

Chronic Pain From the Defense's Perspective

By

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I. INTRODUCTION

As in any case, the effective defense of a chronic pain syndrome case begins, first and foremost, with a thorough and complete investigation conducted under the supervision of defense counsel. This investigation should obviously include an investigation into the facts of the accident and the liability issues involved. The investigation must also necessarily include a thorough review of the plaintiff's background, including developing into trial evidence bits of information usually obtainable from a review of the plaintiff's prior medical background, employment background and educational background.

Multiple experts may also be required in order to convince the jury that the plaintiff's claims are not worthy of a significant damage award.

Many jurors are skeptical of claims presented by plaintiffs seeking large damage awards stemming from low impact accidents, or other claimed injuries based primarily on the plaintiff's subjective complaints of pain. It is the job of defense counsel to channel and focus that natural skepticism of many jurors.

Obviously, in a case dealing with chronic pain syndrome credibility becomes the key issue that the jury will focus on throughout the trial. Credibility applies not only to the witnesses but also to the lawyers trying the case.

Lawyers defending cases involving claims of chronic pain syndrome need to look for other possible causes for the plaintiff's alleged chronic pain. Defense lawyers will need to work closely with their medical experts in an effort to develop evidence of other possible or potential causes for the plaintiff's claimed chronic pain. These other causes can be physical, sociological or psychological. Minnesota's revised jury instruction dealing with pre-existing disability or pre-existing medical condition, CIVJIG 91.40 needs to be factored into the defense of any case dealing with a pre-existing disability or pre-existing medical condition.

Defense counsel needs to explore issues of functional overlay and the concept of secondary gain from the initial injury. If the jury believes that the plaintiff is being effected by such concepts a minimal jury award will almost always be the result.

II. INVESTIGATION AND WRITTEN DISCOVERY

A. Insurance Company's Claim File

By the time a case is referred to defense counsel the insurer of the defendant has often already conducted an investigation into the accident. The insurer's claim file usually will include things such as police reports, accident reports, photographs and at least some medical records of plaintiff.

This information will allow defense counsel to “hit the ground running” as he or she begins work on the defense of a new lawsuit.

The claim file may also include an index search of the plaintiff which will give defense counsel a head start on developing information with respect to prior claims and injuries of the plaintiff.

Particularly in cases involving low impact accidents, it should be kept in mind that “a picture is worth 1,000 words” in your effort to convince a jury that this is truly a case of minimal injuries and damages.

B. Interrogatories

In addition to serving interrogatories dealing with the liability issues and the facts of the accident detailed interrogatories should also be used to develop the following information from the plaintiff:

- Prior names or aliases.
- Prior addresses.
- Age, birth date, birthplace and social security number.
- Marital history and family history (former spouses can sometimes provide defense counsel with a wealth of information).
- Employment history.
- Identity of all witnesses and a brief statement of the facts believed to be known by each such witness (these witnesses can then be either interviewed or deposed).
- Information dealing with the plaintiff’s employment at the time of the accident including any wage loss calculation.
- Information regarding the plaintiff’s current employment including wages, salary, etc. to be contrasted with plaintiff’s employment status at the time of the accident.
- A detailed description of all injuries and damages being claimed in the lawsuit.
- The identity of any physicians, surgeons, chiropractors, medical practitioners of any kind, or other experts that plaintiff has treated with or consulted with in connection with the plaintiff’s claims being made in the lawsuit.
- The identity of all hospitals or other institutions that plaintiff claims to have been treated as a result of the injuries for which plaintiff is making claim.
- A complete history of all illnesses, diseases, injuries, disabilities or other medical problems that plaintiff has suffered prior to the injury, including the following:

- 1) the nature and extent of each such illness, disease, injury, disability or other medical problem;
 - 2) the inclusive dates of each such illness, disease, injury, disability or other medical problems;
 - 3) the nature, extent and inclusive dates of any disability resulting from each such illness, disease, injury, disability or other medical problem;
 - 4) the names and addresses of any hospitals, doctors, or other professional people who treated plaintiff, were consulted by plaintiff or involved in any way by plaintiff in connection with each such illness, disease, injury, disability or other medical problem;
 - 5) if not fully recovered, what residual effects Plaintiff has from each such prior illness, disease, injury, disability or other medical problem.
- A complete history of all illnesses, diseases, injuries, disabilities or other medical problems that plaintiff has suffered since the injury, including the following:
 - 1) the nature and extent of each such illness, disease, injury, disability or other medical problems;
 - 2) the inclusive dates of each such illness, disease, injury, disability or other medical problem;
 - 3) the nature, extent and inclusive dates of any disability resulting from each such illness, disease, injury, disability or other medical problem;
 - 4) the names and addresses of any hospitals, doctors, or other professional people who treated plaintiff, were consulted by plaintiff or involved in any way by plaintiff in connection with each such illness, disease, injury, disability or other medical problem;
 - 5) if not fully recovered, what residual effects Plaintiff has from each such prior illness, disease, injury, disability or other medical problem.
 - Identity of plaintiff's family doctor and all former family doctors of plaintiff.
 - Identity of all persons or corporations that plaintiff has made a claim against for injuries in the past, including workers' compensation claims and no-fault claims.
 - With respect to all professional medical treatment plaintiff has received as a result of the accident which forms the basis of the lawsuit obtain the following:
 - 1) the identity of each treating medical professional;
 - 2) the exact nature of the treatment received from each such medical professional;
 - 3) the dates of each such treatment;

- 4) the amount of the bill, statement or other charges for each such treatment.
- Identity of all accident or health insurance policies plaintiff had in effect at the time of the accident including the name and address of the insurance company and the nature and amount of any benefits received from or paid on plaintiff's behalf by each such insurer.
 - Identity of each person who plaintiff expects to call as an expert witness at trial. With respect to each expert obtain the following:
 - 1) the area of expertise of said expert, his/her educational background and experience;
 - 2) the subject matter in which said expert is expected to testify;
 - 3) the facts and opinions to which said expert is expected to testify;
 - 4) the grounds for said opinion.
 - Determine whether plaintiff has ever been convicted of a crime and obtain the details of any such conviction.

Once the answers to interrogatories have been received follow-up investigation will need to be done to develop further the information provided in the answers to interrogatories. This can be done by a paralegal or legal assistant.

C. Demand for Production of Documents and Statements

Defense counsel should serve a Demand for Production of Documents and Statements upon the plaintiff requesting information relating to both liability and damage issues, including the following:

- Copies of police reports, accident reports and/or investigation reports.
- Copies of any statements.
- Copies of plaintiff's state and federal income tax returns from several years prior to the accident through the present.
- Copies of plaintiff's medical bills and any other bills for expenses.
- Any photographs, films, videotapes, motion pictures, drawings, models, charts or other type of demonstrative or illustrative evidence.
- Any documents or records referred to in plaintiff's answers to defendant's interrogatories.
- All documents and records between plaintiff and any insurance company relating to the payment of benefits including any agreements executed with any insurance company.
- Copies of reports prepared by any expert witness.
- Copies of any documents that plaintiff contents support plaintiff's claims for damages.

- Copies of any other documents or exhibits that plaintiff intends to offer at trial.

The responses to the Demand for Production of Documents will also open up further avenues for investigation by defense counsel's office.

D. Demand for School Records

Defense counsel should obtain authorizations from the plaintiff authorizing defense counsel to obtain copies of plaintiff's school records.

Once obtained, these records should be reviewed for evidence of any prior medical problems, social problems or educational problems that may have an impact on the issues involved in the case.

E. Demand for Employment Records

Defense counsel should obtain authorizations allowing access to plaintiff's employment records.

The employment records will need to be reviewed and analyzed. They often provide a wealth of information useful to the further defense of the case including the identity of other employers, the identity of medical problems and medical providers, wage records, reasons for termination of employment and other things of that nature.

F. Demand for Insurance File and/or No-Fault File

In an auto accident case there is usually a no-fault file which can be obtained through the use of an authorization which will often provide valuable information helpful in the defense of the case. Also, authorizations should be obtained for insurance claims files in connection with prior injuries and accidents sustained by the plaintiff.

G. Demand for Medical Reports and Written Authority to Inspect Records

Defense counsel should obtain through the use of authorizations plaintiff's complete medical history. Those medical records need to be reviewed and analyzed in detail. Such review often will disclose the identity of other doctors or medical professionals that plaintiff has not disclosed. The medical records will need to be provided to defense experts for their review and analysis in forming their ultimate opinions and conclusions with respect to plaintiff's claimed injuries and damages.

H. Demand for Workers' Compensation Records

Defense counsel should obtain authorizations which will allow defense counsel to obtain whatever records are on file at the Department of Labor and Industry dealing with any workers' compensation claims submitted by plaintiff.

I. Demand for Production of Documents Regarding Collateral Sources

This information should be obtained in order to calculate the amount of the collateral source set off that defendant will be entitled to in the event the case proceeds to trial.

III. DEPOSITIONS

In a case involving claims of chronic pain syndrome it will be important to take a number of depositions. Depositions of witnesses with knowledge dealing with the liability issues in the case will need to be taken. In addition, the plaintiff may disclose through his/her answers to interrogatories a number of witnesses who have knowledge of plaintiff's claimed injuries and damages. These "before and after" witnesses will often need to be deposed. In addition, a deposition of the plaintiff will need to be taken.

A. "Before and After Witnesses"

Plaintiff's "before and after" witnesses will most likely consist of the plaintiff's spouse or other family members, fellow employees or other friends and relatives. These witnesses can be strong witnesses on behalf of the plaintiff. Defense counsel should, in a tactful manner, try to establish their bias in favor of the plaintiff.

Most of these witnesses would not be listed as witnesses or called as witnesses by the plaintiff unless they can provide information helpful to the plaintiff's case. The challenge for defense counsel is to dig up and develop whatever information he or she can that plaintiff has made a good recovery from the initial injury. Items to be explored include plaintiff's work ability before and after the accident including inquiries regarding plaintiff's attitude, dependability and complaints while working. Also, information from the "before and after" witnesses can be obtained relating to the effect of plaintiff's injuries on plaintiff's activities around the home, hobbies, household chores, vacations, trips and plaintiff's social activities.

Defense counsel should try to establish plaintiff's continued participation in recreational activities such as bowling, softball, broom ball, horseback riding, skiing or other physical activities that a person must be in at least decent physical condition to participate in.

These witnesses need to be deposed in order that the strength of their testimony and their impact on any ultimate verdict can be assessed and evaluated prior to trial. If credible, these witnesses can be very effective advocates for plaintiff. If not credible or if defense counsel can establish through these witnesses that there has been little impact or change in plaintiff's lifestyle, these witnesses will turn out to be good witnesses for the defense.

B. Deposition of the Plaintiff

Obviously, a deposition of the plaintiff needs to be taken. In addition to questions dealing with the facts of the accident and liability issues the plaintiff's claimed injuries and damages need to be explored with the plaintiff in detail.

Areas of inquiry to be made with the plaintiff at the time of the plaintiff's deposition include the following:

- Marital and family status
- Educational background
- Military background
- Employment background including problems encountered at different jobs and the reason for changing jobs
- Prior accidents
- Prior injuries
- Prior lawsuits
- Prior workers' compensation claims
- A description of what actually happened at the time of the accident resulting in plaintiff's claimed injuries
- What plaintiff recalls happening at the accident scene after the accident happened
- Conversations with others at the accident scene
- A description of all of plaintiff's claimed injuries and damages
- Plaintiff's condition when he/she first began treating for the injuries
- Plaintiff's present condition
- Any physical limitations/restrictions experienced by plaintiff
- Which doctors or medical professionals have placed any limitations/restrictions on plaintiff
- What can't plaintiff do now (work, hobbies, day to day, etc.)
 - how often did plaintiff do these activities before the accident
 - if the activities involve athletic participation, what leagues was/is plaintiff in, what, if any records are kept by those leagues
 - who does/did plaintiff participate in these activities with
 - has any doctor placed any limitations or restrictions on these activities
- A description of the pain experienced by plaintiff

- Constant or intermittent
- Worse morning or evening
- Does activity help or aggravate
- What pain killing medications has plaintiff taken since the accident occurred
- Is plaintiff's condition improving, worsening or staying the same
- Describe all present symptoms being experienced by plaintiff
- Any problem with injured areas before the accident
- Detailed description of all prior injuries
- Detailed description of all prior hospitalizations/medical treatment
- Detailed history of any pre-existing disability/impairment
- Detailed history of any prior serious illnesses
- Identification of all doctors or medical professionals who have treated plaintiff in the past
- Identification and specialty of each medical professional seen by plaintiff as a result of this accident. With respect to each such medical professional:
 - when the plaintiff first saw each medical professional after the accident
 - how plaintiff got there
 - the type of treatments received
 - the number of treatments received
 - when plaintiff last saw the doctor
 - has plaintiff been released from treatment
 - when is plaintiff's next appointment
 - who referred plaintiff to that doctor
 - what each doctor said was wrong with plaintiff
 - what each doctor said about the length of time of any disability/limitation
- Physical therapy received by plaintiff
- Occupational therapy received by plaintiff
- Medications taken by plaintiff
- Exercise being done by plaintiff
- Any emergency room treatment received by plaintiff
- Any hospitalization of plaintiff
- Any surgery undergone by plaintiff
- Any specialized tests undergone by plaintiff
- A description of plaintiff's past medical expenses
- A description of plaintiff's anticipated future medical expenses
- Time lost from work by plaintiff
 - when returned to work on light duty
 - when returned to work on full duty
 - when did doctor okay plaintiff's return to work
 - did plaintiff's doctor place any limitations or restrictions on plaintiff when plaintiff returned to work
- Anticipated future loss of earnings

- Any disfigurement
- Has plaintiff ever applied for unemployment after the accident
- Has plaintiff filled out any job applications after the accident
- Has plaintiff kept any diary of his/her claimed injuries and damages or the effect of the those injuries and damages on plaintiff's lifestyle

IV. SURVEILLANCE

In the appropriate case, video tapes of the plaintiff performing his/her normal daily activities done by a reputable surveillance company can be very effective in establishing that plaintiff is not actually suffering from the severe, chronic pain that is being claimed.

Defense counsel must make sure that he/she has engaged a reputable surveillance company so as not to be exposed to additional claims of liability.

V. EXPERT WITNESSES AND INDEPENDENT MEDICAL EXAMINATIONS

A case in which plaintiff presents claims based upon alleged chronic pain syndrome can result in a situation where more than one expert witness and more than one independent medical examination or independent vocational examination is needed.

These types of cases may require independent medical examinations and expert testimony from a number of professionals including neurologists, neuropsychologists, psychologists, experts in pain management, orthopedists, physical therapists, occupational therapists, vocational experts and economists.

The trial court has broad discretion to order a physical examination under Minnesota Rule of Civil Procedure 35.01. After plaintiff's discovery responses have been received defense counsel needs to evaluate the need for one, and possibly more, independent examinations. In Lepage v. Manley, 1991 W.L. 222 450 (Minn. App. 1991) the court of appeals sustained the trial court's ruling which permitted five adverse medical examinations. In its decision the court of appeals recognized that when the physical or mental condition of a party is in controversy, the trial court may order the party to submit to a physical or mental examination. The court of appeals recognized the trial court's broad discretion in this light. In Lepage the plaintiff claimed psychiatric, orthopedic, neurologic, brain and vocational disabilities. Due to that fact the court of appeals held that the trial court did not abuse its discretion by requiring the plaintiff to submit to five adverse examinations.

The expense of the independent examinations must be considered together with the potential exclusion of such testimony based on its cumulative effect. Each

case needs to be looked at on its own merits in order that the proper defense can be provided.

Once it is determined what expert witnesses need to be used the information obtained by defense counsel through the written discovery process needs to be provided to them before their independent medical examination or independent vocational examination is conducted.

VI. TRIAL ISSUES

A. CREDIBILITY, CREDIBILITY, CREDIBILITY

Credibility is the most important issue in any trial. Credibility issues may be even more important in a trial involving a claim of chronic pain syndrome than in other trials due to the subjective nature of the plaintiff's claim of chronic pain syndrome. The issue of credibility applies to the plaintiff, defendant, lay witnesses, expert witnesses and lawyers involved in the trial of the case.

Juries usually seem inclined to award larger verdicts to plaintiffs who have made an effort to move forward after the accident, get on with their life and make the most of their situation. By the same token, juries are disinclined to award much in the way of damages to a plaintiff that the jury perceives to be a whiner or a malingerer.

B. Jury Selection

At the time of jury selection an effort must be made to determine the potential jurors' feelings, prejudices and biases with respect to a plaintiff's claim of chronic pain syndrome when such a claim will be presented during the trial. Inquiry must be made of the prospective jurors as to their experiences with pain and the experiences of their friends and relatives that may have some impact on their outlook.

C. The Theme of Defendant's Case

By the time the case gets to trial, defendant's counsel should have a definite theme of defendant's case which will be presented at trial. The theme will have been developed through the course of the discovery that has taken place and the investigation that has been done. The theme should set the tone of trial from the defense perspective. Through the trial testimony the theme will be developed and presented to the jury. The theme will not be the same for every case but will vary depending upon the facts and circumstances of each individual case.

Once the plaintiff has been deposed and his/her demeanor and credibility have been assessed, defense counsel will be able to determine the type of theme to present with respect to the plaintiff. Also, once the defense experts have completed their

investigation, examinations, and reports their testimony will become part of the theme of the defense of the case.

D. Cross Examination of Plaintiff's Experts and Presentation of Defense Experts

In most cases, the expert testimony of the doctors or other medical professionals testifying on behalf of the plaintiff and the independent medical examiners will all have been done on video tape prior to the trial. This is a definite help in the preparation of defense and plaintiff's counsels' opening statements and provides an early start on the preparation of your closing argument.

Prior to any trial depositions of the other side's medical professionals, time should be taken to check their background and qualifications with the state licensing boards. Information which can be obtained from those boards includes information regarding any suspensions or revocations of their licenses. Obviously, this type of testimony can be devastating at trial.

It is often very difficult to cross-examine a doctor with a frontal attack on his opinion. Most doctors have forgotten more about medicine than most lawyers will ever know. For that reason, it is recommended that a cross-examination of the opposing doctor be done in a more subtle fashion. Often they can be cross-examined on their lack of knowledge of information contained in medical records that the defense has obtained through the discovery process. There are also usually important bits of information in their records which are supportive of the theme of the defense's case. Those items of information need to be brought up and developed during the cross-examination of the opposing doctor. If defense counsel is lucky, the doctor's file will contain some information from the plaintiff's attorney's office that can be used to establish a bias or an attempt by the plaintiff's attorney to influence the doctor's opinion.

The plaintiff's medical records may contain a series of missed appointments. This information can obviously be explored through cross-examination of the treating doctor.

If there is evidence in the record of other potential causes of plaintiff's pain that can also be explored with the treating doctor. Along the same lines, a lack of objective findings can also be brought out through cross-examination of the plaintiff's doctor.

In order to do an effective cross-examination of the plaintiff's doctor or doctors, defense counsel must have a total grasp of the plaintiff's medical records.

In the presentation of the testimony of the independent medical examiner and other expert witnesses it is important to have them fully present their credentials. It is

also important to present to the jury what percentage of their practice is spent doing independent medical examinations. They should explain to the jury what is involved in doing an independent medical examination, which often takes more time to do than an examination by a treating doctor.

The importance of the history obtained by the independent medical examiner should be presented to the jury particularly when there are discrepancies in the history. If there is a lack of objective findings that should obviously be pointed out.

The independent medical examiner in the appropriate case might be able to express an opinion dealing with the concept of secondary gain and the concept of functional overlay.

E. CIVJIG 91.40 Items of Personal Damage—Aggravation

CIVJIG 91.40 dealing with pre-existing disability or pre-existing medical condition is probably the most controversial of the recent changes to Minnesota’s Jury Instructions. That instruction provides as follows:

**CIVJIG 91.40
ITEMS OF PERSONAL DAMAGE—
AGGRAVATION**

Pre-existing disability or pre-existing medical condition

There is evidence that (plaintiff) had a pre-existing disability or medical condition at the time of the accident.

(Defendant) is liable only for any damages that you find to be directly caused by the accident.

If you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then defendant is liable for all of the damages.

Minnesota’s prior jury instruction dealing with pre-existing disability or pre-existing medical condition did not include the third paragraph of CIVJIG 91.40. Defense counsel needs to be aware of the change to the jury instruction and needs to be able to separate damages caused by the pre-existing disability or medical condition from those caused by the accident. If not, under the new jury instruction, defendant will be liable for all of the damages.

VII. CONCLUSION

When defending a case in which the plaintiff asserts a claim for injuries and damages based upon chronic pain syndrome, it is imperative that defense counsel conduct a thorough and detailed investigation of the plaintiff including investigation of the plaintiff's medical background, educational background, employment background and social background. The discovery devices set forth above are good tools that enable the defense to obtain the information necessary to adequately evaluate and defend the case. As this information is developed defense counsel must establish his or her theme of the case to be presented at trial. Presenting the theme of the case in a believable way through the use of credible witnesses is the key to success in defending cases such as these.