for Disaster:

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The aggressive defense of medical claims is crucial in all liability and workers' compensation actions. Medical issues, such as lingering pains from a slip and fall injury at the loading dock, must be challenged with no less intensity and vitality as we apply to the defense of the cause of the accident.

Medical issues are the common denominator to all bodily injury litigation. The nature of the accident may vary from a driver's failure to brake to a right-turn-squeeze. The claimant may be either a third party litigant or our own driver for worker's compensation. However, the cause and extent of the alleged medical condition is a key element in all of these actions. These issues are the determinant of case value.

It is even more important in today's world were many view medical maladies as an alternative to work. *"There is presently a disability epidemic in the United States."* This is the opening line of the Guide to the Evaluation of Disease and Injury published by the American Medical Association. This is the challenge we face in defending against the cause and extent of medical claims.

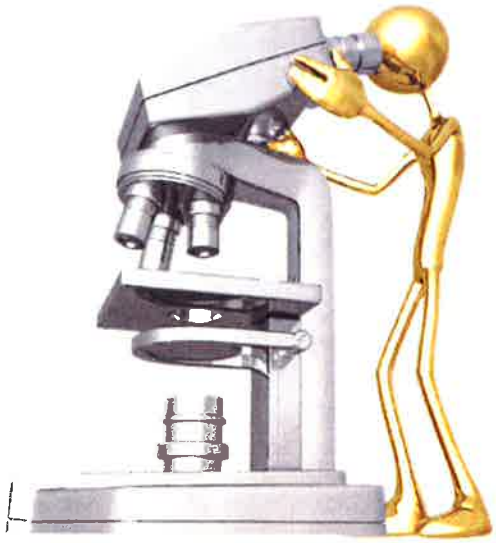
In contesting causation of the accident, we engage top level experts to analyze physical evidence by the application of scientific principles. Speed is derived from skid marks and the applicable coefficient of friction. Driver reactions are gauged against scientifically established perception-reaction norms.

Medical issues require a similar systematic scientific approach in their defense. They require qualified experts that utilize professionally accepted procedures and base their findings on scientific principles applied to indisputable evidence.

Our position in defending claims renders our medical expert suspect by virtue of his mere retention. We are faced with the notion of judges and juries, inflamed by the plaintiff that ours is an expert-for-hire as opposed to the kindly, treating doctor.

In vintage television terms, Paladin v. Marcus Welby; a belated one-time examiner engaged solely for purposes of litigation in contrast to one rendering treatment from the time of the accident through the duration of litigation. We are burdened by this misperception.

An Examination of Medical Claims



However, this can be overcome. To do so, we must present the opinion of qualified experts based upon an accepted form of analysis, utilize the medical science available to us, and coordinate an aggressive attack from the time of the accident.

The selection of a qualified expert is the important first step. It is important to seek expertise from the specific field of medical applicable to the claimant's alleged injuries.

Even the most qualified of experts is relatively impotent outside his/her area of expertise. I had a trial in which the opposing plaintiff hired a highly qualified expert who testified that a pulmonary embolism was the result of an accident with my client. However, because the "expert" specialized in colorectal surgery, he carried little weight with the jury as opposed to my cardiopulmonary expert.

The second key element is the expert's utilization of a medically recognized evaluation process. While each medical specialty recognizes its generally accepted forms of examinations, they still often vary from doctor-to-doctor dependent on individual practice. Further, the examination is often subject to criticism for its brevity and limitations.

This argument can be diffused by an examination conducted in a manner and form recognized and accepted by the medical community. The key is to utilize a medically and governmentally accepted examination protocol.

For example, the National Association for Occupational Safety and Health (NIOSH) and the American College of Occupational and Environmental Medicine (ACOEM) has developed examination processes for the evaluation of the work-relatedness of a condition or injury. Such nationally, medically-based and accepted formats provide an anchor for the evaluation process. A consistent application of a medically recognized examination by a qualified expert goes far in strengthening our position.

A third component is the complete evaluation of all medical records. This is an important part of the medically recognized evaluation process. It provides a logical evidentiary foundation for the opinion of our independent expert. Further, a complete review of all records by our physician presents a persuasive rebuttal to the attempt to paint her as biased. It gives us the argument that ours is the only expert to see the complete pre- and post-accident medical records of the claimants and

perform a forensic evaluation. In contrast, the claimant's treating doctors see only the records utilized in their specific treat and view them for treatment, not forensic or causation analysis.

Our standard practice is accumulating all records by release, subpoena, or court order. To do so, we must seek sources identifying these records beyond those revealed by the plaintiff in discovery. The sad reality of today's world is that those who seek money from our companies frequently fail to be forthcoming, particularly as to their pre-accident medical status.

To identify potential medical providers, sources must be scoured such the insurance industry index of prior claims and the payees of the plaintiff's health insurers. In one case, I encountered a plaintiff who claimed a back injury

from the accident, but denied any prior back problems. However, subpoenaed record of prior payments by his health insurer identified an orthopedic surgeon and MRI several years pre-accident. When these records were subpoenaed, evidence of a pre-existing back condition consistent with his current claims was unearthed.

Chronological organization of the medical records is crucial to provide a perspective for the timing of the medical conditions. We summarize all records in a chronological data base. We all make a duplicate copy of all records organized in a chronological binder.

The chronological binder facilitates the review by the examining doctor. More important, the jury is provided with a logically organized, easily referenced single exhibit of paginated medical record. In a recent case, the plaintiff's counsel objected because he had never seen such an exhibit in such a form. The Court overruled the objection as it appreciated the simplicity of a singular source of records. The jury followed the references to the page number of the respective chronological records during both the trial as well as the closing argument. In fact, the jury during deliberation requested access to the exhibit shortly before rendering a defense verdict.

The fourth element is employing the wealth of medical research to challenge the causation of the claimed injuries by the accident. The application of science to the determination of causation is just as important in defending against injuries as it is in defending against fault in the accident. Plaintiffs argue that medical causation is a simple equation:

Accident + Medical Condition = Damages.

The result is the simplistic logic that any condition of the claimant after the accident must have been caused by the accident. Thus, they argue, they are entitled to compensa-

tion for the condition merely because it is present after the accident.

This logic fails to consider the medical studies that challenge this simplistic notion. There are multiple medical studies that are scientific, available, and question the link between the accident and the injury. These studies demonstrate or at least provide a basis to question the causal connection of the condition. Many are found in Guide to the Evaluation of Disease and Injury.

For example, MRI's of individuals who were not in accidents and had no complaints have revealed asymptomatic lumbar disc herniations in 20% of the people younger than 60 years of age. This number increased to 36% of the people tested over 60 years old. Thus, the mere presence of a herniated disc is neither indicative that an accident caused it, nor that it was a problem.

Another example is that medical research is fraught with studies as to the effect of smoking on discs and the potential for back complaints. Similarly, smoking impedes the healing process because of the constriction of capillaries by nicotine.

Studies regarding carpal tunnel syndrome indicate that factors such as job dissatisfaction, limited job control, monotonous work, and short cycle time may have more of an influence on reports of musculoskeletal disorders than a person's type or duration of employment. Yet another study found that those at the highest risk for carpal tunnel were those who consumed caffeine either alone or in combination with alcohol.

The point is that we should not accept a causal relation of an injury to an accident by the mere fact of its occurrence. Instead, the medical research should be reviewed to determine if the claimant has characteristics or habits that are a scientifically proven cause of the claimed condition.

The fifth element is to commence the collection of information concerning the claimant's condition immediately upon the occurrence of the accident. When the accident occurs, consider the potential for a significant claim and value of early surveillance—before they are on-guard or represented.

When you receive the letter of representation, push back. Respond with releases for medical and employment records. Note your need for immediate investigation and the prejudice you will suffer if they fail to cooperate.

Request a pre-litigation physical examination. If the claimant's attorney agrees, you have an early evaluation and take away the argument that your doctor did not see the claimant until long after the accident. If they refuse, you have documented your request and can later raise questions as to their claims—if they were legitimate, why wouldn't they let us examine him or her?

Continually review publically accessible social media sites of the claimant. The claimant's own pictures may undermine the tale he/she tells the doctors.

Medical claims require aggressive defense no less than the accident itself. The response must be by a qualified expert who has reviewed the complete medical records and performed an examination in a nationally, medically accepted and recognized format.

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