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Experts: Who you need and who you don't

Going light on experts can cost you at trial; going heavy can cost you, too

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Choosing the correct experts can be the key to winning many cases and determining damages. Following is a guide to determine which experts can be useful in a variety of cases.

Premises liability

As it relates to premises liability, both dangerous condition and notice are almost always at issue. Both can be established and/or buttressed through expert testimony.

Experts in human factors and safety experts can explain how a condition is dangerous to people. For example, a human-factors expert can explain how a seemingly inconsequential half-inch rise in that piece of concrete is a tripping hazard and dangerous, or how uneven risers in a flight of stairs can cause a fall. Experts in human factors can also give opinions on perception and reaction which is crucial in situations where comparative fault is at issue. For example, in low-lighting cases a human-factors expert can use foot-candle readings to explain how a dangerous condition could not be seen by a plaintiff because of inadequate lighting.

Be it actual or constructive, the issue of notice is almost always a point of contention in premises-liability cases. Many times we must show constructive notice.

In other words, we must show that through the use of reasonable inspections, the defendant should have known of the dangerous condition and fixed it.

Of course, this poses the question: what constitutes reasonable inspection? That likely depends on the type of property/business involved. As such, experts should be specifically tailored to the type of business of the defendant. If the

defendant is a grocery store, then hire an expert with extensive experience in the grocery-store business to testify about reasonable inspections/practices of a grocery store. If the defendant is an apartment building, hire an expert who has managed apartment buildings. Be cautious of experts who market themselves in a wide variety of fields. Their real world experience will be limited, making them good targets for cross examination on foundation.

Experts are not always required to prove a condition was dangerous, or that the defendant had actual or constructive notice of the condition. Many times the defendant (employees, PMK, etc.) will admit the condition that caused injury was dangerous. This almost always occurs in slip-and-fall cases. Nearly everyone will testify the milk in the aisle, oil on the ground, or water on the stairs was dangerous and could cause someone to slip and fall. Explore the issues of dangerous condition and perception/reaction in the depositions of the defendant (employees and PMK). The testimony will often amount to admissions on a dangerous condition and your client's inability to perceive it, thereby eliminating comparative fault. If the defendant admits there is a dangerous condition, hiring an expert to say the same thing is unnecessary.

There is no need to pay an expert thousands of dollars to do inspections, coefficient of friction testing, etc. when defendant has admitted that spilled milk in a store aisle can cause people to slip and fall.

Code violations can make a bad premises case a good one, and a good premises case a great one. Approximately every two years cities, counties and municipalities will adopt the most recent

Uniform Building Code through an incorporating statute/adopting ordinance. Determining the applicable dates of the adopting ordinance and applying that to building construction can be done by code experts. Code violations should be explored in every premises case.

Medical malpractice

Experts are not only necessary in medical-malpractice cases, they are required by law. Only an expert physician can testify as to the standard of care of a physician. In choosing your standard-of-care expert a good rule of thumb is to retain an expert who practices in the same field as the defendant. If you allege the defendant orthopedist fell below the standard of care in performing an orthopedic surgery, you should retain an orthopedic surgeon. Otherwise your expert's opinions may be inadmissible as lacking foundation.

Additional medical experts are sometimes required to establish causation in medical-malpractice cases. There can be egregious standard of care violations with no causal link to damages. Failure to diagnose cancer is a good example of this. Take the dermatologist who fails to biopsy and diagnose an obvious skin cancer for years and years. This may sound like a good case, but you must address the question: So what? If the treatment course and life expectancy would be the same with an earlier diagnosis (when the diagnosis would have been made if the standard of care was followed) then there are no damages. In other words, the delay in diagnosis did not cause any damages.

Causation and standard of care in medical malpractice will often involve completely different medical experts. Take the above example of the failure to



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diagnose skin cancer. Whether the dermatologist fell below the standard of care should be addressed by a fellow dermatologist. However, a dermatologist is not qualified to give opinions on causation; i.e., the treatment course and life expectancy relating to a specific cancer diagnosis, and hypothetical earlier diagnosis. This would fall under the purview of an oncologist.

Auto

The most common experts in auto cases are accident reconstructionists and biomechanical engineers. Accident reconstructionists can explain how the collision occurred by analyzing damage to vehicles, crash test data/dynamics, road markings (gouge marks, tread marks), police reports, other sources of physical evidence, and deposition testimony. Accident reconstructions can show who was at fault for a collision (who ran the red light, etc.), and the forces involved in the collision. The forces involved in the collision are essential to the biomechanical analysis. Biomechanical engineers explain how the forces of a collision (derived by an accident reconstruction) can cause injury to the occupants in a car. An expert in biomechanics can explain to a jury how a rear end collision can cause neck and back injuries even in a low-impact collision.

How quickly a driver reacts and sees things in the few seconds of a collision is often important in determining negligence and eradicating comparative fault. An expert in human factors can explain how quickly a driver can perceive and react to a particular condition. For example, the defendant bus driver had plenty of time to perceive and avoid the impact. Or the plaintiff could not perceive and react to the defendant's car running the red light in time to avoid the collision. Accident reconstructionists are generally aware of perception and reaction times of drivers and can testify on such issues.

Their qualifications in the area of human factors however, may certainly be challenged. If the case is big with issues of

perception and reaction, hiring a human factors expert along with an accident reconstructionist is recommended.

Auto: Minor Impact Soft Tissue (MIST)

Perhaps in no other case are we more financially limited in expert expenditures than in minor-impact soft-tissue auto cases. Expenditures on experts can quickly overtake the actual value of the case, potentially leaving your client with nothing. It is often not economically feasible to retain either a biomechanical engineer or an accident reconstructionist on a MIST case. Going to trial with only your treating physician (orthopedist, chiropractor) is generally your only option.

Some insurance carriers will defend MIST cases with a slew of experts including radiologists, accident reconstructionists, and biomechanical engineers in addition to orthopedists. Many of these areas of testimony can be addressed by a treating physician. For example, every orthopedist is trained in radiology and can offer expert opinions in that area. Retaining a biomechanical engineer where the value of the case warrants it is recommended. If not, consider using your orthopedist. Despite popular belief, orthopedists are trained in biomechanics.

Orthopedists are specifically trained and have extensive knowledge in what types of forces cause injury. What types of forces cause injury is biomechanics at its very core. The problem orthopedists have in giving an opinion on bio-mechanics only has to do with the actual term "biomechanics." That word is not used in orthopedic residency. The concepts of the forces that cause injury certainly are. Before expert discovery, sit down with your client's orthopedist and explain that "biomechanics" simply refers to what types of forces cause certain injuries. With this understanding, an orthopedist will feel much more comfortable offering opinions on biomechanics. Orthopedists are not going to be familiar with the most recent data and studies relating to biomechanics. This can be problematic. But

they can always fall back on their real-world experience, their own study if you will, of treating thousands of patients that do get hurt in car accidents. Although it's not very scientific, it can be powerful with a jury.

Damages

Damages experts will span a range of issues including the nature and extent of injuries, past and future medical expenses, lost earnings/earning capacity, causation and general damages.

Your client's treating physician(s) will serve as one of your experts in virtually every personal-injury case. Treating physicians can explain to a jury your client's injuries including causation and prognosis. Some physicians have experience serving as experts in litigation. Others do not. Either way, it is extremely important to meet with your client's treating physician before designation and certainly before their depositions for thorough preparation.

On injury cases where your client has permanent physical injury, chronic pain, and/or neurocognitive deficits, much of the economic damage will come from future medical care. Your job as the plaintiff's lawyer is perhaps best described as identification and matching. You must identify which client will require future medical care and match the general type of care with the appropriate experts in developing a future medical-care plan (commonly referred to as a life-care plan). Identifying the client is relatively simple. If the injury permanently affects your client's activities of daily living, your client will need a life-care plan. Certified life-care planners are experts in this field and are knowledgeable as to the costs of such future medical care. They are instrumental in developing a life-care plan.

Life-care plans do not end with the life-care planner. Life-care plans should be buttressed with the expertise of medical doctors who can work with your life-care planner to develop the plan. The type of medical doctor needed will depend on the injury. If your client's



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activities of daily living are affected by chronic pain, you should retain a pain management specialist to work with your life-care planner. If your client's injury is physical in nature, with motor deficits such as spinal cord injury, brain injury, etc., retain a physiatrist (physical medicine and rehabilitation) to work with your life-care planner. Traumatic brain injury will likely involve neurocognitive deficits, in addition to physical deficits, necessitating future care. Consider retaining neurologists and neuro-psychologists to address the neuro-cognitive issues in a life-care plan.

Generally, forensic economists and vocational rehabilitationists provide the expert testimony in the areas of lost earnings and loss of earning capacity. Economists can review past earnings records, along with nationally reported statistical data, to calculate your client's lost earnings and loss of earning capacity. Experts in vocational rehabilitation, who actually examine and test your client, can explain to a jury how your client's injury prevents them from working. They can also show how your client's condition prevents him

or her from entering the workforce in the same field or a new field. Lost earnings and earning capacity can, and at times must, involve expert testimony. However, do not ignore the importance of testimony from co-workers and supervisors who worked day in and day out with your client. This testimony is free and powerful.

It seems the defense is designating radiologists on every case involving injury to the spine. Generally these experts will review the radiology films (X-ray/MRI) and testify there is no evidence of injury or acute injury on the films. Most of these radiologists are routinely used by the defense and subject to impeachment for obvious bias. Even so, the testimony can be very damaging to your case. It is also often the last testimony heard by the jury. If the value of the case warrants the expense, and assuming the defense designates a radiologist, consider retaining your own radiologist and designating them as a supplemental expert for rebuttal purposes. This will allow you to call your radiologist as the last witness at trial. The opinions of your radiologist, as opposed to the defendant's, will be the last evidence heard by

the jury before closing argument and deliberations.

Conclusion

Picking the right experts for your case is not an easy task, especially where the value of the case does not warrant hiring multiple experts. While cutting corners with experts is not recommended, sometimes you got to do what you got to do.

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