



PREEXISTING CONDITIONS

By Eugene M. Moen, J.D.

INTRODUCTION

We all know that we are now facing juries that are very skeptical and even cynical about personal injury lawsuits. Phrases like “trying to win the litigation jackpot” and “sue-happy people trying to make big bucks” can be heard in any gathering of people talking about the civil litigation system. There has developed a public attitude of near-animosity toward the claimant seeking damages within the civil justice system.

Within the limited scope of voir dire, you will never persuade most jurors that this view of litigation is distorted and mythical. The burden for any plaintiff’s attorney is to convince the jury that the case being presented to them is not like “those other cases,” that your client’s injuries are real, and the plaintiff is forced to come before the jury in order to seek justice in the form of reasonable compensation for the injuries.

When your client has preexisting conditions, that burden is even greater. This is true whether the preexisting condition is asymptomatic and the contention is that the tortfeasor’s action lighted up the condition, or whether the condition was symptomatic and the contention is that the injury has added to, or created new, damages or adverse impact on the plaintiff’s life.

In order to meet that burden, you must develop rapport with the jurors

and convince them that your client is credible and believable. In this era of juror cynicism, the jurors must be persuaded that your client is a “deserving” plaintiff and thus entitled to a reasonable damage award.

ADMIT BAD FACTS TO DEFUSE THE DEFENSE

Most personal injury attorneys believe that the plaintiff’s attorney must admit weaknesses or bad facts in the plaintiff’s case in the opening statement in order to defuse the impact of the defense attorney pointing out those weaknesses or bad facts. This position is doubly true in cases involving preexisting conditions, and those weaknesses or bad facts must also be brought out through the testimony of the plaintiff and the plaintiff’s damages lay witnesses.

If the jury is told in the opening that certain bad facts exist and will be presented during the plaintiff’s case, they will be waiting to see how the plaintiff handles those matters in his/her testimony. The plaintiff who testifies to preexisting conditions in a candid and forthright manner, without having it pulled from him during cross-examination, will present as a credible and honest witness.

This candor by the plaintiff will defuse some of the cynicism and even animosity many jurors feel toward the claimant asking for large damages. If the plaintiff admits to facts that can

potentially decrease his/her damage award, they may be surprised and impressed. How can the jurors then see the claimant as someone who is tricky or trying to “work the system” to get a big award?

The admission of the impact of a preexisting condition by the plaintiff must not be seen as grudging or forced, but rather as open and honest. The plaintiff will benefit more from fully acknowledging and even emphasizing the impact of the preexisting condition than by trying to minimize it. Let the damages lay witnesses, family, friends, or co-workers, do the task of contrasting the situation of the plaintiff before (even with the preexisting condition) and after the injury. By doing so, their testimony inherently emphasizes the honesty and openness of the plaintiff.

EXAMPLES

EXAMPLE:

The plaintiff had a preexisting low back injury that occasionally flared up and prevented him from doing certain physical activities. He then had a rear-ender accident which resulted in a cervical injury that required surgery and added substantial new limitations to his activities. A direct examination might go as follows:

Q: Before this auto collision, did you have any back problems?

A: Yes, I had a work-related low back injury that has caused me problems off and on for a number of years.



Preexisting Conditions

continued

Q: Are you contending that your neck injury has worsened your low back injury?

A: No, not at all. I still have problems from my low back and they weren't affected by the auto collision.

Q: Are you contending that your present physical limitations are caused entirely by your neck injury?

A: No, it wouldn't be fair to say that. Before the auto collision I had occasional flareups of my low back condition that sometimes laid me up for a day or two and prevented me from doing many things. For example, when I had low back flareups I couldn't even walk or sit without pain, and I would sometimes miss work as a result. I couldn't do things with my kids or help my wife around the house at times.

Q: Let's talk about your neck injury. How has it impacted your life?

A: I have an almost constant aching in my neck, which is made a lot worse when I move it in certain ways, like bending it forward. I can't work at my computer without having pain and the pain prevents me from doing most activities with my children, such as playing catch or taking them fishing.

EXAMPLE:

An 81-year old plaintiff suffered a broken hip when he fell in a store, which immobilized him and, even after surgery, prevented him from working in his garden or walking to the grocery store.

Q: Were you limited in your activities even before your broken hip from the fall?

A: Yes, I had a lot of arthritis pain and my heart problems kept me from doing a lot of things.

Q: Were those problems becoming worse?

A: As you age, those things certainly don't get better. I think that, gradually, my function was getting less over the years, but I hoped to have another 10 years of good life left in me.

Q: What kinds of activities did you do before the hip injury and fall?

A: Other than just getting through the day, I got the most pleasure from working in my backyard garden, growing vegetables and flowers. The other thing I did regularly was walk every day to the grocery store where I'd buy a few things, but mostly just visit with and joke with the people working there. Those two things were the highlights of my day-to-day life.

Q: How has the hip injury from the fall impacted you?

A: I can't do any work in my garden any more and I can't walk to the grocery store. I really don't have much left other than just puttering around the house as best I can.

NOTE: In this case, the treating internist, who had special training in geriatrics, wrote a report in which he stated that the hip fracture resulted in a 100% disability for plaintiff. He pointed out that plaintiff had very little that he could do because of his preexisting health problems – and this consisted primarily of gardening and walking to the grocery market – and those things were now impossible because of the hip fracture.

EXAMPLE:

A man in his 30's had suffered a closed-head injury and brain damage in an accident more than 10 years ago. He was able to function on his own, but was on SSI and had some limitations in terms of short-term memory and other neuropsychological problems. He was hospitalized for an infection and was given an overdose of Gentamicin, which caused inner-ear problems which made him dizzy whenever he stood up and required the use of a wheelchair most of the time to avoid falling.

Q: Before the inner ear problem and dizziness, did you have any problems in day-to-day functioning?

A: Yes, I would get confused sometimes if I had a discussion with someone and they disagreed with me. I also had to keep lists all the time of what I had to do, and what I had already done, so I would be sure to do things that needed to be done and I wouldn't do something over again.

Q: Did those problems affect your life?

A: Yes, in most cases I didn't travel very far from my home and I stayed away from crowds or events where I could get mixed up.

Q: What kinds of things did you do for pleasure or relaxation?

A: I would walk around the neighborhood a lot, because I knew people there, and I would also work out at the local gym and lift weights at home. I also liked to visit my folks who live across town and go see my brothers and sisters.

Q: How has the inner ear problem and dizziness affected your life?

A: The main thing is that I can't stand up without becoming dizzy and risking a fall. So if I want to move around at all, I use a wheel-chair. That's really hard to do, because my house isn't designed for wheel-chair access, and there are no sidewalks in my neighborhood. I really can't do the things I used to do, but I try to do as much as possible. My family comes and picks me up in their car so I can still visit with them.

EXAMPLE:

The plaintiff, in his late 40's, has a severe back injury that required a complex fusion surgery. He was considered disabled from employment before and after the surgery because of his back problem. During the surgery, an anesthesiology error resulted in undue pressure on the blood vessels supplying blood to the optic nerve, and he ended up being blind in one eye.

Q: Before your eye injury, did you have limitations or disability?

A: Yes, the back pain was so great that I couldn't do most things that required physical activities, such as lifting or even sitting or standing for long periods.



Q: Were there any activities that you could do?

A: I could do some things. As long as I could shift my position frequently I could watch TV or do some things around the house. I could drive for shorter distances, and take my wife shopping and doing minor repair work on my car.

Q: Without vision in your right eye, could you still do those things?

A: I could still watch TV, although I develop severe headaches after a while. I can't drive at night or when it rains, because of vision distortion, so that was a change for me. Working on my model planes is hard because of lack of depth perception and eye-hand coordination, so I have had to give that up. Working on my car is now almost impossible. I had problems before from my back, because of the pain when I would repairs, so that's another thing I have given up completely.

NOTE: This case was arbitrated before a three-person panel, and in closing argument a “half-empty, half-full” analysis was used. It was argued that, for someone like plaintiff, the loss of vision in one eye was much worse than it would have been for someone who otherwise had full function. Because of his back condition, he had very few activities he could engage in that gave him pleasure, and now those had been taken away because of his vision problem. This made it a much bigger loss than it would have been for a non-disabled person. This argument was necessary because, during the hearing, we learned for the first time that the defendant anesthesiologist was blind in one eye and functioned very well despite that handicap.

**USING DAMAGES:
LAY WITNESSES**

In presenting evidence on damages in almost any personal injury case,

one of the most important factors is testimony of lay witnesses. If is through such testimony that the jury can get a “people’s view” of the damages and can relate to the plaintiff and how the injury has impacted his/her life. If the lay witness is credible and presentable, and has no stake in the outcome of the trial, the testimony can contribute to the story you are trying to tell in a fashion that cannot be duplicated by health care providers or the plaintiff and his/her family.

In cases involving preexisting conditions, the lay witnesses can be even more important. Because you are trying to establish your client’s credibility through candid and open discussion about the impact of the preexisting condition, it is better to leave to the lay witnesses the task of emphasizing the new impact of the injury on the plaintiff’s life. Otherwise, the jury is left with a conflicting view of the plaintiff: on the one hand, he is credible and honest in discussing his prior problems, but on the other hand, he is trying to get a big award by talking about the severity of the new injury or its impact. A plaintiff who tells the jury how much an injury has reduced his/her enjoyment of life can appear to be a “whiner” or trying to extract more money from the jury.

Lay witnesses can validate the vocational impact of an injury and can provide key information on the plaintiff’s loss of enjoyment of life. A credible lay witness can help to paint a picture of intangible losses that is much more effective and believable.

In most cases, the jury’s perception of the character of the plaintiff can be important in their verdict. Lay witness

testimony about the plaintiff and his/her life can help establish in the jury’s mind that the plaintiff is a good person and deserving of a reasonable award.

Establishing Vocational Facts

Longer term medical consequences of an injury can be established by lay witness testimony about the plaintiff’s symptoms and pain. A lay witness can express opinions about the mental or physical condition of a person, Parris v. Johnson, 3 Wn.App. 853, 479 P.2d 91 (1970), and the Court has broad discretion under ER 701 in admitting lay witness opinions, State v. Kinard, 39 Wn.App. 871, 39 Wn.App. 371, 696 P.2d 603 (1985). A lay witness can testify about the symptoms persisting at the time of trial, and a damage instruction for future pain, loss of earnings, and disability may be given even if based only on such lay testimony, Bitzan v. Parisi, 88 Wn.2d 116, 88 Wn.2d 116, 558 P.2d 775 (1977).

Lay witness testimony about the ability of a plaintiff to perform his job duties can be most effective. Even if you have vocational experts or physical capacity examiners testifying about range of motion and physical abilities, it may not be as effective as your client’s co-worker describing the actual, day-to-day physical demands of the job. If the jury already knows what limitations are present through other lay testimony, it can use its own imagination to conclude that the plaintiff could not possibly perform the described duties.

Establishing General Damages

The standard jury instruction on damages will list pain and suffering, disability, disfigurement, and loss of



enjoyment of life. It is these general damages that can be presented, or corroborated, most effectively by lay witness testimony.

Who Should Testify?

Locating the best lay witnesses can be difficult and time-consuming, but well worth the effort. Of course, you should ask your client to identify those friends, neighbors, co-workers, or others who know the client and have had an opportunity to observe the consequences of an injury. I have often found that the client’s perception of who would be a “good witness” is far from accurate, and the last person on his list of ten people may provide the most valuable testimony. It is often best if a non-lawyer from your office contacts the lay witness initially, because a call from an attorney can be intimidating and produce less valuable information. It will take time to interview each potential witness, but without detailed information about what each witness knows and can testify to, you cannot make good decisions about trial witnesses.

Terry Abeyta presented excellent written materials on this subject at a WSTLA seminar in December, 1999, at “Trial Masters at Work: Excellence in Damages.” He included a “lay witness checklist” in his materials, which I have duplicated and attached as an exhibit to these materials, along with a checklist of potential problems a client may be experiencing after an injury (also included in Terry’s materials). In addition, attached is an “activities of daily living” checklist we use in our office to help establish the disabilities and problems resulting from an injury. The use of these checklists can be helpful in eliciting information from

a lay witness who otherwise will only give generalities like “the plaintiff isn’t as active now as he was before,” or “he used to get around a lot better before he lost both legs.”

Sometimes you don’t have a lot of choice in selecting lay witnesses, because the plaintiff didn’t have a lot of friends or people who witnessed the effects of the injury. In other cases, you will have so many people on the list provided by the plaintiff that it is hard to choose. You clearly don’t want to present cumulative testimony from many witnesses, and the court may prevent you from doing that in any event. You want to present different witnesses, if possible, who will each support some slightly different aspect of the general damages.

If you have choices among people, consider the witnesses’ occupation. Each year, Gallup does a poll on which occupations are most respected. The pre-September, 2001 poll has nurses first, pharmacists second, veterinarians third, physicians fourth, and grade school teachers fifth. I have heard that a recent poll now has firemen in first place, with nurses second. At the bottom of the list are used care salesmen and telephone solicitors. Given a choice and other things being equal, good testimony from a grade school teacher will probably be much more credible than that of a car salesman.

There is also some advantage in trying to “mix” the witnesses in terms of gender and age. One of my goals is to have lay witnesses that jurors can identify with; older jurors may respond better to a witness in their age group, for example, and blue collar jurors may respond better to a blue collar worker. If a juror identifies with a witness, that

witnesses’ testimony about the plaintiff may resonate and have more impact.

What Should a Lay Witness Testify About?

I think the most important goal of a lay witness’s testimony is to convey a “word picture” about the plaintiff’s damages. In cases involving preexisting conditions, the same “word picture” may be presented as to the limitations caused by the new injury.

Generalized testimony is almost useless. For example, people will easily say such things as “the plaintiff seems to be in a lot of pain,” or “the plaintiff doesn’t do as much as he did before,” or “he had problems before but now they are a lot worse.” What you want, however, is for jurors to hear the lay testimony, and decide for themselves how terrible the injury has been for the plaintiff and how much worse off the plaintiff is now than before, despite the preexisting condition. A conclusion reached by the jury itself is held more firmly than one you tell them to reach.

One way to highlight limitations or disabilities is to present a lay witness who only testifies about the post-injury activities. By talking about things that the plaintiff now cannot do after the injury, but without contrasting it with the pre-injury situation, the witness is more credible and less likely to be seen as trying to persuade or influence the jury. Other evidence will establish the plaintiff’s past condition, and the jury can use its collective imagination to contrast that with the pre-injury situation. As note above, it is more effective to let a jury reach its own conclusions than to point out those conclusions to the jury.

In one such case where a lay witness (a neighbor and friend) testified only



about the post-injury limitations he observed in the plaintiff, and didn't comment about the prior condition, the defense attorney asked as a first question: "You have talked about problems the plaintiff has now, but isn't it true that even before this accident the plaintiff had a lot of disability because of [the preexisting condition]?"

The answer was: "Yes, but it's like night and day." Not too many additional cross-exam questions were asked.

I have found that the most effective lay witness testimony is the use of anecdotes or vignettes to illustrate the point being made. It can be amazingly difficult to pull such stories from witnesses, however. I like to call these the "I remember when..." stories. A few examples:

"I remember when John got tickets to the Mariners for himself and his young son. He was a baseball fan and pretty excited about going, and his son was even more excited about going with his dad. Then John called me that morning and asked if I would take his son instead, because he was in too much pain to go."

"I remember when Fred tried to get up from his chair, and he fell backwards when his leg gave out. That happened quite a few times."

"I remember asking Bill after he got out of the hospital if he wanted to go fishing in my boat. We used to go almost every weekend when the weather was good. But he told me he couldn't do that anymore because he couldn't get in and out of the boat because of his back. He had tears in his eyes when he told me that."

"I remember the time Mary was going to sing in the church concert on a Sunday evening. She'd been a member of the choir for many years and had a beautiful voice. But she had to cancel that afternoon because she was no longer able to stand long enough to participate."

These kinds of short stories or anecdotes are the verbal equivalent of

photographs. The paint a picture of the plaintiff that stays with a jury much longer than generalized descriptions or conclusory testimony. They can also illustrate aspects of the plaintiff's character or lifestyle that you want to bring out: how dedicated the plaintiff is to his/her children, how much they treasured such things as fishing with a friend, or singing at church, or the indignity and embarrassment of not being able to get out of a chair without assistance. You have accomplished two things with the anecdotes: established the level of pain of disability and how it affects that person's life, and how much of a "good person" the plaintiff is.

It isn't always easy to pull these anecdotes from lay witnesses. Some people have a difficult time being specific and will resort to generalities repeatedly. It may be necessary to "talk" the witness through a day, or a week, or a month of the plaintiff's life, and ask about specific things they recall about what happened during that time period. Usually, you can find something that witness can tell the jury that helps illustrate your client's damages, but sometimes it is a hopeless task. In some cases I have had a group meeting with a half dozen witnesses to collectively talk about what they know and can recall, and that can trigger memories of events that can be used in testimony.

CONCLUSION

In most cases where general damages are a major component of the case, the plaintiff's attorney is trying to paint a word picture of the extent and severity of disability or loss of enjoyment of life experienced as a result of the injury. In cases involving preexisting conditions, that task is made more

difficult by having to take into account that not all of the problems experienced by the plaintiff are caused solely by the injury. It is a more complex task and one that requires emphasis on credibility and candor in order to avoid the impression that the plaintiff is overreaching and trying to blame all of his/her problems on the injury.

Jurors give good awards to plaintiffs they think are deserving people. An attorney cannot take the risk that defense cross-examination will make it appear that the plaintiff is minimizing his prior problems caused by a pre-existing condition and trying to "con" the jury into giving a large award. To avoid that, the attorney and the plaintiff should bend over backwards in acknowledging and recognizing the preexisting problems.