Auto accidents and the eggshell plaintiff

Embracing your client's past medical history to prove your case

By Loren Schwartz

If you handle auto accidents, there is a good chance that at some point you have represented someone who might be considered an "eggshell plaintiff." The term, of course, evokes a certain mental image characterized by a degree of fragility.

The fact of the matter is that as we age, the discs in our spine begin to degenerate. If you are 40 or older, there is a good chance that if an MRI was performed of your spine today, it would demonstrate some evidence of disc degeneration.

For much of the population, degenerative changes of the spine may be asymptomatic. Despite the gradual progression of these changes in our neck and back, many of us will be entirely pain free. At the same time, an individual who already has degenerative changes in their spine will often be more susceptible to injury from an auto accident than someone for whom these natural degenerative changes have yet to take place. Those individuals who are more susceptible to injury may end up being your "eggshell plaintiff."

Two people may be involved in the same collision, experience similar forces exerted on their spine, yet experience very different outcomes. One may have a full recovery within a matter of weeks or months. The other may end up with neck pain for the rest of their life. Depending on the circumstances, if you represent the individual who, despite the passage of time, develops chronic pain, there is a good chance that the defense will argue something to the effect that this person's ongoing pain cannot reasonably be attributed to the crash. They may have a defense medical examiner who opines that your client sustained a mild sprain/strain injury and should have made a complete recovery within six to eight weeks; and that if they continued to report pain past that point – well, it must be from something else, namely the fact that they already had issues with their spine to begin with.

Fortunately, for your client, the law provides you with a number of ways to effectively approach these types of cases and address these types of arguments.

Understanding your client's medical history

Any time you have an auto accident case involving a client with pre-existing medical issues, it is imperative that you have a firm grasp of what those issues are as well as the nature and extent of your client's prior treatment – if any – for those issues. Don't wait until suit is filed or the defense has sent out medical record subpoenas for your client's records before seeing these records yourself. You need them at the outset and it is important to discuss with your client how any such pre-existing issues may impact their case.

If your client was periodically treating for neck pain during the year prior to the crash and then continued to periodically treat in a similar manner for the same neck pain following the crash, then it is possible that the crash may have had little (or even no) appreciable physical impact on your client's neck condition.

Alternatively, if your client either had no symptoms, only mild symptoms, or otherwise periodic symptoms before the crash, and then after the crash they began to experience chronic pain, provided the crash was a substantial factor in causing that pain, they should be entitled to recover damages in compensation for the harms which they sustained.

Regardless of the specifics, once you know that your client may have had pre-existing medical issues germane to their case, make sure you get the relevant records documenting these issues. Not only will this help you prepare your case, but it will also allow you to have a candid and informed discussion with your client early on regarding their case, potential strengths/weaknesses, and what to potentially expect moving forward.

The law is on your side

When prosecuting an auto accident case on behalf of someone with pre-existing medical issues, it is important to continually keep in mind the laws relating to causation and to the "unusually susceptible plaintiff." When it comes time to depose the defense medical examiner, preparation for the deposition should be done with an eye towards getting certain concessions that will assist you in developing your case themes and ultimately proving your case.

Regardless of how complex the medical issues may be, if your case goes to trial, ultimately the jury is going to be provided with a set of instructions and a verdict form that come down to more basic concepts, including the question of whether or not the crash was a substantial factor in causing your client's particular harms. The key concepts to keep in mind relating to the issue of causation are reflected in the California Civil Jury (CACI) instructions that ultimately will be read to the jury. These include the following:

CACI 400 Negligence – Essential Factual Elements

Plaintiff claims that Plaintiff was

harmed by Defendant's negligence. To establish this claim, Plaintiff must prove all of the following:
1. That Defendant was negligent;
2. That Plaintiff was harmed; and
3. That Defendant's negligence was a substantial factor in causing Plaintiff's harm.

CACI 430 Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

CACI 431 Causation: Multiple Causes

A person's negligence may combine with another factor to cause harm. If you find that Defendant's negligence was a substantial factor in causing Plaintiff's harm, then Defendant is responsible for the harm. Defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing Plaintiff's harm.

CACI 3928 Unusually Susceptible Plaintiff

You must decide the full amount of money that will reasonably and fairly compensate Plaintiff for all damages caused by the wrongful conduct of Defendant, even if Plaintiff was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

Questioning the defense medical examiner

When it comes time to depose the defense medical examiner, don't run away from your client's pre-existing conditions. Embrace them. Get them out in the open. Ask the deponent to go through all of the various pre-existing spinal issues which the deponent believes your client had.

After you have done that, but before returning to the specifics of your client's case, consider seeing if you can find some general points of agreement with the deponent. Think about crafting your questions in a way that tracks the language of the instructions that will ultimately be read to the jury.

By starting off in general terms, you will frequently be more likely to get some basic concessions that you might not otherwise get if you are discussing the specifics of your particular client's case. For example:
(1) Doctor, generally speaking, if an individual has pre-existing degenerative disc disease such as *(consider describing the type of degenerative disc disease your client had)*, that pre-existing disc disease can make that individual more susceptible to injury than a normally healthy person would be, true?
(2) And doctor, would you also agree that when an individual is experiencing pain, there can be more than one factor contributing to that pain?
(3) For example, an individual with degenerative disc disease who is involved in a collision may consequently experience pain which can be fairly attributed to both that preexisting disc disease as well as the collision itself?

After you have hopefully established some of these basic principles, then see if you can get some concessions relating to your particular case, again tracking the language contained within the applicable jury instructions. For example:
(1) Doctor, you discussed earlier the rather extensive pre-existing degenerative disc disease which my client had preceding the collision. Given the rather extensive pre-existing degenerative disease which you described, you would agree that with respect to this particular collision, the Plaintiff was more susceptible to injury than a normally healthy person would have been, true?
(2) And as we discussed earlier, when an individual is experiencing pain, there can be more than one factor contributing to that pain, true?
(3) Such that in this particular case, even if we accept the fact that this pre-existing disc disease was an important and substantial factor in the painful symptoms which my client developed following the collision, would you agree that the collision itself was also a substantial factor in causing these symptoms?

If the deponent balks at your use of the phrase "substantial factor," it may be useful to ask follow-up questions that still track the language in the CACI 430 jury instruction, including questions designed to get the deponent to acknowledge that, at the very least, the crash "contributed to the harm."

Often, the deponent will acknowledge that the crash was a substantial factor in causing your client some harm and some pain but will go on to opine that your client should have recovered within a certain time frame, say six to eight weeks.

Well, perhaps other individuals might have recovered during that time frame. But your client didn't. So, what is the difference? Ask the witness to let you know on what date did your client's pain stop being from the crash. Unless there is some subsequent event that the witness can point to, this question puts them in a position of assigning some quasi-arbitrary date as to when your client *should have recovered*. But again, just because some people may have recovered earlier, everyone's situation is different and as we know from the law, as long as the plaintiff proves that the subject crash was a substantial factor in their ongoing pain, they are entitled to compensation for that ongoing pain, even if there were other factors which also contributed to their symptoms.

Ultimately, if your case proceeds to trial, keep in mind that there is the medicine; there is the law; but there is also common sense. If you have a good, authentic, and likeable client who lived her first 50 years on this earth without ever having to see a health care provider for neck pain; and then she was involved in a collision; and since that time has had ongoing neck pain for which she has had to see a variety of doctors and physical therapists, common sense should tell us that this collision was – at the very least – a substantial factor in her ongoing symptoms.

Some final thoughts

Auto accident cases are personal-injury cases. Personal-injury cases should be personal. Don't get sucked into evaluating your case through the lens of

an insurance company. The case is not about a body shop repair estimate. Or a claim number. Or a "Date of Loss." It's about your client – the person.

Personal-injury cases involving clients with pre-existing medical issues can be technically complex. However, regardless of these complexities, your ultimate objective – demonstrating that the crash was a substantial factor in your client's harms – is decidedly more basic. And so, while it is undoubtedly important to thoroughly understand the medical issues at play, it is also important to never lose sight of what you are ultimately trying to prove – that even if your client had certain medical conditions which pre-existed the crash and even if these conditions contributed to the harm which your client ultimately sustained, the crash itself was a substantial factor in contributing to your client's harms. And your client is entitled to be compensated accordingly.


Schwartz

Loren Schwartz is a partner in the San Francisco Office of Dunn & Panagotacos LLP. *His practice focuses on representing plaintiffs in personal injury, medical negligence, elder abuse, and employment matters. He is an active member of the Consumer Attorneys of California, Bar Association of San Francisco, and San Francisco Trial Lawyers Association.*