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TRIAL ADVOCACY

The Use of Hypothetical Questions as Weapons at Trial

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Hypothetical questions are a vital tool for a trial lawyer. Without them, we would have more difficulty proving cases, more difficulty disproving opposing theories, and more difficulty convincing juries of the righteousness of our cause.

This is true in spite of the adoption of [CPLR 4515](#), which removed the requirement of posing hypothetical questions to obtain expert opinion at trial. The Legislature evidently felt that the use of hypothetical questions was unduly time-consuming, one-sided, and added very little to trial practice. Famous legal scholars even said that such questions were 'misused by the clumsy and abused by the clever.' [FN1] Even the Federal Rules of Evidence did away with the requirement for hypothetical questions.

Streamlined Hypothetical Questions

Nothing in the law, however, prohibits the use of streamlined hypothetical questions and the tactical advantage in using this questioning technique is one that should not be overlooked.

The premise behind all trial lawyers' strategic decisions at trial serve one uniform purpose: to convince the trier of fact that his position is correct. This is not an easy goal to achieve, particularly in personal injury cases where expert opinion is a mandatory part of the proof: to show that an injury is permanent and painful; that a doctor departed from accepted standards of medical practice; that the negligence in question caused a specific injury; that an injured victim can no longer work; or that scientific or technical expertise, such as that possessed by an accident reconstructionist, reveals which party was at fault. In truth, all of these opinions can be made clear by the effective use of hypothetical questions.

Consider a typical case involving an automobile accident where a 19-year-old plaintiff sustained a herniated lumbar disc in a rear-end accident. The trial lawyer could simply go through a direct examination of the treating physician, having her define medical terms, discussing the history given to her by the patient, and her findings. He can then ask the doctor her opinions as to injury, causation and future prognosis without using a hypothetical question. It is far more persuasive and far more dramatic, however, to ask a hypothetical question that incorporates the relevant facts that you have already proved through other witnesses and the expert physician herself. Such an approach strengthens the effect of the expert's testimony by focusing the jury on the facts upon which it is based:

Q: Doctor Patel, I would like to assume the following as true. That on June 29, 2004, my client, your patient, Tom McMurray, was sitting in his automobile stopped in traffic, looking straight ahead. That he was struck from behind by a garbage truck which the defendant testified weighed over three tons. That although Tom was belted in, his head, neck and back were thrown first backward and then forward. At that very time he felt a pain in his low back. He was taken to the emergency room, where X-rays were negative for fracture and came under your care the following day. By that time he had pain radiating from his back into his right leg and big toe. As a result you did a physical examination which revealed muscle spasm in his lumbar spine, an absent Achilles reflex and positive straight leg raising on his right side, the significance of which you've already informed this jury. As a result of those findings you made a presumptive diagnosis of a herniated lumbar disc which was confirmed on MRI the following day. That MRI that you showed this jury revealed a right-sided herniated disc at the level of L5-S1. That Tom has been under your care since that time up to the present time, and that you have prescribed anti-inflammatory medications and physical therapy. My question is as follows:

Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether or not the accident in question was a substantial factor in bringing about the herniated disc? What is the basis for your opinion?

Q: Do you have an opinion, also to a reasonable degree of medical certainty, as to whether or not the injury is permanent? Why do you say that?

Q: Do you have an opinion, to a reasonable degree of medical certainty as to whether or not that herniated disc is a competent producing cause of pain from the time of the accident until today?

Q: Do you have an opinion to a reasonable degree of medical certainty as to whether or not the herniated disc will be a competent producing cause of pain in the future?

Q: For how long, in your medical opinion, will he have such pain in terms of years?

Q: What is the basis of your opinion?

Q: Do you have an opinion as to what, if any, medical treatment Tom will need?

#### Proving Causation

The hypothetical question is particularly important in the cases involving difficulty in proving causation. Take, for example, the same automobile accident, but this time with a 55-year-old plaintiff with a prior arthritic condition in the lower back. The use of a hypothetical question can crystalize your proof:

Q: Doctor, I would like you to assume the following. That at the emergency room right after the accident, Tom's X-rays showed an osteoarthritic condition. That although the X-rays showed bony spurs, Tom had never been treated for a back problem, and in fact, never felt pain in his lower back before this accident. That the MRIs you sent him for showed both a herniated disc impinging on the exiting S1 nerve root on the right as well as dessication or drying out of the disc at L5-S1 and narrowing of that disc space as well. Yet, as you told this jury not five minutes ago, the narrowing and dessication was a typical finding for a 55-year-old

man, and that you could tell the herniation was an acute injury based upon the high signal or brightness of the herniated portion of the disc on MRI.

Q: Doctor, do you have an opinion, based on a reasonable degree of medical certainty, as to whether the disc herniation was caused by the accident?

Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether it was the pre-existing osteoarthritis or the accident that caused the herniated disc?

Q: Do you have an opinion as to whether it is the arthritis or the disc herniation which is the competent producing cause of Tom's pain?

Do not be concerned with streamlining your direct of the expert witness. The better method is to take a methodical approach to this problem, set forth objection-proof hypothetical questions, and enhance the opinion of your expert by using factual data already brought out on your direct case.

#### Vocational Experts

Vocational experts are very important in bridging the gap between your expert physician and economist when it comes to proving lost earnings. This is particularly true where your physician gives an opinion that your client can no longer work as a construction worker, but the defense experts say that he could do other more sedentary work. Pointed mini-hypotheticals based on facts in evidence can be very persuasive in this area as well.

Q: Dr. Stine, I want you to assume that Tom McMurray has been a laborer all his life. He has never been employed in any other capacity. That his highest level of education is 11th grade, and he has been unable to pass high school equivalency exams. Do you have an opinion, to a reasonable degree of vocational rehabilitative certainty, as to whether or not Tom McMurray is employable in any capacity now that he can no longer perform manual labor?

A: Yes I have an opinion. At Tom's age he is not easily employable to begin with. Moreover, the fact that he does not have a high school degree dramatically limits the pool of jobs to which he would have access. And the intelligence exams I have given him demonstrate his inability to be retrained for other work. My opinion is Tom is functionally unemployable now based on his injuries and intellect.

Q: The defense opened to this jury saying: That although Tom can no longer perform manual labor he could perform sedentary work like security or filing. I want you to further assume, however, that his treating physician testified that he has a herniated disc at L5-S1 that causes severe pain radiating down his leg into his foot and that, as a result, he can not sit for extended periods of time, nor stand for extended periods of time. Dr. Patel further testified that the injury was permanent. Do you have an opinion, to a reasonable degree of certainty, as to whether or not Tom will be able to work in a sedentary position as either a file clerk or a security guard?

A: My opinion is he could not do either. Sitting for extended periods of time is one of the hallmarks of performing sedentary work. Tom certainly cannot do that

based on his medical condition. Also his physical limitations, due to the injuries suffered in this accident, would prevent Tom from becoming a security guard.

#### Liability

The use of hypothetical questions is equally as important in establishing liability. In any malpractice action, expert testimony is required to prove medical negligence. Here, hypothetical questions are the best way to prove liability. Imagine a scenario where the plaintiff's lawyer attempts to establish negligence in the absence of a hypothetical question:

Q: Dr. Caruso, did you review the records in this case?

Q: What did they reveal?

Q: Based on those records, do you have an opinion as to whether the defendant departed from accepted standards of medical practice as of June 29, 2003?

As you can see, this type of questioning is not particularly persuasive. Just as importantly, such bare-boned minimal questioning would most likely draw an objection from counsel based upon a lack of foundation. The better way is to question the doctor with a series of hypothetical questions which incorporates prior testimony of the defendant doctors and the records themselves:

Q: Doctor, I would like to assume the following facts as true. I would like you to assume that Tom McMurray was involved in an automobile accident where he was actually struck from behind by a truck. He felt immediate neck pain and was taken by ambulance to an emergency room. At that time they took X-rays of his Tom's cervical spine which were negative for fracture. While in the hospital he felt pain radiating into both arms. After a time he felt weakness and numbness in both legs. Do you have an opinion as to the significance of the pain in both arms and the numbness and weakness in both legs?

A: That is a clear sign of spinal cord compression.

Q: I would like you to further assume that the emergency room physician sent Tom downstairs for an MRI which revealed a large herniated disc at C4-C5 compressing the spinal cord. As a result, a neurosurgical consult was called with a Dr. Mechanowitz who observed diminished sensation to pin-prick in both arms as well as decreased biceps reflex, patellar reflex and Achilles reflex. Dr. Mechanowitz sent Tom home with instructions to come in to his office the following day. Tom's wife asked that Tom be kept in the hospital because she was afraid that her husband's health was rapidly deteriorating. Dr. Mechanowitz refused to admit Tom, so Mrs. McMurray asked that the ER physician intervene. Dr. Hannah, the ER physician refused, saying that was improper protocol. Do you have an opinion, to a reasonable degree of medical certainty as to what Dr. Hannah should have done at that time?

A: Dr. Hannah should have intervened and called the head of the service to see to it that Mr. McMurray was observed closely and not released.

Q: Do you have an opinion to a reasonable degree of medical certainty as to whether Dr. Hannah's refusal to intervene was a departure from good and accepted standards

of medical practice?

A: It was a departure.

#### Departures and Causation

Do not forget, in a medical malpractice case, to immediately connect the departures with causation of injury.

Q: Do you have an opinion Doctor, as to whether that departure was a substantial factor in bringing about the injuries of Tom McMurry, including his paralysis?

A: It was a substantial factor, yes.

Q: I want you to further assume that, that night, Tom's pain increased and he could no longer hold his urine. He called Dr. Mechanowitz who told him to take two aspirin and call him in the morning. The next morning, Tom woke up paralyzed from the neck down. My question is Doctor, do you have an opinion, to a reasonable degree of medical certainty, as to whether or not Dr. Mechanowitz' failure to admit, follow and operate on Tom, was a departure from good and accepted standards of medical practice as of June 29, 2003?

Q: Do you have an opinion, to a reasonable degree of medical certainty as to whether Dr. Mechanowitz's failure to admit, follow and operate on the patient was a substantial factor in bringing about Tom's injury?

Hypothetical questions are also helpful when questioning safety engineers. In many automobile accident cases the defense asserts a seatbelt defense. Take for example a case involving a fractured pelvis where the driver was injured in an intersection collision with the impact on his driver side door, and the plaintiff admits he did not have his seatbelt connected.

Q: Mr. Ross, I am going to ask you to assume that the following facts are true: That Tom McMurray was taking his child, who was in a carseat behind him, to the hospital. Tom had not fastened his seatbelt, and one block from his house the defendant ran a stop sign striking Tom on the driver side door. The impact caused the door to come in to Tom's body and Tom to be thrown into the door. He was taken to the hospital where X-rays revealed a fracture of the pelvic ring. Dr. Gold testified that the pelvic fracture was caused by the intrusion of the adverse vehicle into Tom's body through his car door. Dr. Gold testified that the fracture was from a 'classic' side impact. My question is, do you have an opinion, to a reasonable degree of engineering certainty as to whether a seatbelt would have prevented Tom's pelvic fracture?

A: My opinion is a seatbelt would not have prevented that injury. The defendants' vehicle struck the precise spot where the plaintiff was sitting, literally intruding into his space. A seatbelt could not have prevented that at all. Seatbelts are useful to prevent ejection or going through the windshield. They do not prevent pelvic fractures on side impact situations.

It is essential not to exaggerate or modify prior testimony in any way so as not to undermine your credibility while phrasing the hypothetical. Only those facts in

evidence (or those taken subject to connection of proof to be adduced at a later point in time), may be included in the question. The manner, method and speed of delivery should be calculated to be of interest to the jurors and hold their attention throughout. Changes in the tone of your voice and position should be made to enhance your presentation.

#### Opposing Expert

The use of a hypothetical question on cross-examination of an opposing expert is a vital technique to undermine and limit his opinions.

This will be the subject of an upcoming article. As demonstrated above, the hypothetical on direct provides context, support and resonance to your expert's opinion. Its value should not be overlooked when seeking to achieve a successful result.

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FN1. 2 Wigmore On Evidence §686 (Chadbourn rev. 1979).

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