accident in question. While most plaintiff's lawyers deal with the first three arguments on a regular basis, it is the fourth argument—the pre-existing condition—that is oftentimes neglected.

To properly deal with the defense of a pre-existing medical condition, the plaintiff's lawyer must be prepared to meet the defense contentions head on and at the outset. Put another way, weaknesses must be dealt with up front—strengths will become apparent during the course of the trial. Like any potential weakness in the case, to the extent that a pre-existing medical condition is relevant to the claim, dealing with it in a forthright manner by the plaintiff's attorney will produce the positive result of diffusing the negative impact of the defense position.

Given the limitations and time constraints the attorney faces during jury selection, the opening statement is the first real opportunity to deal with defense themes. The failure to prepare for these themes and diffuse the defense argument has the potential to spell disaster for the plaintiff's claim.

Prior to even delivering an opening statement, however, the plaintiff's lawyer must know the answers to basic, yet essential, questions relating to the injuries claimed. First, what was the plaintiff's health like before the current accident? Second, what happened to the plaintiff's health as a result of the current negligence—as a result of the defendant's acts and omissions? In other words, since the current accident, what is the plaintiff's present level of function and pain?

In preparing to answer these questions and evaluating the proof, it is not sufficient to simply rely on the plaintiff's version of his or her medical history. Careful examination and scrutiny of the plaintiff's medical records together with thoughtful analysis of the plaintiff's complaints and familiarity with the jury instruction generally given by the trial judge on this issue, pave the way for a successful result.

While some plaintiff's lawyers might see a pre-existing medical condition as a detriment to the medical claim, in some cases, the pre-existing condition can serve as the foundation for a substantial damage

award. It is not the original, pre-existing injury for which plaintiff seeks compensation, but, rather, the aggravation of the same. In other words, it is the fact that the condition was made worse by the defendant's negligence that is the basis for which compensation should be awarded.

Imagine the scenario in which the plaintiff's attorney knows of a pre-existing medical condition similar to the one claimed in the subject accident—a herniated cervical disc—but chooses not to deal with that pre-existing condition. Foolishly, the plaintiff's attorney turns a blind eye to the pre-existing condition hoping to overwhelm the jury with medical proof and rhetoric about pain and suffering during the opening. Here, the defense lawyer can not only explain the medical significance of the pre-existing injury but can also deliver the opening in such a way as to impugn the credibility of the plaintiff's attorney:

Ladies and Gentlemen, to understand the nature of the injuries in this case you must understand that there was something that you were not told about during the plaintiff's opening. There was something that you were not told about that will clearly put the medical proof in its proper perspective. There was something that will allow you to understand that the plaintiff did not suffer those injuries that you were just told about in this accident. So let me now outline for you the medical proof. Let me now put the medical proof in its proper context. Let me now tell you what you did not hear from plaintiff's counsel about the medical proof.

One year before this accident ever took place the plaintiff was injured. One year before this accident ever took place the plaintiff complained of pain in her neck. One year before this accident ever took place the plaintiff went to the hospital complaining of an injury to her cervical spine. And one year before this accident ever took place the plaintiff had severe limitation of range of motion in exactly the same part of her neck for which she now seeks compensation.

Put simply, in this scenario the plaintiff's lawyer was not straight with the jury and that poor decision might well cost plaintiff the case. Had the plaintiff's attorney properly evaluated the medical proof prior to trial and carefully considered the pitfalls of withholding medical information from the jury, the opening could have been delivered in a manner to prevent the defense attorney from undermining the plaintiff's claim and from undermining counsel's own credibility as a trial attorney.

Knowledge of the Pattern Jury Instructions (PJI) regarding "Aggravation of a Pre-Existing Condition" is essential before delivering the opening (PJI 2:282). Here, the plaintiff's lawyer must track the language of the court's charge, making clear that no compensation is sought as a result of the original injury. It is only the aggravation and exacerbation of that original injury for which compensation is sought. In following the PJI, the court will undoubtedly explain that the plaintiff may recover for such increased or augmented suffering or damage that was caused by the defendant's acts. Usually, the court will go even further explaining in its instruction that the jury must consider plaintiff's pre-existing medical condition and limit the award solely to the extent to which plaintiff has been further disabled as a result of the defendant's negligence.

Counsel's opening should put a favorable spin on the court's instruction that despite a pre-existing condition, the plaintiff is still entitled to recover; the plaintiff is entitled to compensation for the aggravation of his injuries:

Ladies and Gentlemen, to understand the nature of the (plaintiff's) injuries you must understand that (the plaintiff) suffered an injury a year before this accident ever took place. She went to the hospital. X-rays and MRI scans were taken and it was determined that the plaintiff suffered a neck strain. There was no disc herniation. There was no damage to the spinal cord. There was no impingement of the nerves stemming from the spinal cord. But the pain lasted for about a month and then went away. For the next 11 months (the plaintiff) was pain free—until this accident.

As you will see, it was this accident that caused a herniated cervical disc. It was this accident that caused further damage to the neural structures in the neck. It was this accident that caused such excruciating pain that (the plaintiff) now needs surgery. Although the defendant's actions did not cause the original injury, their actions aggravated and exacerbated that condition to the point where (plaintiff's) neck was no longer stable. The defendant's negligence aggravated and exacerbated (plaintiff's) condition to the point where she suffers pain throughout every waking hour of the day. The defendant's carelessness turned what was a pain-free condition into one that has caused pain with the slightest of movements of her neck and will continue to cause pain for the rest of her life.

#### Direct Examination

During the direct examination of his own client, the plaintiff's lawyer must not only be intimately familiar with the contents of the medical records from the original injury but must anticipate the cross-examination by the defense lawyer before mapping out a cogent and compelling direct examination. The worst thing the plaintiff's lawyer can do is to minimize the original injuries in a manner that is inconsistent with the prior medical records.

As discussed before, the goal is to admit the purported weakness—the pre-existing injury—and to diffuse the impact of the cross before it is ever conducted, thus taking the wind out of the defense lawyer's sails:

Q: Let me direct your attention to the (prior accident). How did that accident occur?

Q: Were you injured?

Q: What, if any, pain did you suffer in that accident?

Q: Describe the severity of the pain from that accident.

Q: As a result of that accident did you go to the hospital?

Q: Why?

Q: Had you ever been to a hospital before for an injury to your neck?

Q: For how long did you suffer pain stemming from that accident?

Q: What, if any, limitation of movement did you suffer to your neck at that time?

Q: How did these limitations affect your ability to move?

Q: How did these limitations affect your ability to sleep?

Q: How did these limitations affect your ability to work?

The plaintiff's lawyer must fully explore the nature of the pre-existing injury, its cause and the resultant pain and suffering. The plaintiff's lawyer must fully inquire about all potential negatives in the original hospital record or doctor's chart. To the extent that medications or therapies were administered inquiry must also be made:

Q: What, if any, medications were you given for the pain?

Q: How often did you take these medications?

Q: How would you evaluate your pain from that injury on a scale of 1 to 10, with 10 being the worst?

Q: How would you describe your pain after taking the medication?

It is only after such inquiry has been made that the plaintiff's attorney can seek to minimize the original injury in comparison to the subject accident and resultant injury:

Q: When did you stop taking pain medication for that accident?

Q: When was the last time you felt pain from that (original) accident?

Q: When was the last time that (original) injury affected your ability to sleep?

Q: When was the last time that injury affected your ability to move?

Q: When was the last time you sought medical attention for that injury?

Q: When was the last time that injury affected your ability to (work or participate in activities of daily life)?

#### Summation

In presenting a summation, once again the plaintiff's attorney must be mindful of the court's instruction on the pre-existing injury. Because the jury will be carefully instructed to award only those damages proximately caused by the defendant's negligence and not by the underlying condition or illness itself, the plaintiff's lawyer should spell out in his summation that it would be improper to award compensation for the original injury. By tracking the language of the court's charge, the plaintiff's lawyer will enhance his own credibility and receive an implicit stamp of approval from the court when it reads its instruction to the jury:

Ladies and Gentlemen, we have never sought compensation for the original injury. It happened one year before this accident. It happened one year before the defendant was negligent. We have never sought compensation for that, and we never will. The question here is what happened to the plaintiff as a result of the (subject) accident? Is there any doubt that the (plaintiff's) medical condition was aggravated by

the (subject) accident? Of course not! Is there any doubt that the (plaintiff's) condition was aggravated so as to cause increased suffering and disability? Of course not! The defendants didn't cause the original injury. But it was their actions and their failures that made this condition far worse than it ever was before the accident. Not once in 11 months did (the plaintiff) complain of pain. Not once in 11 months did (the plaintiff) have any difficulty in sleeping through the night. Not once in 11 months did (the plaintiff) have any limitation of movement of his neck. Put simply, the plaintiff suffered no pain before this accident. Then everything changed. And it changed for the worse.

So what is it that we are seeking here? Compensation only for the aggravation of this pre-existing condition. Compensation only for that which was made far worse by the defendant's negligence. Compensation for the pain that the (plaintiff) has endured and will continue to endure for the rest of her life as a result of the carelessness and negligence on the part of the defendants.

When dealing with a pre-existing medical condition, the best "defense" is a good "offense." Do not shy away from this indisputable medical fact; prepare for it and make it a part of your case. A pre-existing medical condition is not the end of a case. For the well-prepared plaintiff's attorney, it is merely the necessary factual foundation to recover for the increased or augmented suffering or damages that were caused by the defendant's acts or omissions.

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