

DAMAGES
ATLA WINTER CONVENTION 2003
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One of the many battles that we face as trial attorneys in these times is to persuade a jury of the merits of awarding an injured individual damages if she or he has a preexisting medical condition or a pre existing degenerative condition. Often, it seems that juries make the subsequent injury small or unimportant unless it is abundantly clear how the previous medical condition or injury is different.

The Restatement of Torts Second states and most jurisdictions agree that the purpose of damages is to:

- a) give compensation indemnity or restitution for harms
- b) determine rights
- c) punish wrongdoers and deter wrongful conduct
- d) vindicate parties and deter retaliation or violent and unlawful self help.

PRE EXISTING CONDITIONS

The challenge for us is to nullify the juror attitude that would find that the injured or ill person had the problem before the accident and should not be “rewarded” for injuries sustained if they are not “caused “ by the accident.

The law in most jurisdictions is clear. If a person is injured by the negligence of another and the injured person has a pre existing or degenerative condition which pre dates the accident, the plaintiff is still entitled to compensation for the injury and/ or exacerbation of the condition. In other words, the defendant takes the plaintiff as he finds him or her. This principle is known as the “eggshell skull” rule. A defendant does not escape responsibility if the person that they injured is not perfect at the time of the injury. The law proposes that even if there is a pre-existing injury or a susceptibility to injury, these circumstances are foreseeable and the defendant is still responsible. *The law does not only protect perfect people !*

The difficulty in these cases is that the defense attorneys will emphasize the pre-existing condition and say that little has changed from before the accident.

The question for us is how to get this across to our juries. First, we must answer the question for ourselves. The way to find the answers is to question your client at length about their prior medical history. Even after questioning, clients may not remember their total medical history. The next thing you should do is to obtain the names and addresses of their past treating physicians and request all of the clients’ past medical records from their offices. Are there diagnostic studies that

exist? Get the actual films and/or studies. Do not rely on the physician's interpretative report. It may be necessary for your latest expert to try and differentiate the prior and subsequent accident. Most doctors would prefer to look at the studies themselves or the raw data and form their own conclusions.

In review of the medical records does it appear that your client recovered from their prior injury? If they did continue to complain of their condition to a doctor, did the frequency of treatment decrease before the subsequent accident? Is there a difference in the nature and type of treatment rendered? Perhaps prior to the accident physical therapy was required for the contested injury, but now surgery is indicated and required for recovery.

ACTIVATION, AGGRAVATION, & ACCELERATION

The "eggshell skull" rule generally applies when there is:

1. activation of a previously underlying but asymptomatic condition;
2. aggravation of a preexisting physical or mental condition or disease;
3. re-activation of a condition that was previously under control; and
4. acceleration of a condition for increased injury or death.

ACTIVATION

When the plaintiff suffers from a underlying but asymptomatic condition that is made symptomatic by the injury, the defendant may be held responsible for all of the damages resulting from the defendant's action in activating.

Often an individual may have degenerative processes that exist because of the aging process that we all must endure. However, just because we get older, it does not necessarily follow that we will have pain or that those degenerative processes will be symptomatic.

If the defense tries to argue that this pre existing condition was not activated by the accident, but was just the natural course of the disease, show by your client's medical records, hospital records, work and sick day records, workers comp claims or anything (or the lack thereof) that there were no missed days from work as a result of their underlying degenerative condition and before the accident. However, after this accident, there were missed days from work, pension claims etc.

AGGRAVATION

In some cases, plaintiffs have a pre-existing condition and are receiving treatment or the plaintiffs have a condition with which they have made adjustments and adapted to their lives. In cases where the plaintiff's condition is made materially worse as a result of the defendant's conduct, then the result is properly described as an aggravation of the preexisting condition.

If the plaintiff has a pre-existing condition that is aggravated by the defendant's conduct, the plaintiff is only entitled to recover for the aggravation created. Many times it is impossible to determine what portion of the injury is due to the accident and what portion is due to the underlying condition. In numerous jurisdictions, the defendant is liable for the entire damage.

Of course, the defendant is likely to argue that the condition that the plaintiff complains of would have happened anyway. It is incumbent upon you as the plaintiff's attorney to show through your medical expert the prior disease, how that prior condition affected the patient/client through work or other activities, treatments and recovery if applicable.

BURDEN OF PROOF

Before recovery can be granted for aggravation of a preexisting condition, the plaintiff must establish causation between the accident and his or her current medical condition. But since the tortfeasor takes his or her victim as they finds him or her, the plaintiff only need prove that the accident was a substantial contributing factor in the aggravation of his or her preexisting condition, or that plaintiff would not be in his or her current shape but for the defendant.

ACCELERATION

There are occasions where a defendant can cause a pre existing injury to accelerate or hasten and become chronic and permanent. If that occurs, then the defendant is responsible for the result of their act. Imagine a person who has a pre existing heart problem and is then involved in a motor vehicle accident, in which he or she sustains blunt trauma to the chest and a heart condition worsens from injuries sustained in the accident. Clearly, the accident would not have caused the pre-existing injuries heart problems, but the motor vehicle accident may hasten and /or accelerate the disease process.

In all of these cases it is necessary to show that "but for " the defendant's conduct the subsequent condition would not have existed or that the defendant's behavior was a substantial factor. Do not forget that the plaintiff has this burden of proof.

In those cases involving acceleration, again show the plaintiffs prior condition and how it was limited or controlled. Were the prior medical symptoms regulated? Is there something different from the prior condition or does the condition differ in degree from previously?

Discovery is essential in all of these cases. All documentary evidence must be obtained. Use not only will medical experts to establish the plaintiff's baseline, also use witnesses who have had the opportunity to observe the plaintiff over the years.

SUBSEQUENT NEGLIGENT ACTS

Imagine that a person is injured in a motor vehicle accident and is taken from the scene in an ambulance. When the person reaches the hospital he or she is then involved in medical malpractice by the emergency room physician.

The original defendant may want to argue that he or she is responsible for the original injury only. However, the original defendant may be responsible not only for aggravating a plaintiff's preexisting injury or condition. But, in an appropriate case, a defendant may also be liable when the injury he or she causes is in turn aggravated by the subsequent negligence of another if the subsequent conduct is foreseeable and is a natural consequence of the injury.¹

The above situation is why in settling your cases you should not have your client execute a general release. If it is determined that a suspected injury was committed subsequent to the original and that it flowed from the original, yet your client released any and all parties, you may face a legal malpractice case for your failure to maintain an action against a viable party.

In the alternative consider that a person suffers an additional injury because of his weakened condition. Once I had a client who was injured in a slip and fall accident injuring her knee. Later while trying to use her crutches she fell, injuring herself again. The original defendant in that case was required to bear all the damages resulting from both falls.

Sometimes there are other accidents such as accidents that may follow the original tort. If for example the plaintiff is injured while leaving the scene of the accident in an ambulance that is struck by another vehicle, plaintiff can bring suit against the original tortfeasor and also the second actor. While the original actor will argue intervening and/or superseding cause by the second tortfeasor, the original actor is ultimately responsible for putting the whole situation in motion.

¹ Restatement of Torts Second § 457