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Presenting the “unusually susceptible” plaintiff to a jury

A LOOK AT THE EGGSHELL-PLAINTIFF DOCTRINE AND HOW IT CAN BE APPLIED IN A CASE WITH PSYCHOLOGICAL INJURY

As personal-injury lawyers, I would hazard a guess that you, like me, have regularly explained the legal concept of the “eggshell plaintiff” when meeting with potential clients with “pre-existing injuries.” You remember the eggshell plaintiff, right? Also referred to as the “thin-skulled plaintiff,” it’s a concept that captured our attention way back in law school. It’s so prominent as to even be defined by Black’s Law Dictionary as, “[t]he principle that a defendant is liable for a plaintiff’s unforeseeable and uncommon reactions to the defendant’s negligent or intentional act.”

In meeting with clients who have a history of pre-existing injuries, we all at some point transition to the other basic legal concept that “a defendant takes the plaintiff as he finds her.” Both are time-tested legal concepts subject to their very own jury instructions - CACI 3927. Aggravation of Preexisting Condition or Disability; and CACI 3928. Unusually Susceptible Plaintiff. In order to win the case for your unusually susceptible client, you must know and embrace these instructions. If you do, you just might increase the value of your case.

This article explores how to present this type of claim in a way that will resonate with a jury.

The genesis of the eggshell-plaintiff doctrine

Before we dive in to the CACI instructions, a refresher on the history of the “eggshell plaintiff” rule would be helpful. The doctrine was born in concept, if not in name, in the 1891 Wisconsin Supreme Court case of *Vosburg v. Putney* (Wis. 1891) 50 N.W. 403. In that case, twelve-year-old George Putney kicked fourteen-year-old Andrew Vosburg in the shin in a common classroom altercation. Unknown to Putney, Vosburg had suffered a sledding accident the month before, injuring his leg. The kick aggravated the previous injury and led to Vosburg’s permanent incapacitation. The court found Putney liable for all of the damages due to the kick, finding: “the wrongdoer is liable for all the injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him.” (*Id.* at 404.)

Following *Vosburg*, the doctrine began spreading to jurisdictions across the

United States. It finally received its name in a case decided by an English court in 1901, *Dulieu v. White & Sons* (Eng. 1901) 2 K.B. 669 at 679.) There, a negligently driven carriage crashed into a pub, where a pregnant woman working behind the bar suffered shock, became ill, and gave premature birth. The court awarded her full damages, finding that it is “no answer to the sufferer’s claim for damages that he would have suffered less injury or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.” (*Ibid.*)

The eggshell-skull rule continued to spread, and is now universally accepted and widely applied, with every American jurisdiction awarding eggshell-plaintiffs damages. (*Restatement (Third) of Torts: Liab. For Physical & Emotional Harm* § 31, cmt. B, reporters’ note (2005) (“Every United States jurisdiction adheres to the thin-skull rule; more precisely, extensive research has failed to identify a single United States case disavowing the rule.”).) In California, the doctrine is usually phrased as follows: “[t]he tortfeasor takes the person he injures as he

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finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability.” (*Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471 (citations omitted).)

Relevant CACI Instructions

In any case you handle, always start with an understanding of the law. In most cases, that means the CACI Jury Instructions. It is vital to understand exactly what you need to prove at trial from the onset, so you can work your case up from start to finish with the law — CACI — in mind. It’s admittedly a basic concept, yet so many lawyers miss this crucial first step.

Here are the relevant instructions, with my emphasis added:

• **3927. Aggravation of Preexisting Condition or Disability**

[Name of plaintiff] is not entitled to damages for any physical or emotional condition that [he/she] had before [name of defendant]’s conduct occurred.

However, if [name of plaintiff] had a physical or emotional condition that was made worse by [name of defendant]’s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her] for the effect on that condition.

What a great instruction! It only requires the condition to be “made worse” — so make sure you ask all treating doctors this question (of course, know the answer before their depositions and trial.) Pin down the defense doctors and get them to concede the pre-existing condition (they love to do that) and then push the doctor to admit that it was made worse. Family members, friends, and business associates should all talk about how the condition was made worse. Of course, your client will need to say so as well. Work your case up with this instruction in mind.

• **3928. Unusually susceptible plaintiff**

You must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for all damages caused by the wrongful conduct of [name of defendant], even if [name of 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.

This is the homerun instruction! There is so much here that resonates with a jury. Frankly, I should have highlighted and bolded the entire instruction. [Editor’s note: No. You shouldn’t. Italics is pretty much always fine!] Think about it — the jury “must decide” “all damages” “*even if plaintiff was more susceptible to injury...*”

Work up your case understanding that you need to prove that your client was “more susceptible” to this injury. The examples, both physical and emotional, are endless — from a plaintiff with a pre-existing back injury who gets rear-ended and now requires fusion, to the plaintiff with pre-existing emotional trauma who suffers PTSD. Work up your case knowing what you have to prove. Family and friends can help here, but focus should be with the treating and expert doctors.

Voir dire

By the time you get to trial you should have all of your witnesses prepared to address the above principles, particularly “made worse” and “more susceptible.” You need to address pre-existing injuries and the concept of eggshell plaintiff during voir dire. Get the jury thinking about it. Here are some actual questions used at a recent trial once we started discussing damages issues:

Injuries: a little touchy subject here

(1.) If you need to discuss this privately with us, or just the judge, that is fine, so feel free to let us know, as we respect your privacy. But we have to ask some sensitive questions.

(2.) Who has or who knows somebody who, as a child, was physically abused by a parent, molested by an adult?

(a.) Can you tell us about that?

(b.) How did that affect your friend?

(3.) How about as a child, witnessing a mother being physically abused, and running and hiding in a shelter to try and stay away from dad?

(4.) I ask these questions, as sadly, you will hear testimony that Heather experienced these horrible events as a child. So, first off, we need to know if there is anyone that doesn’t feel they could be on the case as it would be too difficult to hear that type of testimony.

(5.) Anybody here have any training or experience with dealing with psychological issues following a difficult upbringing?

(6.) Anybody here have any training or experience with dealing with psychological issues following trauma?

(7.) How about the effect a traumatic experience can have on someone that may have a troubled background?

(8.) You will hear testimony from two experts, one for each side, that will tell you that Heather suffered psychological disorders following this incident. There won’t be much dispute about it from the experts.

(9.) So, some people think when things go bad, you should just get over it. Others understand that there are truly psychological ramifications of traumatic events, which way do you lean, Mrs. ____?

(a.) Tell me about that.

(b.) Go over more thoroughly with juror.

(10.) The military has done a great job shedding light on Post Traumatic Stress Disorder. We are not here downplaying at all the trauma of war. But, it has brought to light PTSD. Anyone here know anyone who suffered PTSD?

(a.) Tell me about that.

(11.) Anyone here believe that PTSD isn’t legitimate?

(a.) Anyone have a problem evaluating whether or not she suffered that, and if we prove it, compensating her for it?

(b.) Her doctor has told Jennifer that she shouldn’t be here to hear certain testimony at trial.

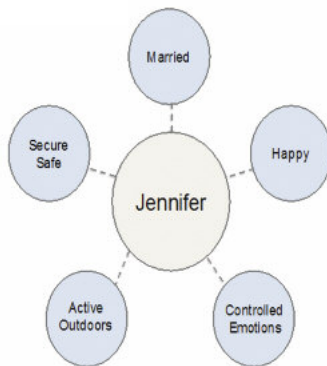
Will you hold it against her?

(12.) Anybody here know somebody who has suffered from:

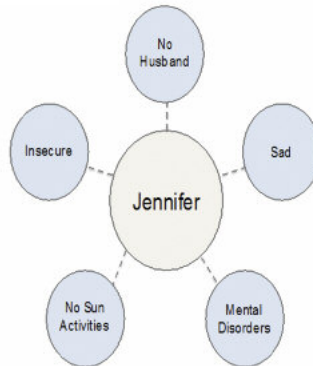
- Anxiety
- Depression
- Bi-polar
- Scarring
- Burn injuries?

The goal here is to get the jury thinking about the pre-existing problems

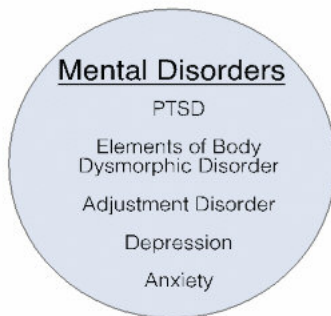
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Before Explosion



After Explosion



as well as identifying those “tort-reformer” jurors that don’t believe people with prior problems should be compensated.

Talking “made worse” in opening statement

Opening statement is a good time to start laying the groundwork for the “made worse” case. You need to tackle the pre-existing issue head-on. Don’t talk legalese, but start talking about “made worse.” Make sure to use good visuals (I like PowerPoint) during your opening.

Here on Page 20 are a few visuals used during the opening presentation. You can never underestimate the impact of a good visual presentation. Don’t overdo it — just make sure you visually tell the story.

Expert testimony

As indicated above, make sure your questions at deposition and trial ask specifically about the pre-existing injury that was made worse. In the *Ries* matter,

here is actual trial testimony from plaintiff expert Lester Zackler, M.D. followed by defense neuropsychiatrist Dr. Jeffrey Lulow:

Plaintiff expert Dr. Zackler, on direct:

Q: Based upon her makeup and psychological profile, is she more susceptible to suffering from PTSD after an explosion event like this?

A: Yes. I mean, clearly it is this history, the traumas that she’s experienced, the psychological instability, and then the good years. It’s like the bad years and the good years, and then this trauma occurs. It really undermined her entire sense of self, resulting in not just the posttraumatic stress disorder, but all these adjustment problems that affected herself and her husband.

Q: Based upon her pre-accident experiences and her psychological profile and makeup, is she more susceptible to suffering the elements of body dysmorphic disorder following an incident like this?

A: You would not have anticipated it. If this was just an emotional trauma, and she wasn’t physically scarred, it probably wouldn’t have had any effect on that. But the physical scarring, and the meaning of the scar, it takes on two meanings. One, it represents the trauma. So, on one hand, she refuses to look at it. She doesn’t let — did not let her husband look at it. She’s ashamed of it. On the other hand, she’s preoccupied with it, and it is a source of distress for her.

It sounds superficial when we talk about it like this, but you have to put it in context of who she is as a person and how damaged she had been, how good her life was turning out, and how she’s now in this state of feeling deeply damaged again.

Q: So on the day of the incident, when she got in the car on March 25, 2013, who she was made her more susceptible to having that disorder?

A: Yes. It’s likely if she were a different person, this wouldn’t have happened. If I had a similar scar, if other people had similar scars, it may not have caused this catastrophic response. But because of her unique life history, she was unusually vulnerable to the effects of this kind of burn injury and scarring that followed.

Defense expert Dr. Lulow, on cross

Q: And based upon her makeup and psychological profile, was Jennifer more susceptible to psychological injuries following this traumatic event?

A: I think she was, particularly this type where she feels that her body has been disfigured.

Q: (By Mr. Bentley) Based upon her makeup and psychological profile, is she unusually susceptible to psychological injury following an event like this?

A: I think she is more so than most people, yes.

Q: And she was a fragile woman due to her psychological makeup and pre-life experiences at the time of this explosion; correct?

A: She was fragile, in addition to the strengths that I mentioned earlier. She had both. She’s a whole person.

It’s important to hit the “more susceptible” question from *both* experts, as

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you will get a better explanation from the plaintiff's expert, but need the admission from the defense expert. Both are vital to invoking the eggshell-plaintiff rule.

Client's testimony

Walk the client through the process, but have them stand strong. A person who has suffered in the past is generally well received. Tell the story, but don't overbake it. Hopefully, the jury will already be with you as you have laid the proper medical groundwork with the doctors, family members and friends before the client testifies. Jurors want to like and believe in a "survivor," exactly how you want to portray your client.

Closing

Again, make sure to prepare a PowerPoint to present closing. Include the verdict form either in your PowerPoint or have boards made up listing each question on the form. You must walk the jury through the verdict form – on every case.

I like to print boards of key instructions, and, also, have some of them included in my PowerPoint. I feel it is best to focus on key instructions in closing as well. I generally make sure I talk about Substantial Factor, CACI 430, and like to go over other key instructions, depending on the case. Make sure to have boards made of CACI 3927 and 3928. Walk the jury through the instruction, emphasizing the key terms and referring to actual trial testimony that proved the point.

If all goes well – ask for a big number!

Conclusion

The eggshell-plaintiff doctrine has been around for more than a century and has become woven into the fabric of American jurisprudence. It rightly compensates victims for *all* of the injury caused by the negligence or intentional acts of a tortfeasor. The doctrine is a powerful tool for plaintiffs and their attorneys, and, when used correctly, can ensure full and fair compensation.

Editor's Note: This article was first presented at the 2016 CAALA Convention in Las Vegas.

Greg Bentley is a partner at Bentley & More LLP specializing in the representation of consumers on a wide variety of cases, including insurance bad faith and catastrophic personal injury and wrongful death claims. He has been recognized as a Super Lawyer by the Los Angeles Magazine (2010, 2011, 2012 and 2013) and is a member of the American Board of Trial Advocates, currently serving on the Executive Committee of the San Bernardino/Riverside Chapter. Bentley was named the 2012 Trial Lawyer of the Year by the Consumer Attorneys of the Inland Empire and was a finalist in 2012 for the Consumer Attorneys Association of Los Angeles Trial Lawyer of the Year Award. He is the Past President of the Consumer Attorneys of the Inland Empire (2010 & 2011) and sits on the Executive Committee of the Board of Directors of the Consumer Attorneys of California.

