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Cross examining the biomechanics expert in a “minor impact” trial
When the defense is disputing causation, this is the expert you have to discredit

By Spencer Lucas

In a vehicular-collision case that results in anything less than complete destruction of your client’s vehicle, you can expect the defense to hire a biomechanics expert to opine that your client could not have possibly suffered the injuries claimed. Tom Schultz and I recently dealt with this in a trial and we were able to prove the defense’s biomechanics expert and proving injury causation to the jury.

Background research on the witness

Our trial was against the State of California (Department of Justice – Attorney General’s Office) and involved a car crash. Our client suffered cervical and lumbar injuries, as well as left-shoulder, left-lumbar, and left-wrist complaints. He was unemployed and left the hospital with a diagnosis of cervical and lumbar strain.

After conservative chiropractic care, the plaintiff ended up having a one-level cervical fusion C6-7, a left-shoulder labral-repair surgery, and two wrist arthroscopic surgeries. In trial we faced a biomechanics expert who opined that our client could not have possibly suffered any significant injury in the crash.

The essence of the testimony was that our client, at age 50, had a long history of chronic neck and back pain based on his work as a heavy equipment operator. Our client suffered cervical and lumbar injuries, as well as left-shoulder, left-lumbar, and left-wrist complaints. He was unemployed and left the hospital with a diagnosis of cervical and lumbar strain.

Before deposing the defense expert, you have a good understanding of the defense expert’s prior opinions, you will be better prepared to keep your witness honest when they try to destroy your case and call your client a fraud.

Accident reconstruction foundation for opinions

Before deposing the defense expert, it is critical to obtain all of the accident-reconstruction data from your expert and gain a clear understanding of the forces involved. This will enable you to poke holes in the defense expert’s opinions if her analysis is based on a flawed reconstruction. This typically involves knowing the (1) speed of vehicles involved, (2) principal direction of force, (3) areas of impact, (4) evidence of vehicle damage, previously relied on your own biomechanics expert’s published research. This happened to be the case in our recent trial.

Prior opinions

A key aspect in spinal-injury cases is looking at the earlier opinions of the defense expert to see what he or she has opined about before in terms of the minimum threshold for causing disc injury. This varies depending on the type of collision, whether frontal impact, rear-ender, or side-impact. This also varies whether one is dealing with a cervical injury or lumbar injury. Generally speaking, it is easier to prove a cervical-disc injury in a rear-ender than a lumbar-disc injury in a frontal collision. The reason for this involves the whip mechanism of the cervical spine, which is not as prominent in the lumbar spine. In side-impact cases, biomechanics experts will testify that the forces imparted on the occupant are not as severe as they would be in a rear-ender or frontal impact.

Once you have a good understanding of the defense expert’s prior opinions, you will be better prepared to keep your witness honest when they try to destroy your case and call your client a fraud.

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and (5) orientation of the injured occupant.

We learned that our reconstruction expert had the impact at 16 mph, which was close to the defense’s impact speed. However, the defense’s Delta V (DV) was only 4 mph, where ours was 10-12 mph. This difference was enormous because most biomechanics experts would agree that someone can suffer a spinal-disc injury at DV 10-12, but not at 4. The critical issue became the analysis used by the defense accident-reconstruction expert that the biomechanics expert relied upon.

In our case the defense reconstructionist opined that the defendant’s vehicle first hit our client’s cement-pumper trailer and then hit the rear of our client’s truck. He used a computer program that did two different reconstructions of the impact: (1) the impact to the trailer and (2) the impact to the truck. Upon reviewing his file after the depo it became clear he used two different methods to monkey the numbers to sway a lower change in velocity than reality. He used a momentum analysis for impact with the trailer and a damage analysis for the truck. While in and of itself this might not be fatal, the expert chose a stiffness value of the truck as 9999.99 which is the highest value the program allows. There was no basis for such a high value given the obvious deformation to the steel underride bar of the truck.

This knowledge enabled us to expose a faulty foundation in the defense theory of the reconstruction. If the basis of the biomechanics expert opinion is flawed then the entire opinion of the biomechanics expert is worthless.

Use medical records to your advantage

In virtually every case, the defense lawyers will fail to provide their experts some of the medical records. Sometimes this is harmless error, other times it is an overt attempt to improperly influence the witness.

In our recent trial it became apparent that the DOJ lawyers failed to provide their biomechanics expert with the records from the initial treating chiropractor, which proved that our client had complaints of pain to the areas of his body at issue within three days of the incident. The defense was so overzealous in trying to prove their point that our client wasn’t injured that they wanted to hide the evidence from their own witnesses.

Medical records often discuss the positioning of the injured party as it pertains to the mechanism of injury. For example, if someone is unbelted the records will mention this and might further explain if your client “hit the dash.” In our case, the plaintiff was unbelted and suffered a left-wrist and left-shoulder injury. The problem was that not a single medical record discussed “hitting the dash” or an “outstretched hand.” When dealing with this situation, where the medical records don’t mention a key aspect of the accident and injury, it is important to prove that collisions often happen in less than a matter of milliseconds. We countered this with testimony from both our expert orthopedic surgeon, who had biomechanical training, and also our biomechanics expert, who talked about how the human mind is not always able to interpret the specific kinematic movements of the body in a crash that happens in less than a half-second. There are published studies on this topic dealing with football players who do not recall which way their leg twisted resulting in knee tears.

Despite somewhat problematic medical records, in trial we were able to cross the witness by essentially blaming the lawyers for failing to provide the witness with the key records. This became a highlight of the cross and took any thunder they had away from them.

Use “Before and After” evidence to prove causation

Medical records can often establish the fact that your client was asymptomatic before the subject incident, and became symptomatic after. Biomechanics experts are typically not medical doctors qualified to give a diagnosis, so they are forced to admit what the records say on their face.

Even when your client has a prior history of neck or back pain, the likelihood is that the prior medical records are significantly outweighed by the treatment post-incident. This can be used to your advantage with the defense expert by establishing the timeline of before and after. For example, if the number of medical visits your client had in the five years before the incident, compared to the post-incident number of medical visits. Force the defense expert to admit that your client was asymptomatic on the date of the incident. Use the deposition, or declarations, of family members, co-workers, and friends to establish what your client could do physically without limitation before the incident. Force the defense expert to admit they have no evidence to contradict what the friends and family say.

Videotape the deposition

Tom Schultz of our office took the deposition of the defense biomechanics expert. The expert admitted that she had no idea which injuries were caused by the collision and which may have been pre-existing, if any. Obviously this was disturbing to the DOJ lawyer who had been working for several years to try and prove that all of our client’s injuries were pre-existing. What happened next was by far the most amazing piece of videotape deposition evidence I’ve ever seen:

The DOJ lawyer writes out in huge black letters on a piece of paper “You do have the opinion that the plaintiff was not injured in the accident and that all of his injuries are pre-existing.” He then slides this note over to the expert – which is visible in the video. The witness is looking over and reading it. You can see the arm of the defense lawyer sliding over the note. Tom, incredulous, says “What? Is he handing you a note? Did you just read a note from counsel?”

The witness herself can’t really believe what is going on and chuckles and says “Well, yeah I guess so.”

So after a big fight, Tom gets the note and marks it as an exhibit. Of course the note became an admitted exhibit at trial, and we played the clips.

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May 2016

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from the videotaped deposition before the defense expert took the stand.

Key points for the deposition

As part of your outline, develop a list of concessions that you want the witness to make based on the evidence and materials you have. For example, if you are armed with prior-opinion testimony on issues relevant to your case about spinal injury threshold use this and force the expert to commit to their prior opinion. Then move factually to the specifics of your case and force the expert to admit anything that helps establish your theme. If there is helpful witness deposition testimony describing the seriousness of the collision, force the expert to acknowledge they cannot refute the eye witness account of what occurred. If there is frame or structural damage to your client’s vehicle, force the expert to acknowledge that this was likely caused in the crash. Focus on your client’s immediate onset of pain and make the expert admit that your client suffered injury in the collision. As discussed below, this will help you with a verdict form that avoids improperly getting defended on causation.

As you go into the deposition, you should have a list of records that you have provided to your expert. This can be used to examine the witness about all the missing records that the defense lawyer failed to provide their expert. This not only boxes them in on a Kenemur motion, it makes both the lawyer and the witness look unprepared. Biomechanics experts look for the initial-treatment records to determine at what point your client started complaining of the injuries at issue.

In spinal-surgery cases the experts look for complaints of radiculopathy. It is helpful to be armed with the initial-treatment records whether they be ambulance, E.R., chiro, P.T., or orthopedic records. In spinal surgery cases, you should have an understanding of the nerve distribution at issue. For example, C6-7 nerve distribution extends behind the scapula, down the arm (triceps) into the middle finger. A C6-7 nerve issue will typically create weakness in the wrist. Use anything in the record to help establish these facts. In our case even though the "radiculopathy" was not precisely identified until 18 months post-incident he had pain diagrams within a week of the

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the incident circling the left scapula and left wrist which are consistent with the nerve distribution at issue.

After all the concessions have been made, and it is apparent she doesn’t have the complete records, her confidence will be rattled and this is the point where you get her “opinions.” Get the witness to provide all of her opinions, all the bases of her opinions, all assumptions she is relying upon, all research relied upon, all experts she spoke to, and all demonstrations she will use at trial.

**Motion in limine re ultimate opinion on causation**

Experts are precluded from offering an ultimate opinion that would invade the province of the jury. This is true for accident reconstructionists opining that a party was “negligent” and also true for biomechanics experts who are not medical doctors and who attempt to testify about “causation.” All they can say is if there is a mechanism of injury or not. A medical doctor, whether a treater or expert, may be qualified to say if the collision caused the injury at issue. However, this is not the proper subject of expert opinion from someone without an M.D.

It is critical to meet and confer about this and get a stipulation and put it on the record during the Motion in Limine hearing. If the defense will not agree, file a motion.

**Use the appropriate verdict form to avoid improperly getting defensed on causation**

Once the defense expert admits that your client suffered a whiplash injury, or even a minor soft-tissue injury, the verdict form should be crafted to avoid confusion on causation. If the defense admits that the incident caused injury, and the dispute is only the extent of the injury, that issue is addressed in the damages section of the Verdict Form. Reference to the CAAC Verdict Form 400 is helpful to persuade the judge to omit question #2 on: “Was defendant’s negligence a substantial factor in causing harm to plaintiff?”

Sometimes the judge will require “substantial factor” language in the Verdict Form out of an abundance of caution. In our recent trial, the defense admitted liability after trial started and the court agreed to use the following language after we proved that the defense experts admitted plaintiff was harmed. “What are plaintiff’s damages of which defendant’s negligence was a substantial factor?” While not as straight forward as

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“what are plaintiff’s ‘damages’” this at least correctly took out an opportunity for the jury to defense the case by answering “no” on a straight causation question.

Crossing the defense expert at trial

Begin your cross-examination preparation by creating impeachment video deposition clips. If you are going to spend the time and energy on any trial, it is worth the money to get the synchronized video deposition of the key defense experts (at least the orthopedic expert, accident reconstruction, and biomechanics). With the synchronized video, you can make your own impeachment clips and have them loaded onto a laptop ready to play for the jury when the witness tries to deny what they said in deposition. It is shocking how experts try to squirm out of what they testified to under oath in deposition.

With your outline, start with proving the expert’s bias, their defense-slanted nature, how much money they make doing defense work, and how much money they are making to provide the defense opinions in your case. Make sure even for the most basic concession that you have the video clip ready to play for when the witness goes sideways.

Then expose all the records that the defense lawyer never gave them. When the defense expert is a polished and likeable witness, I find it a useful strategy to focus the blame on the lawyers and their strategy to hide the truth.

Next go to the best points of your case on causation whatever they may be. This may be the idea that your client was asymptomatic on the date of the incident. It may be witness testimony explaining how active your client was before the collision at issue.

The “eggshell” plaintiff

Another key point for cross examination is aggravation of pre-existing condition. Often the defense biomechanics expert, along with the defense radiologist and orthopedic spine surgeons, will testify that your client suffered from a degenerated spine from aging and wear and tear. Force the defense expert to admit that she cannot state to a reasonable degree of scientific certainty that the collision did not exacerbate an underlying condition. CACI 3927 states “if plaintiff had a physical or emotional condition that was made worse by defendant’s wrongful conduct, you must award damages that will reasonably and fairly compensate him for the effect on that condition.” Put it in simple terms and just ask, “you can’t rule out that my client’s condition was made worse after the collision?” (i.e., He was an “eggshell” plaintiff.) This theme resonates with juries because everyone has some aging in the spine which pre-disposes us all to injury.

Faulty foundation

Finally, go to the faulty foundation in the biomechanics opinion based on the defense’s accident reconstructionist. You will have already addressed this issue with your accident reconstructionist, poking holes in the defense theory.

Let’s take a look

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The medical-emergency defense

Defendants try to avoid liability by claiming a “medical emergency caused them to lose control

By Brian Panish and David Rudorfer

As insurance companies and the lawyers that represent them search for ways to evade responsibility, the improper use of the medical-emergency defense has grown in popularity. The defense is usually raised after an alleged medical condition causes a driver to lose control of a vehicle which kills or injures many innocent people. This article explains how to make this defense tactic backfire and actually increase the plaintiff’s chances of proving liability and damages.

The law does not favor this defense

California has codified that a defendant who causes injuries as a result of an unsound mind, or mental medical emergency, has no defense. Specifically, Civil Code section 41 provides that “A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person [...].” In Bashi v. Wood, (1996) 45 Cal.App.4th 1314, it was clearly explained that mental illness of any kind are not a defense to negligence or any other civil torts. The rationale is that individuals, who hurt or kill innocent members of the public as a result of their mental medical condition cannot be proved or there is ample evidence of the defendant having reason to anticipate the sudden medical emergency.

Defendant’s burden

Based on the law set forth in Cohen, Waters, Bashi, Civil Code section 41, and related case law, a defendant asserting the sudden physical-medical-emergency defense has the burden to affirmatively prove the following: (1) That defendant driver was telling the truth; (2) The medical cause of the alleged sudden condition the defendant driver experienced was a physical, rather than mental, medical emergency; (3) That it was a sudden condition which immediately rendered defendant unable to control the vehicle; (4) That defendant driver had no reason to anticipate or foresee this sudden physical medical condition; and (5) Whether the defense could be considered to overcome the presumptions of negligence (ex ipso loquitur or negligence per se). The case law specifically provides that these issues are questions of fact for the jury to decide.

This defense is somewhat controversial. Numerous jurisdictions have recognized that any form of medical-emergency defense would be inconsistent with the principles of comparative fault and arbitrarily makes victims pay for the harm caused by others’ physical medical emergencies. California’s approach, while maintaining a comparative-fault system, has been to limit the defense in the ways stated above so that it is almost always subject to defeat. Despite the law that limits this defense, it should come as little surprise that it is commonly asserted in cases where the medical condition cannot be proved or there is ample evidence of the defendant having reason to anticipate the sudden medical emergency.

Plead against the defense

When to begin the fight against the medical-emergency defense is generally a question of whether it appears to be a medical-emergency case from the police report or other pre-litigation investigation. If it appears clear that the collision was

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the result of any form of medical emergency, consider pleading allegations against the defense. The allegations should provide that the defendant knew or was reckless for not knowing of medical conditions which posed a danger of losing control of a vehicle and causing serious injury or death to innocent members of the public; and that despite such knowledge, the defendant negligently and recklessly continued to operate a vehicle while recognizing he or she was being dangerously influenced by these medical conditions. Under such circumstances, allegations of punitive damages can be alleged based on defendant acting with a conscious disregard for public safety. If the case involves a defendant who is an agent, independent contractor or employee of another person or entity, and was operating a vehicle in the course and scope of such employment, you should consider making allegations of negligent hiring/training/retention/supervision against that employer. Such allegations would include: that the employer knew or should have known its employee was unfit to drive a vehicle as part of his or her work duties but recklessly still allowed the employee to drive a vehicle for work. Again, such allegations would support claims for punitive damages against the employer if the misconduct was ratified by managerial employees and was carried out with the consent of the officers, directors, and/or managing agents.

Written discovery
Written discovery should be aggressively pursued against the defense. In medical-emergency cases, the issues of whether the defendant driver violated various rules of the road in causing the incident are typically not in dispute. That is because in most of these cases the defendant driver lost control of the vehicle at high speeds, resulting in massive multi-vehicle collisions that seriously injure or kill people. Defense counsel will normally concede how the collisions occurred and that such operation of a vehicle was in violation of the applicable Vehicle Code sections. Although it may not be in dispute, be sure to confirm through written discovery and depositions that defendants admit to any applicable violations of the Vehicle Code.

The focus of discovery should be on obtaining evidence that can in any way prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to
evidence to prove that the medical cause of the alleged sudden medical condition the defendant driver experienced was physical rather than mental; (3) this sudden condition did not immediately render the defendant unable to control the vehicle; (4) the defendant had reason to anticipate or foresee this sudden physical medical condition; and (5) the conduct at issue meets the elements of negligence per se and res ipsa loquitur. In other words, discovery should be focused on establishing that the defendant cannot meet the burden to affirmatively prove all the requirements of the medical-emergency defense addressed above.

Written discovery covering all subject areas at issue should be sent out early. It should generally cover any and all medical conditions that could in any way impact the ability to do what was being done at the time of the incident. As soon as the alleged medical condition responsible for causing the subject incident is identified, the written discovery should be specifically focused on any history relating to that condition. Once the defense is at issue, all such medical records of the defendant driver are relevant and subject to discovery. If it is alleged that the defendant driver lost consciousness, the written discovery should cover anything relating to medical treatment for losses of consciousness over the 10 years leading up to the incident. Similarly, emphasis should be placed on any medications defendant was taking during the years leading up to the incident. Use the medical records to establish false responses or inconsistent statements of the defendant driver.

Focus on an employer

Along the same lines, if the case involves an employee, focus the attack against the emergency defense by requesting all documents that could relate to the employee’s policies or procedures on safety. In addition to what is provided in California’s Vehicle Code or California’s driving handbooks, it is often the case that employment hiring and/or training materials provide additional safety responsibilities. In particular, employer safety policies and procedures often provide that employees are responsible to ensure that no medical condition impacts their ability to drive safely. Be sure to obtain all employment documents on the defendant driver, including the entire personnel file, any history of problems, and any policies or procedures they were expected to follow.

This defense is also often asserted by commercial drivers who fall asleep or black out at the wheel after violating various state or federal laws or safety standards they were required to follow leading up to the incident. In cases where defendant drivers are also commercial drivers, there should be a focus on the heightened training and safety rules these drivers are supposed to follow. Get the defendant drivers to admit that they had to follow the California Commercial Handbook Rules and various federal or state motor carrier safety rules. Any safety rule violation that led up to the incident serves to eliminate the defense. In particular, for commercial drivers in the state of California, and across the U.S., it is required that a commercial driver fitness determination exam is conducted every 2 years, as a minimum. The forms themselves are entitled “Medical Examination Report for Commercial Driver Fitness Determination.”

This permits doctors as well as chiropractors to conduct these examinations and the system is one of self-reporting by the drivers. In other words, it is the duty of the commercial driver to accurately and honestly fill out the “Health History” portion of these forms prior to each examination. After the commercial driver fills out the “Health History” portion of the form, the commercial driver must acknowledge by signature that “I certify under penalty of perjury under the laws of the State of California that I have provided true and correct information concerning my health. I understand that inaccurate, false or missing information may invalidate the examination and my Medical Examiner’s Certification.” Obviously, if the defendant driver has failed to self-report on the DMV medical examination what is reflected in the defendant’s medical records, there has been no medical emergency – there has been reckless conduct with a conscious disregard for public safety.

Strategies to defeat the defense

Various strategy considerations should be taken with the written discovery obtained to beat the medical-emergency defense. First, do not take the defendant driver’s deposition too early. Wait until you have compiled all medical records and/or employment records. Not surprisingly, most of the defendant drivers asserting this defense have a long history of various medical problems that have been treated by doctors and/or have had similar problems identified at work. After obtaining all medical and/or employment records, consider which doctors and/or employers are worth deposing.

Defendant’s treating doctors

However, a word of caution should be noted when it comes to the doctors of defendant drivers who cause catastrophic injuries or death and then assert a medical-emergency defense. These doctors can greatly assist in defeating the medical-emergency defense but may also be hesitant to cooperate. If there is evidence that the defendant driver’s doctor provided negligent treatment relating to the medical advice on the ability to drive, the defendant driver’s attorney may consider suing the doctor just to muddle the waters. Preferably, the defendant driver’s doctor confirms reasons why the defendant driver had reasons to anticipate the medical condition in question. A phone call to the doctor’s office to request that the doctor’s attorney call you back to discuss the doctor’s deposition may be worth trying. Explain to the doctor’s attorney that his or her patient’s alleged medical conditions have caused injuries or deaths to your clients.

Once the doctor’s attorney understands that the doctor’s patient is attempting to evade responsibility by blaming the doctor’s advice or medical treatment, that doctor will be on the defensive and will normally confirm he did everything by the book and the
defendant driver failed to act reasonably. On the other hand, if the defendant driver’s doctor is going to bat for his patient and attempting to assist with the medical-emergency defense, it is usually best to simply undermine the doctor’s credibility or knowledge. There is little to gain by suing the defendant driver’s doctor in these cases and it normally just wastes time and resources.

**What the employer knew**

When the defendant driver has an employer, regardless of course and scope issues, a person most qualified (‘PMQ’) deposition notice should be sent to the employer regarding subject areas that pertain to the elements of this defense noted above. For instance, PMQ subject areas should include any person who has knowledge of the defendant driver’s medical conditions and any instances of any medical emergencies in the past. The employer’s PMQ will normally confirm no such efforts were taken, which creates a separate basis of opposing the defense. Also, get the PMQ to confirm the various safety rules the driver was supposed to follow but violated by failing to disclose the alleged medical condition in question.

Similarly, larger corporations with human resource departments will often produce a human-resource manager as its PMQ to confirm the company had no knowledge it was employing an unfit driver with dangerous medical conditions and had no reason to possibly know the driver was unfit. These human-resource managers normally explain that such medical information is private and protected by the American Disabilities Act (“ADA”) and therefore not subject to inquiry. If the HR manager attempts to hide behind the ADA in that way, simply ask if they are aware of any exceptions to the ADA relating to asking employees if they have medical conditions that could pose a threat. If they say they are not aware of any such exceptions, then the employer is negligent for not knowing that the ADA has specific rules that permit employers to inquire if an employee has any form of medical condition that could pose a threat to themselves or others.

In fact, the Equal Employment Opportunity Commission (“EEOC”) regulations implementing the ADA have provided that an employer’s determination of whether an individual with a medical condition could pose a threat to themselves or others.

**See Medical-Emergency Defense, Page 24**

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**Medical-Emergency Defense, continued from Page 20**

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disability poses a direct threat to health and safety should be based on an evaluation of the individual’s ability to safely perform the job and a consideration of the following four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. These are considerations that most employers fail to consider or ignore when putting employees behind the wheel of commercial vehicles, or any vehicle that creates a medical emergency. That is why it is often best to take the driver deposition last in order.

Retain experts and consider trial motions

In some cases it might be better to eliminate the medical-emergency defense by filing a motion in limine based on defendants’ clear inability to meet the affirmative burden. We have filled many of those motions and the defense will normally admit fault before the judge rules on them. However, in many other cases we have determined that allowing the medical-emergency defense to go to jury actually increases the value of the case because the juries are overwhelmed by the reasons why the defense should not apply and are inflamed by the meritless attempt to evade responsibility. Regardless of whether you decide to keep the defense out of the trial by way of motions in limine, you must be prepared for the defense to go to the jury. As such, you need to retain experts to explain the importance of the information you obtained during discovery. An accident reconstructionist can help explain the defendant’s loss of control of the vehicle and the medical-emergency defense to go to jury may actually increase the value of the case. The expert should be used to explain the safety violations at the time of the incident and the violations that occurred leading up to the incident. The safety expert can also address an employer’s failure to follow safety practices with hiring, training, supervision and retention.

Similarly, a human-resource management expert can explain what the employer should have done to ensure the employee was fit for job duties that included driving a motor vehicle; that would include an evaluation of any medical conditions that could pose a threat. A medical doctor should also be retained to confirm there is insufficient evidence to prove it is more likely than not that a physical, rather than mental, medical emergency occurred. Lastly, if any medications are at issue, a toxicologist should be retained to explain the medications’ warnings and side effects which were ignored.

In the last three years we have handled many of these cases where the medical-emergency defense asserted the medical-emergency defense after a defendant caused serious injuries or death to innocent members of the public. The evidence developed to defeat the medical-emergency defense significantly increased the value of all these lawsuits. The negligent defendant driver is exposed as a liar or as a person who is attempting to hide behind a meritless defense. The employer is exposed for putting profits ahead of safety by consciously ignoring its duties to keep unfit drivers off the road. Either way, the jury is inflamed by the failure to take responsibility and to blame the victim.

In conclusion

It should be clear that although the medical-emergency defense should be taken seriously; it can actually provide an opportunity to obtain discovery that would ordinarily not be available and that has great benefits in proving liability and damages.

Brian Rudofker is a partner of Panish, Shea & Boyle LLP in Los Angeles. He is a member of the Inner Circle of Advocates. He specializes in litigating catastrophic injury or wrongful death cases on behalf of plaintiffs. (www.panish.com)

David Rudofker is an associate attorney with Panish, Shea & Boyle LLP in Los Angeles. He specializes in litigating catastrophic injury or wrongful death cases on behalf of plaintiffs. (www.panish.com)

The authors will provide other plaintiffs’ attorneys with sample pleadings, written discovery, deposition notices and motions in limine they have used in medical-emergency-defense cases.
Litigation financing: Risk vs. reward

Necessity is the mother of a litigation loan. Be smart about it and read the fine print

BY DAVID COOK

Many plaintiffs’ attorneys make a career of handling modest personal-injury cases, and when they are fortunate enough to sign-up a big case that is likely going to trial they refer that case to a larger, more prominent, and typically better-financed firm.

For some, however, the day comes when you are ready to handle the towering case with its exhaustive discovery, battlefield of pricey experts, demonstrative exhibits, and the trial of the century. And maybe the epic appeal. While your trial tactics dazzle, your finances drizzle. Money makes the [legal] world go around.

Once you have found a lender who is willing to advance significant capital to finance your portfolio or the "big case," you and the lender talk terms. If the devil is in the details, be prepared to read the very fine print. Consider this article your magnifying glass to read the "fine print."

The first questions

Before going down the routine of litigation financing, you, as the prospective borrower, must confront these questions:

Is this a recourse or non-recourse loan? If I lose the case, am I on the hook for the loan?

Do I have to make payments during the term of the loan, or is the debt due when the recovery is made? Can I afford to make payments? What is the debt service burden? What is the debt service if I default?

If I lose the case, or another attorney takes the case away from me, and the loan is recourse, can I pay off the loan, or am I assuming too much risk?

Are you a good risk?

A good credit score is a plus, or necessity for some loans, but litigation financing borders on "asset-based lending" in which the primary goal of the lender is to collateralize the loan with assets, and not necessarily to evaluate the good credit of the borrower.

Finding a lender

First, you must find a lender. Lenders to trial lawyers are critical to leveling the playing field between insurance or corporate interests with their unlimited resources and the plaintiffs’ attorneys who represent the victims. Spending the plaintiff’s counsel into the ground is a recognized strategy.

Many commercial banks decline to lend to plaintiffs’ law firms – too risky and they are unfamiliar with the market. You may get a business credit card or credit line from the local bank or even one of the big banks, but those usually top out at around $100K – insufficient for any big case.

Low bank rates +

all the additional capital you need at our customary rates.

Type of loans

A term loan offers a fixed sum of money, due on a certain date, which usually requires the borrower to make monthly fully amortized payments. Term loans typically finance capital acquisitions such as computers, office furniture, cars, leasehold improvements and real estate purchases.

A line of credit offers, up to the stated limit, funds upon demand. A line of credit finances the operation of the firm’s office. Payments of interest are typically due monthly and repayment of principal is due according to some agreed schedule, depending upon whether the lender is a bank or finance lender. This is the most common type of loan for plaintiff firms needing to finance their portfolio of modest personal injury cases or big time mass-tort, class-action or products-liability litigation.
Guarantors. Expect that all firm partners or shareholders will execute a boilerplate — and lawyer-proof — personal guaranty. Guarantors make the best collateral because the guarantor will hammer the primary obligor, the law firm, down off the debt and the firm’s resources. Together with their community-property spouse, the guarantor will sue the day they signed the guaranty because they subjected their community property to potential judgment or foreclosure. Regardless, personal guaranty “thaw” also suggests the word “sink.”

Capital or Equipment Loans. A capital loan enables the borrower to buy specific assets, such as computer systems, high-end copiers, or other expensive hardware. The hardware and the firm’s assets collateralize these loans. These loans typically run about five years or the loanee’s life of the collateral.

The other alternative is leasing (caprice or open market) which might be more (or less) costly depending upon the equipment, its base price, servicing, bargaining skills of the parties, the market for the equipment, and buy-out terms. In purchasing any hardware (or software), keep in mind that last year’s model is just a few years completely functional and often costs less.

An overdraft loan is another form of a line of credit. An overdraft allows the loanee to borrow up to a certain limit. The lender’s credit line is not a loan balance; it becomes a very public record. Do you want competitive firms or defense counsel to know you are highly leveraged? Access to firm records. Absent attorney-client privileged communications, the word could have access to the loan proceeds and other paper of which, including billing records. In very significant loans, the lender packs a kite or two in the firm’s accounting department on a monthly, weekly or daily basis. The person is financial cop on the beat. You are paying for these expenditures.

Interest and penalties

Rate of Interest. Rates of interest from a bank start at about 3% over prime for $1 million. High interest rates are common in commercial real estate term loans. The rate for the new loan is 24%, which you are paying on the prior accrued interest. Ignore my next math. You are paying 35% on the original loan balance. Don’t forget the rollover and refinancing rates that may be available at a later date. Read the loan contract very carefully to determine if you are stuck with a prepayment penalty. Some lenders could charge a higher rate but waive the prepayment penalties.

Prepayment penalties

Perhaps you are thinking of financing your litigation by taking the equity out of your law firm’s building and paying off the loan when you settle the big case. If you own pricey real estate in downtown San Francisco settlement or trial 10 years ago, this could be a real option. Prepayment penalties are common in commercial real estate term loans. The term is usually 10 years, but amortized over 25 years to make the monthly payments lower. With a balloon payment due at the end of ten years. The lender doesn’t expect you to make the huge balloon payment; rather, he expects that you will need to refinance with a new term loan at the end of the 10 years, at then current interest rates. Refinancing approval is likely given appreciation, a lower loan balance and the “seasoning” of the loan.

Be careful if you plan to pay off that 10-year loan early when the interest rates that may be available at a later date. Prepayment penalties are commonplace.

Prepayment penalties effectively lock a borrower into a long term loan at the original current rates, precluding the borrower from a refinance at the lower rates that may be available at a later date. Read the loan contract very carefully to determine if you are stuck with a prepayment penalty. Some lenders could charge a higher rate but waive the prepayment penalties.

For all these reasons, the better strategy is that the lender gets a money judgment and seizes the firm’s clients to compel payment of fees (called a creditor’s suit). Many lenders would seek the appointment of a receiver; that is even more draconian and very expensive. (Six figures for the receiver and counsel are common). If the loan is secured, the lender grabs all collateral, including all unpaid and pending fees.

Non-economic covenants

These covenants usually barred in Paragraph 23, fifth page. The usual language is the non-economic covenant in which the borrower owed to the lender. This is the usual cast of characters: Minimum revenue per month or per year; total number of partners; minimum amount of billing per partner (or contingency fees earned from settlement of a case); cash flow minimum in each month or quarter; minimum cash on hand; retention of certain “rammakers”; maintenance of E&O, general liability and worker’s compensation insurance; office rent and bills paid on a timely basis. These do not sound too bad, but a breach of a non-economic covenant in the default rate, penalty rate, and conditioning of interest. Failure of a pending implosion, the lender can call the loan due.

Note that traditional lines of credit are due on a specific date, which is usually annually. Due means that the loan is paid in full. On the other hand, a revolving line of a rollover, or expect to put up more collateral. Expect to turn over financial statements of the firm, the partners and guarantors. These credit line loans tend to “float the firm” as cases move towards resolution and paying down the loan when you settle the big case. If you own pricey real estate in downtown San Francisco settlement or trial 10 years ago, this could be a real option. Prepayment penalties are common in commercial real estate term loans. The term is usually 10 years, but amortized over 25 years to make the monthly payments lower. With a balloon payment due at the end of ten years. The lender doesn’t expect you to make the huge balloon payment; rather, he expects that you will need to refinance with a new term loan at the end of the 10 years, at then current interest rates. Refinancing approval is likely given appreciation, a lower loan balance and the “seasoning” of the loan.

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Arbitration, Waiver of Jury Trial Rights, Reference, Forum Selection and Choice of Law

These terms can Expenses and services that generate income. A portfolio of 100 personal injury cases, each worth $50,000.00 (gross recovery, net fee of $15,600.00, recoverable case costs of $2,500 per file, and $5,000 of employee time) are working assets because these cases generate revenue. Preventing only 50% of the cases are successful.

Assuming a recovery at 50% of the files, the gross fees are $325,000.00 for the entire portfolio. Given that 50% of these cases produce no recovery, the $2,500 in costs per file are lost and therefore a $125,000 on unrecouped costs. Assume 100% financing for total case costs and time that requires a $750,000.00 loan, and 25% interest from a litigation financier, the total loan costs are $187,500.00. The fees, after the unrecouped costs and the accrued interest, are $325,000.00. Deduct office costs, rent, taxes, insurance, car and advertising: little, nothing, is left over.

Risks galore

Cases against Big Pharma, Big Tobacco, Big Auto, or Big anything means big expenses. Class actions generate millions in costs. Big cases, and particularly big cases that generate a huge fee, attract the best, brightest and most ambitious.

When a small to mid-sized firm lands the big case, the firm must consent someone to capitalize the case through a multi-year campaign (in the worst case, this might include a year federal court hand). Third-party financing might finance the firm in its quest, but a big price and bigger risk. Should the case fail, or the attorney is ousted at the hands of others, the loans become due but the case doesn’t go.

Green these risks, pause, not ambition, is the best strategy for the lender and borrower. Shying away from the big case might be the best outcome — referring the case to a larger; better financed firm. Make a business decision, not one born of ego. Shy away from the big case.

By Stephen Ellison

A funny thing happened to Kristen Meredith on her way to becoming a schoolteacher. She earned a Law degree and later became a litigator, and to develop a thriving career as a plaintiff’s trial attorney. A self-proclaimed lover of research, writing, and education, Meredith never quite made it to the head of the classroom per se, but she still views herself as an educator – with the courtroom as her venue. “I present facts and sometimes extrem ely complex information to judges and juries, and I’m trying to educate them and persuade them at the same time. … For me, it worked out great.”

As with any career or life journey, however, there were a few hurdles to overcome. Though she had envisioned working in some sort of public interest capacity, Meredith’s first foray into law was on the defense side, representing manufacturers of medical devices and defending hospitals and doctors in medical malpractice cases. Several years into her defense career, while she was nearly nine months pregnant with her third child, Meredith decided to rethink her future, inspired by a casual comment from opposing counsel, prominent plaintiff’s attorney Tony Branda.

“It was a big case for him, a birth injury, and I think it was after mediation – he looked me in the eye and said, ‘What are you doing? I think you’re a plaintiff’s attorney at heart. Have you considered doing plaintiff’s work?’ And I actually hadn’t,” she said. “At the time, I had two other schoolchildren, and I had to juggle working as an associate part-time. “But the timing was actually pretty fortunate because then, while I was on maternity leave, I had a few months to think about what I wanted to do when I got back. So when I returned to my job, it still kind of played in my mind. I reached out to a few other attorneys who had done defense and switched to plaintiff’s work and asked them about how that went. And one of them offered me a job. Since that fateful day, Meredith has grown from part-time researcher-writer to senior associate to full-fledged partner with Mike Danko. Today, she is one of the most skilful plaintiff’s trial lawyers in Northern California, specializing in products liability, business litigation and aviation, as well as general personal injury cases.

The value of a network

She’s also deeply involved with professional organizations, serving on the board for American Association for Justice, on the American Bar Association’s product liability committee, and as the chair of the women’s caucus for Consumer Attorneys of California, among other roles. It’s a rewarding part of her profession, she said, because she not only gets to spend time with people she likes and learns from them, she also enjoys the value the network provides to the plaintiff’s attorneys don’t have, and it’s true. These organizations provide the structure and camaraderie.

“Some people are perfectly satisfied relying on themselves,” she added. “It find it incredibly helpful to reach out to others for input.”

Research and writing led to law school

Meredith grew up in San Ramon in a household where education was always a priority. Her father was the first in his family to graduate from college, and he encouraged young Kristen to continue with school even after she graduated from UC Davis with honors — a sideways hint to join his alma mater, the University of California, Davis law school. “I loved college. I loved studying, research and writing, so he always said you really should give it a try.”

With that, Meredith got a scholarship to Brigham Young University’s J Reuben Clark Law School, where she was honored with the Distinguished Student Service Award and spent a semester at Howard University Law School in Washington, D.C., giving her a taste of the faculty-student diversity exchange. When she graduated from law school, though, she had loans to pay off. Meredith said, so she set out in search of her first job, landing at Craddick, Democrat.
Cauleyland & Conti, a defense firm based in San Ramon, where she spent the first four years of her career. The defense work was not only challenging but also gave her extensive trial experience—though the approach was a far cry from how she operates today.

She said that, as a plaintiff’s lawyer, she draws on personal knowledge that defense attorneys have many more constraints such as accountability for her extensive trial experience—though I really enjoy that. You’re kind of that they probably have a template for in creative and strategic and innovative, in San Ramon, where she spent the first

and C andland & C onti, a defense firm  based the captain of the ship, and you set the plaintiff’s practice, it’s much more response,” she explained. “With a plaintiff’s practice, it’s much more creative and strategic and innovative, and I really enjoy that. You’re kind of the case in, say Hawaii, I would be good light on his bike; when he crashed riding at night, and he didn’t have a very

Meredith said, whether internal or in the position to steer her own career. In the beginning, she filled a need doing in a position to steer her own career. In the beginning, she filled a need doing in a position to steer her own career. In the beginning, she filled a need doing in a position to steer her own career. In the beginning, she filled a need doing

She recently handled a business case involving a family friend who involved is I’m half Hawaiian,” Meredith said. “They reached out to me because they knew I would have connections as well as knowing the community. It was hard for them to find an attorney because of the bad facts. It was a hard case, but we ended up getting a verdict in favor ($2.2 million), it was a good outcome, and the family was pleased. Because it involved a close family friend, Meredith at times found it challenging: “Dealing with a friend and his wife and knowing how bad the outcomes are for the brain injured; there were times when it was so overwhelming to try to balance the emotions and the professional challenges of litigation. Being able to handle that, I think, increased my compassion for our clients overall and emphasized for me what a difference we make in the lives of our clients.”

Meredith also was a member of the trial team representing 59 victims of the PG&E natural gas explosion in San Bruno.

Referrals from other firms

Danko Meredith takes many cases via referral from other firms or lawyers, and he said he really likes that aspect interesting and exciting. Some of the cases have tested in the legal process for up to 10 years, and if Danko believes she and her colleagues can add value to the case, they’ll jump on board. This process provides variety and builds the firm’s reputation as a go-to plaintiff’s team. Plus it increases her chances for learning and teaching.

She recently handled a business practice case against Intel in which she took a “deep dive” into the area of processors— their speed and power and how they perform on tests, how they’re evaluated by the industry and how that affects the market. She described working with other attorneys who had been on the case for years. They help get her up to speed, and she helps get a more favorable award.

“On one of the cases, we tripled the value of the award,” Meredith said. “With our 10 months of work, they got a substantially higher number from the defendant than what they had before we were involved. They were thrilled, and we were happy to help them.

How did they triple the value of the case? “It’s hard to describe—a lot of it has to do with the perspective of the defense, to be able to make them feel the risk of proceeding with the case,” she added. “The facts are the same; it’s just us coming in and knowing how to use those facts, the big companies or banks [need to] feel the heat of trial before they’re willing to pay what they should— or closer to what the case is worth.”

Beyond the office

While most of Meredith’s leisure time is spent with her family and traveling for professional organizations, she also likes to keep herself fit by running and cycling.

Indeed, a balanced life has always been a priority for her. When she was first starting out, however, she lacked the confidence to ask about such things as professional development and making time for her family. When she finally did work up the courage to ask—about five to seven years into her career— she almost always got a positive response.

“The advice I often give is I didn’t realize my value to my firm until I started asking, and once I did, I understood I’m really in control of my career,” Meredith said. “If I wanted to make things happen, all I really needed to do was ask, and most of the time, I got what I wanted. But I didn’t, at least the people I was working with knew what I wanted, and they would help me make it happen.”

“Now, as a senior attorney and partner, I want to know what the people I’m working with want,” she continued. “And when they don’t ask, I start to worry. I start to think maybe they don’t care about their future. So I encourage younger attorneys to just ask—and do so much earlier in their careers.”

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Persuasive legal writing succeeds when you help the reader
Tips to get your brief read ("by the Court" is implied – you don’t need it)

By Ted W. Peltier

In the December 2014 issue of Plaintiff magazine, I contributed an article titled, “Persuasive Legal Writing Starts with Knowing the Reader,” advocating that a key to persuasive writing is understanding that your reader is overworked and easily distracted – and thus that your primary job is to capture that reader’s attention and keep it. I posted that your reader will be intelligent and want to do the right thing. But she will also know little or nothing about your specific issue. And she will have myriad distractions, including not just a stack of other briefs that need her attention, but also all of life’s other daily requirements. Provide your reader with a reason to get distracted from, or disinterested in, or aggravated by your writing, and your battle to persuade becomes even more difficult.

Thus, the “secret ambition of every brief should be to spare the judge the necessity of engaging in any work, mental or physical.” [Levitan, Confidential Chat on the Craft of Briefing, 4 J. APP. PRAC. & PROCESS 305, 310 (2002).] A perfectly crafted brief will lead the reader straight down the path to your desired result.

My prior article identified keeping the reader’s attention as “The Problem” and suggested that the fix is to do everything you can to “make the reader’s job easier,” offering several basic suggestions: (1) avoid ambiguity; (2) make your documents accessible, both individually and collectively; (3) provide analysis to connect the law to your facts; and (4) maintain absolute credibility. But the space constraints of that article did not allow for many examples or detail.

This article expands on the first item, offering a list of tips on the substance of the writing itself – and how to make it clean and clear and succinct and precise.

(1.) Remove unnecessary words

A tip of the cap here to Miles Cooper, whose excellent monthly column in this magazine (“Back Story”), discussing writing in last month’s issue, noted wisely that “[e]very word must serve a purpose.” Yes. Cut every word you can. “Unnecessary words waste space and the reader’s time, and they make strong writing weak.” [Gary Blake & Robert W. Bly, The Elements of Technical Writing 63 (1993).] Or, as Strunk and White put it more simply in The Elements of Style: “Omit needless words.”

You surely have opened an opposing brief to find a sentence like this: “It is the position of defendant ACME CONSTRUCTION AND SUPPLY, INC. that the three (3) published cases that govern the issues does nothing.” Legal writing gets packed with these extra words and phrases that can be cut: “in this case” (here); “prior to” (before); “the instant matter” (this case); “at the present time” (now). What this writer actually means is: “This Court should grant summary judgment.” Say that.

• Shorten the references: If a party’s name has many words in it, you can use the full name in the case caption, and perhaps the first time you refer to it – but after that, shorten it. “Acme.” “Johnson.” The key here is clarity – if there is no other “Johnson” in the case, then “Johnson” will do fine. And please cut out the ALL CAPS with party names.

• Use short case names: The first time you cite a case, use the full cite (“Jones v. Smith (2015) 123 Cal.App.4th 37.”). After that, use short cites, and in text just call it “Jones” – not “the Jones court.” “Jones holds that . . .” “Unders Jones . . .”

• Numbers: We can all now drop the parenthetical numbers, i.e., “the three (3) published cases.” A legal brief is not a legal instrument that can be forged. The number in parentheticals does nothing.

• Dates: Lawyers love dates. Big, long, full dates. “The March 5, 2016, motion for summary judgment.” But if your brief is addressing that motion, the date adds nothing; omit it. Sometimes a date is important – but what part? Is the exact day critical – or is sufficient context provided by “March 2016”? What about the year – if all the action in your case takes place in 2016, do you need to keep saying it? Or can you just say “January 10,” and “February 6,” and “March 5”? Cut what you can.

Many of these things sound small, but they add up. Cut the clutter, and your point will shine through.

(2.) Use pronouns

A corollary to removing unnecessary words – replace larger names with pronouns. As long as the context is clear, once you are talking about “plaintiff Howard Johnson,” your following sentences can refer to “he,” “him,” and “his.”

(3.) Choose the right word

Make sure that the words you use are both correct and understandable. Be sure that the word you use means what you think it does. If you have any doubt about a word’s meaning, look it up. And then, even if you were right, consider changing it to another more common word. If you had to look it up, so likely will the reader – wasting time and risking distraction.

Know the difference between commonly used words: “imply” and “infer.” As long as the context is clear, (the speaker implies; the listener infers); “effect” and “affect” (most commonly a noun and verb, respectively); “fewer” (countable) and “less” (not) – fewer dollars, less money; “flaunt” (show off) and “flout” (ignore or show contempt for). Keep your words understandable.

Avoid esoteric words, or at least think before using such a word – does it help the reader, or is it just showing off (flaunting) your vocabulary? Your judge knows that you are smart. She will appreciate you keeping it simple – and not having to look up the meaning of your word. Justice Scalia could get away with using “panopticon” [see Maryland v. King (2013) 133 S.Ct. 1958, 1989 (Scalia, J. dissenting)] – we shouldn’t try.

(4.) Organize

Keep your points organized. The best briefs contain a detailed, structured table of contents, which shows the brief’s organized outline. Each major topic heading should discuss a different issue or make a different point. Under each major heading, each minor heading should support that major point – and likewise for every sub-heading under a minor heading.

Many briefs are cluttered by the writer’s uncontrolled desire to make a point over and over again – in every section. An all-too-common example: A brief contends that an objection was both untenable and lacked merit. Section A argues untenable. Then Section B begins: “Even if plaintiff’s objection was...”
timely (and it was not), it lacked merit.” I’ve seen this too many times— including the underlining (and sometimes even an exclamation point). Section A argues untimeliness; section B argues an alternative (”even if”) without conceding the prior point.

(5.) Keep it parallel
Use the same words, phrasing, and structure to describe the same or similar things. Often there are multiple appropriate ways to say something—but once you choose one way, stick with it. Using parallel structure not only provides clarity but is actually pleasing to the reader’s ear (or eye), not disjointed.

(6.) Continuity—it makes it flow
The best writing flows from section to paragraph to paragraph, to section, paragraph to paragraph, paragraph to paragraph. The best writing flows from section to section. Structure your sentences for readability. Make it pleasurable, or at least not painful to your reader, like any skill, is best accomplished at home after dinner. Find what works for you, but do it.

Put the emphasis of each sentence at the end—not “Defendant never raised this argument in his summary-judgment motion” but “Defendant’s motion never raised this argument.”

Use links to echo back to the prior sentence: “this, that, these, those.”

You choose one way, stick with it. Using appropriate ways to say something—but once you choose one way, stick with it. Using parallel structure not only provides clarity but is actually pleasing to the reader’s ear (or eye), not disjointed.

We’re talking about practice, not theory. Practice is more time-consuming, especially at first, but as your skill grows, the process will accelerate. Take the time. Your reader will appreciate it.

The best writing flows from section to section, paragraph to paragraph, sentence to sentence. Many key points here echo back to law school... or high school.

Paragraphs: Start most every paragraph with a topic sentence. Orient the reader.

IRAC/CRAC: The law-school classic is still helpful. State the issue (or the conclusion, i.e., topic sentence); describe the governing rule; analyze (connect the rule to your facts); conclude.

One concept per paragraph. Each paragraph should make one point. When it’s time, it’s time for a new paragraph.

Sentences: Structure your sentences for maximum impact. Use the active voice—not “the motion was denied” (passive) but “the Court denied the motion” (active). This process is more time-consuming, especially at first, but as your skill grows, the process will accelerate. Take the time. Your reader will appreciate it.

Having an appreciative reader is a major step toward persuasion.

The trauma that, in this case, is multifaceted.

The accident itself and the multiple surgeries, nerve pain, phantom limb pain and sensations, reactions from friends, adjustment to her disability, the lawsuit that re-traumatizes her—defines a single incident trauma. Yet, it is not the complete story. Traumatic events do not occur in a vacuum. They are set within a context across generations of geopolitical strife, family dynamics, individual temperament, psychological vulnerabilities and resilience, as well as medical conditions and treatments.
• Single incident trauma: Single incident trauma entails the exposure to single traumatic experiences; car accidents, natural disasters, crimes of violence/abuse/birth trauma are examples of single incident trauma.

• Complex trauma: Complex trauma involves multiple traumas, oftentimes originating in childhood. Examples of complex trauma are neglect and verbal, sexual, and physical abuse of childhood (including bullying). Other examples include war trauma, geo-political unrest, slavery (trafficking), cultural dislocation (refugees), transgenerational trauma, and sexual, and physical abuse of childhood by a current and often unrelated event.

Stressors versus trauma

When a stressor occurs, the body’s biological response is identical to that of a traumatic event. That is, the physiological reaction and sequence is uniform. First, we orient to the danger by turning our heads in its direction (arrest response and orienting). Our vision narrows and becomes hyper-focused on the source of danger. Simultaneously, we exhibit a startle response that prepares us for action (sympathetic arousal) and, if the threat is significant, we increase our blood pressure and heart rate. Blood flow moves to the extremities so we may escape. When we cannot run, we fight.

Trauma and PTSD

The definition and evaluation of trauma is more nuanced, complex and less easily categorized than the definition and evaluation of PTSD. All PTSD involves trauma, however, not all trauma develops into PTSD as it is defined in the Diagnostic and Statistical Manual – 5th Edition. The DSM-5 diagnosis of PTSD requires that specific criteria be met (American Psychiatric Association, 2013):

1. Exposure to actual or threatened death, serious injury or sexual violence.
2. Persistent avoidance of stimuli associated with the traumatic event(s).
3. Persistent Avoidance of stimuli associated with the traumatic event(s).
4. Negative Alterations in cognitions and mood associated with the traumatizing event(s):
   - Inability to remember (dissociative amnesia)
   - Negative beliefs about oneself
   - Distortions in cognition that lead to self-blame
   - Markedly diminished interest or pleasure in activities
   - Feelings of detachment or estrangement from others
   - Inability to experience positive emotions
5. Marked alterations in arousal and reactivity:
   - Irritability and angry outbursts.
   - Reckless or self-destructive behaviors
   - Hyperarousal
   - Exaggerated Startle Response
   - Problems with Concentration
   - Sleep Disturbance

Trauma without PTSD

Additionally, one can experience trauma and have one’s life turned upside down without meeting the criteria for PTSD in the DSM-5. Even though DSM-5 removed the criteria of helplessness and fear at the time of the traumatic event, and even when the event is not clearly or consciously recalled, it does not mean that the trauma is not stored in the body. Moreover, the details of the trauma later learned from other sources may form a visual image that loops and becomes a source of re-traumatization.

Complex trauma

Traumatic experiences in infants and children negatively correlate with their neurodevelopment (Perry, R. et al. (1996). Childhood Trauma, the Neurobiology of adaptation and Use-dependent Development of the Brain: How States become Traits. Infant Mental Health Journal). Indeed, childhood trauma can be damaging but may not grow into full PTSD symptoms. The narrowing of sensory and interpretive abilities places trauma victims at risk for further trauma. Poor decision-making in setting emotional boundaries is common. If a victim blames himself, he may override his intuition, and reject it, thereby placing himself in unsafe traumatizing situations. His attem pts to am eliorate destructive behaviors such as cutting, sexual additions, drugs and alcohol can increase impulsive decisions that potentiate an already bad situation.

The psychological “eggshell” plaintiff

Early childhood neglect and abuse increases the risk of developing PTSD in adulthood for those exposed to later traumas (Journal of Trauma Stress). In legal terms, the eggshell plaintiff is who in a tort or criminal case for a current trauma may not be held responsible for their fragility caused by past trauma.

This fragility is researched most clearly in soldiers and veterans. The risk of developing PTSD for soldiers with childhood histories of family alcoholism, physical abuse and neglect are 25 percent higher than the 10 percent in the civilian population with similar histories (Bliss et al. J. (2014). Veterans Affairs Pittsburgh Healthcare System).

Assessing trauma is further complicate by due to an individual defines trauma, and the ways symptoms unfold over time. For example, soldiers, linguists and other government contractors serving overseas in combat zones may develop trauma-related symptoms while deployed (Combat Stress Reaction) or months to years after returning stateside (Delayed Onset).

Countless times I ask patients, “Have you ever experienced any trauma?” The reply is “No!” I may prod, “So, tell me about your background.” Three sessions into the therapy the patient reports some small but curious detail. Upon further inquiry, a history of trauma unfolds. The patient is not being deceitful nor has she repressed the memory (although that can occur). More likely they do not define their experience in terms of “trauma.” People will rationalize: “It was not a natural disaster or a brutal attack.” “Yeah, my father would hit us but only when we acted out,” or, “I was really close to my mother,” followed by “She used to tell me I would never amount to anything but only after drinking at night.” Victims of geo-political trauma may minimize their experience by stating, “Well, everyone was living in the same condition. It was normal.”

Treat ing traum a and PTSD

Treating trauma, including PTSD, changes the way mental health professionals view the diagnostic system. The various and most subtle types of trauma may be missed or misdiagnosed such as Generalized Anxiety Disorder, Agoraphobia, Panic Disorder, Borderline Personality Disorder, Narcissistic Personality Disorder, Oppositional Defiant Disorders, and Major Depression disguise the etiology of trauma, and consequently, the treatment. Trauma is not a disease or a disorder; rather, it is a reaction to a dreadful life event. When trauma is repressed in therapy and healing occurs, the majority of symptoms often disappear or decrease significantly. Trauma, by and large, is located in the right hemisphere of the brain.

Trauma — The Basics, continued from Previous Page

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Trauma — The Basics

Continued from Previous Page

Research by Scott Rauch, M.D. and Bessel Van Der Kolk, M.D. used functional magnetic resonance imaging (fMRI) to visualize how the brain is activated by memories, sensations, emotions and beliefs when reminded of past events, traumatic and non-traumatic. The results revealed that the largest area of activation, when reminded of the trauma, occurred in the limbic area (emotional/survival), specifically the amygdala (memory storage). This activation elicits all of the physical changes that provoke the fight or flight reaction, or collapse.

Significantly, Broca’s area, a speech center on the left side of the brain goes “offline” when the flashbacks are triggered. A therapist who engages solely in talk therapy (left hemisphere dominated) may treat a patient with trauma for years while the patient continues to feel flooded or dissociative by life events. Indeed, trauma is held in the body in pre- or non-verbal form. The body, often times, provides the therapist a “memory” of the trauma. For example: a woman who cannot recollect sexual abuse recalls a time, at five years of age, visiting her neighbor’s house, and simultaneously experiences a strange sensation in her pelvic region. 

Insight-oriented therapy may help create associative networks of understanding and meaning, and may be used following or integrated into other therapies to help create a cohesive narrative but not without first addressing the body memory. Good trauma treatment requires an integrated, multi-pronged, client-centered approach for healing trauma.

Specific trauma treatments

• Eye Movement, Desensitization and Reprocessing (EMDR)

The American Psychiatric Association, the World Health Organization and the Veterans Administration endorse EMDR therapy for its efficacy in treating trauma and PTSD. EMDR is utilized for single incident and complex trauma. EMDR targets and integrates the traumatic material thereby re-wiring the felt sense of the trauma. It addresses the memory through feelings, body sensations, and negative self-beliefs associated with the memory and reprocesses through the trauma until it changes from a subjective triggering memory located in the present to an objective one that resides in the past. Clients are not re-traumatized by needing to provide the details of their trauma, and may repetitively reprocess the trauma silently while guided by the therapist.

• Cognitive Behavioral Therapy (CBT): Exposure Therapy

Clients are repeatedly exposed to the details of the trauma or to the nightmare. The idea of voluntarily engaging in this activity may be overwhelming for participants. Symptoms may intensify before they begin to abate. “In addition, although exposure therapy is highly successful in reducing the key symptoms associated with PTSD, such as intrusive memories, it does not address other issues such as feelings of detachment from others, excessive anger and feelings of alienation” (National Council on Disability, March 4, 2009). Although CBT has proven effective for phobias, it has not fared as well for traumatized individuals with PTSD resulting in high dropout rates and significant adverse reactions (Schwartz, et al., 2007). “Cognitive Behavioral Therapy for Posttraumatic Stress Disorders in Women” (JAMA, 297, no. 8: 820-30. Bradley, R., et al., (2005)).


• Somatic therapies

Somatic Experiencing (Peter Levine, Ph.D.) and Sensorimotor Psychotherapy (Pat Ogden, Ph.D. & Janina Fisher, Ph.D.) are two leading somatic therapies. Since trauma is imprinted and carried in the body, it makes sense that the body is the vehicle for healing. Somatic treatments track and explore body sensations, movements, gestures and postures and other non-verbal cues as a venue for creating greater internal awareness of emotions/sensations as they relate to the body. The focus is on creating safety, stabilization, grounding, self-regulation, trust and trauma repair.

Neurofeedback


• Yoga and guided mindful awareness/meditation


• Healing communities and socialization

Creating connection and compassion through music, theater, art, animal therapy and writing is a vital part of the healing process. Being able to put wordless experiences into a narrative decreases a sense of isolation, provides a method of expression in which a community that has experienced trauma, bears witness. The arts help survivors begin to create a relationship with their bodies and mind, reconfiguring and integrating a new identity.

Tracy Astrom, Ph.D. is a licensed psychologist with a private practice in San Francisco. She specializes in trauma work, including PTSD with accident survivors and assault victims, grief and mourning, anxiety, depression, phobias, addiction and adults with childhood neglect and abuses. She is a Training Facilitator/ Certified Therapist and an Approved Consultant for the Parnell Institute (PI) and a Certified Therapist and an Approved Consultant for the Eye Movement Desensitization and Reprocessing International Association (EMDRIA). Currently, she is in a 3-year training program for certification as a Somatic Experiencing Practitioner. tracyastrompsychologist.com.
Surveillance-camera video in traffic-collision reconstruction

Surveillance cameras are everywhere in commercial districts, and their video can be useful when accidents occur in nearby traffic lanes — but act fast!

By Kurt Weiss

The popularity of surveillance cameras has advanced to the extent that cameras are often present without the motorist’s public knowledge. Most common are theft-detering surveillance cameras in the upper corners of convenience stores, cameras in bank automated-teller machines, and cameras under gas-station pump overhangs (see figs 1 and 2). Virtually every street corner of a densely-populated metropolitan city will have surveillance cameras mounted above commercial properties, which cameras will also monitor pedestrian traffic and vehicles in adjacent traffic lanes. These technologies have proven useful to the traffic collision reconstructionist. This article explains how surveillance and some onboard vehicle-camera videos may be applied to traffic-collision reconstruction. Several real-world examples are used to illustrate how images, when used as evidence, can provide meaningful results to the accident reconstructionist. Even the poorest image quality may yield something useful to the analysis.

Finding a surveillance camera in the area does not necessarily mean that the video will be helpful to the investigation, because some cameras are decoys, and others may not even point toward the relevant area. When a camera is located, several concerns exist when obtaining a copy of the surveillance video. The foremost consideration is the time between the event and the investigation. Most surveillance videos record systems on a storage drive of finite capacity. That is, when the digital media is full, new images will overwrite previous images, like a circular buffer. Accordingly, efforts to retrieve video files must be performed expeditiously. Then, assuming access to the camera recording equipment is achieved, the next challenge is obtaining a copy of the video without a loss of image quality. Here is where the most diverse video quality is observed.

Video playback speed

Video playback speed is the rate at which the images are displayed relative to time. An example is 30fps, or one frame every 0.0333 seconds. In one example to be examined, an onboard vehicle video camera video system recorded at 4fps, i.e., one frame every quarter second, but displays at 30fps. In that video, the movement of objects is choppy, unlike the fluid motion of objects with higher recording speeds.
position may be determined relative to these lines.

If the collision site can be inspected, then a Total Station or 3D Laser Scanner can be used to create a scale drawing, or collision diagram. On this diagram, landmark marks are identified and reference lines are drawn. Next, each unique vehicle position (and corresponding time) may be placed. In cases where the roadway or intersection has changed (i.e., restriping or new construction) or travel cost prohibits direct site measurement, then the use of scale, high-resolution aerial photographs may yield suitable results.

Using the scale diagram (or aerial photograph), the distance traveled between vehicle positions may be directly measured. The time between vehicle positions is determined by subtraction; the corresponding time of one vehicle position is subtracted from the time corresponding to the position immediately following it.

Surveillance video analysis − Case-study examples

Example #1 — Motorcycle vs. Vehicle Collision

This case involves a vehicle driver that briefly stopped on the right shoulder of a four-lane boulevard and then attempted an illegal U-turn. During the U-turn, the vehicle crossed the path of a motorcycle approaching from behind in the adjacent traffic lane. The vehicle’s alignment is nearly perpendicular to the traffic lanes as the motorcycle slams into the driver’s door, killing the rider.

A surveillance camera was discovered during the investigation. The camera faces the street and captured the moments leading up to and including the collision event (see fig 3 on previous page). The investigation was unable to obtain the raw video file. Instead, a recording was made of the collision event. Note the light frame’s reflection on the playback monitor (see fig 4).

The video quality is so poor that the impact speed of vehicle and motorcycle could not be accurately determined. However, the video still provides important timing and pre-impact information.

The show’s vehicle stopped as the curb for about 32 seconds while the rider awaits for traffic to clear (see fig 5). The vehicle’s headlights and taillights are illuminated, and brake light function is confirmed as the vehicle inches forward several times before commencing the U-turn (see fig 6). The U-turn lasts about 3 seconds until the vehicle is observed to roll clockwise due to the force of impact (see fig 7). The vehicle continues after impact and eventually parks at the far-side shoulder.

The motorcycle’s approach is announced by its headlight beam on the roadway for more than a second before the motorcycle enters the video image. Indeed, the motorcycle’s headlights were functioning (see fig 9 on next page). The motorcycle travels across the video screen for less than a second until impact (see figs 11–14 on next page). In this case, the video recording assisted the analysis of the events, including the driver’s actions, to the developing collision sequence. Ironically, since the date of the headlight beam angle to change. Therefore, with surveillance video the perception of impact hazard by the rider was confirmed, despite the motorcycle having ABS and where no tire friction marks were observed or documented at the scene.

Example #2 — Semi tractor-trailer vs. automobile collision

This case involves a collision between a semi tractor-trailer and a passenger vehicle that was merging onto a highway. As the automobile merged left, it slowed until its left rear bumper corner was impacted by the right edge of the tractor’s front bumper. Upon contact, the vehicle rotated counter-clockwise and was directed to the left. The vehicle then crossed adjacent traffic lanes and collided with another vehicle in what became a three-car event.

The trucking company installed the DriveCam event recorder in its fleet vehicles (see fig 10). The DriveCam unit simultaneously records one camera’s view forward through the windshield and a second camera pointed at the driver (see figs 11–14 on next page). In this case, the video recording assisted the analyst in piecing the pre-impact and impact events together would not have been possible due to the lack of documented physical evidence. In this case, no tire marking or other roadway evidence was recorded, and the “AOIs” were only estimated because access to the roadway was limited due to vehicle traffic speed.

Example #3 — Wrong-way DUI driver head-on collision

This case involves a law enforcement deputy intervening on the report of a wrong-way driver. Up ahead, several vehicles successfully avoided a head-on collision before the deputy entered the highway, driving toward the offending SUV. Approaching from behind the deputy, in the same lane, were two vehicles one behind the other. These vehicles changed lanes to the left and passed the slow moving law enforcement vehicle. The deputy had not yet switched on the overhead lights (see fig 15 on page 47). In the left lane, the passing vehicles were now in a collision course with the offending vehicle. At the moment of impact, the head vehicle of the two swerved right, but the
other debris. The analysis of surveillance camera video is another available tool.

Kurt D. Weiss is a collision reconstruction specialist and forensic engineer with Automotive Safety Research, Inc., in Santa Barbara. He holds a Master of Science degree in Mechanical Engineering, and is ACTAR accredited. Since 1986, Mr. Weiss has reconstructed hundreds of traffic collisions and is familiar with the wide diversity of physical evidence to present crash reconstruction. He is a frequent speaker on traffic-collision reconstruction and forensic analysis and performance evaluation of automotive seat-belt systems. He frequently attends scientific conferences and has authored numerous peer-reviewed papers on topics relating to traffic-collision reconstruction.
Tyson Foods v. Bouaphakeo

The U.S Supreme Court allows statistical evidence to fill evidentiary gaps in class actions

BY JEFFREY I. EHRLICH

Class actions; use of statistical proof: Tyson Foods v. Bouaphakeo, et al. (2016) ___ S.Ct. ___ (U.S. Supreme) Employees of Tyson’s pork-processing slaughterhouse filed suit under federal and Iowa law, arguing that they were not properly compensated for the time they spent each day donning and doffing their protective gear. The district court certified their lawsuit as a class action under F R C P 23. The employer opposed, arguing that because of the variance in the protective gear that each employee wore, their claims were not sufficiently similar for class treatment. Because the employer kept no records of the time that the employees spent donning and doffing the protective gear, the employees relied on a statistical study, which held that the average employee spent 18 to 21 minutes per day putting on the gear and taking it off. At trial, the jury awarded the class $2.9 million. The judgment was affirmed by the 8th Circuit. The Supreme Court affirmed. Whether and when statistical evidence can be used to establish classwide liability depends on the purpose for which the evidence is being introduced and on “the elements of the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as the gear on and taking it off. At trial, the jury awarded the class $2.9 million. The judgment was affirmed by the 8th Circuit. The Supreme Court affirmed. Whether and when statistical evidence can be used to establish classwide liability depends on the purpose for which the evidence is being introduced and on “the elements of the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 180 L.Ed.2d 374, where the underlying question was, as here, whether the sample at issue could have been used to establish liability in an individual action. There, the employees were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. In contrast, the employees here, who worked in the same facility, did similar work, and were paid under the same policy, could have introduced the expert’s study in a series of individual suits.

This case presents no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions. Rather, the ability to use a representative sample to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as the gear on and taking it off. At trial, the jury awarded the class $2.9 million. The judgment was affirmed by the 8th Circuit. The Supreme Court affirmed. Whether and when statistical evidence can be used to establish classwide liability depends on the purpose for which the evidence is being introduced and on “the elements of the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 180 L.Ed.2d 374, where the underlying question was, as here, whether the sample at issue could have been used to establish liability in an individual action. There, the employees were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. In contrast, the employees here, who worked in the same facility, did similar work, and were paid under the same policy, could have introduced the expert’s study in a series of individual suits.

This holding is in accord with Wal-Mart Stores, Inc. v. Duke, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374, where the underlying question was, as here, whether the sample at issue could have been used to establish liability in an individual action. There, the employees were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. In contrast, the employees here, who worked in the same facility, did similar work, and were paid under the same policy, could have introduced the expert’s study in a series of individual suits.

FEHA, Associational-disability claims: Castro-Ramirez v. Dependable Highway Express, Inc. (2016) Cal.App. 4th __ (2d Dist. Div. 8.) Plaintiff Luis Castro-Ramirez sued his former employer, Dependable Highway Express, Inc. (DHE), alleging causes of action for disability discrimination, failure to prevent discrimination, and retaliation under the Fair Employment and Housing Act (FEHA) as well as wrongful termination in violation of public policy. His son requires daily dialysis. For several years, the plaintiff’s supervisors scheduled him so that he could be home at night for his son’s dialysis. That schedule accommoda- tion changed when a new supervisor took over and ultimately terminated the plaintiff for refusing to work a shift that did not permit him to be home in time for his son’s dialysis. The trial court granted defendant’s motion for summary judgment and denied plaintiff’s motion to tax costs. Reversal.

The court held that the defendant demonstrated triable issues of material fact on his causes of action for association- al disability discrimination, failure to pre- vent discrimination, retaliation, and wrongful termination in violation of public policy.

The FEHA provides a cause of action for associational disability discrimination, although it is a seldom-litigated cause of action. As to disability discrimi- nation generally, the FEHA makes it unlawful for an employer, “because of the … physical disability … of any person, … to discharge the person from employment … or to discriminate against the person … in terms, conditions, or privileges of employment.” (Gov.Code, § 12920, subd. (a).) The very definition of a “physical disability” embraces associa- tion with a physically disabled person. FEHA explains that the phrase “physical disability” includes a perception … that the person is associated with a person who has, or is perceived to have a physical dis- ability. (§ 12920, subd. (a).) Accordingly, when the FEHA forbids discrimination based on a disability, it also forbids dis- crimination based on a person’s associa- tion with another who has a disability. A prima facie case of disability discrimi- nation under the FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommoda- tion, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this frame- work to the associational discrimination context, the “disability” from which the plaintiff suffers is his or her association with a disabled person. Respecting the third element, the disability must be a substantial factor motivating the employer’s adverse employment action.

Once the plaintiff establishes a prima facie case, the burden then shifts to the employer to offer a legitimate, nondis- criminatory reason for the adverse employment action. In an appropriate case, evidence of dishonest reasons, con- sidered together with the elements of the prima facie case, may permit a find- ing of prohibited bias.

Here, whether the plaintiff here could perform his job with a reasonable accommo- dation (a modified schedule to admin- ister dialysis to his son) was certainly rele- vant, and the circumstance that he might have required an accommodated schedule was no bar to his discrimination claim. DHE was not entitled to summary judg- ment on this ground. To the extent that federal cases under the ADA suggest otherwise, it is because the language of the FEHA and ADA differ in this area.
After reviewing the record, the court determined that a jury could reasonably infer from the evidence that the plaintiff's association with his disabled son was a substantial motivating factor in his conditions; employee seating:

Arbitration: unconstitutionality; lack of mutuality of remedy; Baltazar v. Forever 21, Inc. (2016) __ Cal. 4th __ (Cal. Supreme).

As a condition of her employment with defendants, plaintiff Maribel Baltazar entered an agreement to resolve any employment-related disputes by arbitration. The agreement provides that, in the event a claim proceeds to arbitration, the parties are authorized to seek to preliminarily enjoin injunctive relief in the superior court. The primary question before the Court was whether that clause permitted the arbitration agreement unconstituional, and therefore unenforceable, because it unreasonably favored the employer. The Court held that the clause, which does no more than restate existing law (see Code Civ. Proc., § 1281.8, subd. (b)), did not render the agreement unconstituional, and that there were no other reasons to support Baltazar's claim of unconstituonality. Accordingly, it affirmed the Court of Appeal's opinion that affirmed enforcement of the arbitration agreement.

In reaching this conclusion, the Court noted that the failure by Forever 21 to provide Baltazar with a copy of the AAA rules for arbitration of employment agreements (which were adopted in the arbitration agreement) did not raise an issue of procedural unconstitutionality because Baltazar's arguments for failing to enforce the agreement did not depend on any way on the terms of the arbitration rules.

Public Records Act requests; inadvertent production of privileged documents; waiver; Arlin v. City of Los Angeles (2016) __ Cal.App.4th __ (2d Dist., Div. 3.).

Long filed a UCL class action against Providence; after purchasing Buyers on its website, www.ploffowers.com. He claimed that the product he purchased was advertised as a non-embalmed product, but actually arrived as a do-it-yourself-kit that required assembly by the recipient. Providence moved to compel arbitration under the Federal Arbitration Act, arguing that Long was bound by the arbitration agreement included in the website’s “terms of use” agreement. At the time Long placed his order, the terms of use were available at the bottom of each page of the site by a capitalized, underlined link titled “TERMS OF USE.”

The court explained that contracts formed on the internet tend to come in two flavors: “clickwrap” or click-through agreements, which require the user to click on an “I agree” box before being presented with a list of terms and conditions of use; and “browsewrap” agreements, in which the site’s terms and conditions of use are generally posted on the site via a hyperlink at the bottom of the screen. Because the user can continue to use a site that uses a browsewrap agreement without visiting the page hosting the terms and conditions, the validity of the browsewrap agreement generally turns on whether the user has actual or constructive knowledge of the site’s terms and conditions. More specifically, the validity of a browsewrap agreement typically turns on whether the site put a reasonably prudent user on inquiry notice of the terms of the contract.

The court held that “Terms of Use” hyperlinks on the Ploffowers.com site were not sufficiently conspicuous to put a reasonably prudent internet consumer on inquiry notice, and that Long did not manifest his unambiguous assent to be bound by the “terms of use.” Hence, the administrative office misleadingly provided the plaintiff with some of the privileged documents. The Court granted the plaintiff’s motion to compel provision of privileged documents under these circumstances waives the privilege, thus allowing plaintiff to retain and use the documents and to disseminate them to others. Section 6254.5 of the Government Code, which is part of the Public Records Act, generally provides that “disclosure” of a public record waives any privilege.

But interpreting section 6254.5 in light of the Public Records Act as a whole, the Court concluded that its waiver provision applies to an intentional, but not an inadvertent, disclosure. Accordingly, a governmental entity’s inadvertent production of privileged documents under the Public Records Act does not waive the privilege.
I’ve got a CACI jones

Using jury instructions for more than just instructing jurors

By Miles B. Cooper

You’ve been on the phone all day, you’re tired, and the phone call that you are about to answer looks like another one of those routine mediation calls. You’re wrong. You’re about to get the call of your life.

Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he assists in us trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and slipheater over his career, and is a member of the American Board of Trial Advocates. Cooper’s interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).

So, how did you get the call of your life? It turns out you have a CACI jones.

My boss (our firm principal in the example) took care of that oversight. He taught young lawyers to use jury instructions from a case’s very beginning. The instructions outline what we have to prove. They can be used to frame the investigation, the complaint, and discovery. Quote CACI in the legal analysis sections for demand letters, mediation briefs, and mandatory settlement conference statements.

Model language on current CACI instructions. We cut and paste cobbler up old complaints to source for new complaints. Look at the boilerplate language. Does it still reference proximate cause? Why? CACI instructions use legal cause. Does your tried and true closing argument burden of proof module talk about preponderance of the evidence? That’s nice, but the word preponderance does not appear in jury instructions anymore.

Trial – instructions are not just find and replace

Having trial prep help is great. Don’t hand over the jury instructions, though. Some people believe drafting jury instructions is simple – find and replace the party names and remove a couple brackets. It is far more nuanced. The brackets and use notes inform the preparation. New instructions appear without fanfare and can be used to one’s advantage. Anyone notice the demonstrative evidence or bias instructions when they quietly appeared? The rote mechanics of preparing them repeatedly drill the language into the trial lawyer’s lexicon. Master CACI, master the jury instruction conference, and master the trial.

As for tools for the job, Thomson West’s California Jury Instruction Software still appears to be the least annoying of the unanswerable options out there. If you’ve got a better option, let us know.

Outro

Back to our firm principal. He found the mediation brief’s young author. The principal, armed with CACI, flipped open to the appropriate instruction – the number memorized. “Your legal analysis is way too complicated,” he chided. “All they need is this.” The author nodded, went back to work, and made the change. The principal and young author later went to mediation. The mediator turned to the author and said, “That was a very well done brief – particularly the legal analysis. I’m assuming you wrote that.” The principal looked to the author with a knowing grin and said, “Yes, he did. He’s becoming quite the lawyer.”

Thanks, Mr. Veen, for the instruction on instructions.

CACI use is mandatory, right? Nope. Under California Rules of Court, rule 1:1030(a)(c)(e), their use is “strongly encouraged” and they are recommended for use unless a judge “finds different instructions would more accurately state the law and be understandable by jurors.”

That’s one reason to be aware of BAJI. The law didn’t simply disappear when an instruction failed to make the CACI cut. There are judges and lawyers who practiced for decades under BAJI. Beware the pre-Discovery Act opposing counsel – they still lurk in courthouse corners, and they’ll savage their opposition with battle-tested jury instructions expert if left unchecked. One common method employed, “Well, judge, it seems to me BAJI’s got a better approach on this issue…”

Special instructions

Some lawyers love special instructions. These are instructions suggested by counsel to fill in perceived CACI gaps. Here be dragons – special instructions are a leading cause of reversal on appeal. Four out of five appellate specialists agree – treat in special instruction territory only if one must. (The fifth specialist needs a new client.)

First and last resource

Law students learn legal research. Not once in my three years did anyone suggest referencing jury instructions, though.

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Where you refer catastrophic cases may be the single most important decision you make for your client. Whether it's cases involving traumatic brain injury, spinal-cord injury or other catastrophic personal injury and wrongful-death cases, the Scarlett Law Group will ensure results above and beyond those that can be obtained by other firms.

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49.1 million — Traumatic brain injury caused by cross centerline big-rig trucking collision

22.8 million — Traumatic brain injury caused by tour bus collision with pedestrian

26 million — Permanent brain injury caused by failure to diagnose H. Flu meningitis

18.6 million — Wrongful death, multiple impact, road defect

13 million — Permanent brain injury caused by failure to diagnose meningitis in a year-old child

11 million — Traumatic brain injury caused by dangerous roadway and light rail vehicle collision with pedestrian

10.6 million — Traumatic brain injury caused by collision with farm machinery.

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