

DEVELOPMENT AND USE OF DAMAGES
EVIDENCE IN SOFT TISSUE CASES
GTLA seminar - 7/5/98

I. Introduction

Soft tissue cases come in all sizes and shapes. Many are similar but none are just alike. Although the classification of "soft tissue" encompasses an unfortunate choice of words, it is a useful classification for talking about muscle, ligament and tendon injury all at one time. This class of physical injury has a reputation for difficulty in proof.

The reputation is well deserved. The difficulty results from a credibility problem. It is difficult to illustrate the physical injury. There are no x-rays, bleeding wounds or pathology slides which dramatically evidence the injury. The cases do not usually justify large expenditures for demonstrative aids and the ones that are available are of limited use.

The focus of the proof should be on making the injury credible. There are many ways to make the soft tissue injury credible. However, they require that you become conversant with the pertinent human anatomy, the mechanism of injury, the clinical signs of the injury and the physical consequences of the injury. Once you have established the credibility of the injury, then the damages can be argued with greater confidence.

The credibility battle is waged in the soft tissue case much like it is in any other personal injury case. Your best weapon is education. Think of the best way you can educate the jury on what a soft tissue injury is, how it occurs and what it can do to a person. Remember, you have a skeptical audience.

There are as many ways to wage the credibility war as there are trial lawyers. I can

only tell you what has been successful for me and what I have learned from my failures. You can then build on what I am able to impart to you and come up with better ideas. Hopefully, you will then pass these lessons on to the other lawyers.

The process of gaining credibility for the soft tissue injury is a trial-long process. There is no silver bullet of persuasion which will accomplish this goal in a brilliant instant. Obtaining credibility for the injury requires an integration of all the portions of the trial. Fortunately, this is not difficult once you know what your focus should be to gain as much credibility as possible.

II. Opening Statement

This is the first opportunity you have at education. At voir dire, you have already asked the jury who has ever had a sprained ankle, suffered rheumatism or suffered a pulled muscle. You have already asked who has suffered an injured neck or back, who has taken pain medication, who has been treated by a chiropractor and who has been treated by a medical doctor or physical therapist for a muscle injury. You have asked who missed time from work because of the type of injury called a soft tissue injury. You may even find a member of the venire that has a chronic problem with a muscular or ligament injury. The venire members that answer for themselves, their family members or their friends will begin the process of establishing the reality of the soft tissue injury.

During opening statement, you can now more fully explain the terms that you will rely on during the medical providers' testimony. These terms may include "spasm," "trigger points" and "fibrosis." You can explain the anatomy of the muscle and the presence of nerves in

the muscles. You can explain how the muscles are stretched beyond their usual capacity and how fibrotic scar tissue left from the healing process irritates the nerves in the muscles. A simpler explanation will provide a better foundation for the jury to gain an understanding of the injury.

You may want to write the key words on a chart or a board. Seeing the words written will assist the jury in paying attention and gaining a better understanding of the nature to the injury. You may have medical illustrations or other generic demonstrative aids which will better aid the jury in understanding the mechanism of the injury and its consequences. Use whatever can simply convey the nature of the injury to the jury.

Explain that this is an injury which cannot be cured by surgery. It cannot be set such a broken bone. The injury cannot be seen on x-ray. However, the injury can be painful just as a badly sprained ankle.

Explain the course of treatment. Explain any medication given. Explain the expected testimony of the medical providers. Write the names of the medical providers on the chart or board. Spend as much time as you believe is necessary, without boring the jury, to lay a strong simple foundation for your medical testimony and your client's complaints.

II. Medical Witnesses

Your choices of witnesses are the primary source of your credibility. I would not recommend that your only medical witness be a chiropractor. Most jurors do not have a strong belief in the competency in chiropractors. A chiropractor will not usually provide adequate credibility for the injury. This is not as much a reflection on chiropractors individually as it is on the perception generally. You need a stronger witness in a more traditional medical field.

Chiropractors also often use unusual terms to explain their findings and diagnoses. This jargon makes it difficult for the jury to understand.

Chiropractic testimony should only be used in conjunction with other medical care testimony, hopefully a doctor's testimony which will corroborate the chiropractor's opinion. Physical therapists are another valuable source of testimony. They are usually very likeable people whose testimony who can explain the patients' problems with clarity.

Both physical therapists and chiropractors can use similar demonstrative aids. These may be medical illustrations of the injury process. Enlargements of the medical records may be helpful. Spinal models may be helpful.

Therapists are more focused on the muscle injury rather than spinal injury. However, juries do not have much of a problem with the occurrence of muscle injury. They do have a problem with the permanency of the injury. Therapists can explain how hard a patient has worked with a problem and the residual restrictions they had after their prescribed therapy.

Copies of outlines of medical doctors, chiropractors and therapists which have been used at trial are attached to the end of this article for your review. They have been used with various degrees of success. However, the purpose of all of them has been to attempt to explain the injury in understandable language for a jury.

IV. Lay Witnesses

Often referred to as before and after witnesses, these witnesses must be interviewed before trial. They have the potential to be disastrous and valuable. Their value rests in their ability to explain how injury has changed the Plaintiff's life. Go through the hobbies that

the Plaintiff could do and now complains of. It is much better to have a lay witness explain the difficulties of injury than to have the Plaintiff complain too loudly.

The best lay witnesses are co-workers who have seen how much more difficult it is for the Plaintiff to perform his job. Maybe his production has slowed. Maybe he grimaces a lot. A Plaintiff's boss is a great witness and provides great credibility to the claim just by being there willing to testify.

V. Demonstrative Evidence

Medical illustrations of the process of injury are commonly available from numerous companies that specialize in this type of service. The drawings are generic and do appear that they would be helpful to explain the injury process.

I have preferred to use photos and drawings from books. There are books with diagrams of referred pain and anatomy books which have good pictures of the affected muscles in them. One method of using these drawings is to have a doctor draw on them showing the areas of the affected muscles during his deposition. Ask the doctor to mark on the drawings with red ink and have him initial and date the drawing. At trial, the drawings can be enlarged and can be shown to the jury during the reading of the deposition. Then move the drawing into evidence so it can go back to the jury.

This drawing then gives the jury something which it can hold onto and actually see an area of damage. It is concrete compared to a discussion of a vague cervical strain. This drawing gives the injury a lot of credibility.

X-rays, in some instances, can be helpful. These instances occur when the lordotic

curve has been lost and the spine has been straightened. Positive prints of the x-ray can be obtained from the local photography store for a reasonable cost. A medical provider can then explain the significance of the positive print. He can mark on it too. Then move it into evidence and send it back with the jury.

VI. Lost Earning Capacity

This is the darling of damages in soft tissue cases. The juries today, and probably always, are most impressed with lost earning capacity. Although juries will usually award medical expenses to a Plaintiff once he establishes liability, they must see more before they get too concerned about damages.

If the jury is impressed with the sincerity of your Plaintiff and is convinced that he has done the best he can do with the injury, then Plaintiff's work becomes significant. If his work requires physical labor, then an injured muscle is significant. If he must drive long distances as a salesman, then a bad back is also significant. The degree of significance is the big issue and each jury will likely consider it significant to different degrees.

Lost earning capacity is not the same as lost income. However, the courts often get these two items confused. Lost earning capacity is a general damage while lost income is a special damage. Lost earning capacity only requires that you prove some degree of lost ability to labor.

A trial brief is attached in which the item was allowed in a soft tissue case. The only proof requirement for allowance of a charge and argument on this item of damages is some permanency of physical impairment from the injury. The Defendant will likely argue loudly that

actual lost income is necessary. However, that Defendant has confused the special damage of lost income with the general damage of lost earning capacity

Conclusion

There are no silver bullet items of evidence in soft tissue damage cases. You must only explain the injury as it really is without exaggeration. In most soft tissue cases, the damages are not life threatening. However, the damages are significant to the injured person and may very well change the quality of his life. This message takes a whole trial with solid witnesses to convey.

Furthermore, these are not injuries for which there are any surgical techniques or medicines which will cure the injuries. They often belong to the Plaintiff for the rest of his life. The degree to which these damages can be made understandable will affect the verdict rendered for the Plaintiff.

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