



Unique injuries: Preparing and proving your case

BEFORE YOU WALK AWAY, DETERMINE IF THAT UNIQUE INJURY HAS SUBSTANTIAL VALUE

Every once in a while a case will come across your desk with an injury you have never heard of before. Perhaps this unusual injury is the primary basis for your client's damages. Alternatively, it might be combined with injuries we deal with day in and day out, such as spinal injuries. When that unique injury case presents itself, we have all thought, "I don't know anything about this injury...How do I go about proving this...This sounds expensive...I think I want to pass."

If you simply walk away from cases involving obscure injuries, you might be walking away from substantial value. Cases involving unique and uncommon injuries provide interesting opportunities to significantly increase the value of a case, because the difficulty in evaluating a case with unique injuries can unnerve insurance adjusters. When insurance adjusters get nervous, they start offering money. Do not walk away from a case just because it comes with unique injuries.

The intent of this article is to help consumer attorneys prepare and strategize a case involving unique injuries.

Familiarize yourself with the injury

The first step with a case involving a unique injury is to simply gain an understanding of the injury. Once you establish this understanding, there is really not much difference in how you work up the case. A unique injury does not change your burden of proof or modify causation. At its core, each case is pretty much the same regardless of the injury. Once you immerse yourself in the medical aspects of the injury, it is no different than working up a spine case.

Thankfully, researching any injury is easy. The internet is flooded with data on just about every single injury and health condition imaginable. Start with a simple Google search. Additionally, Wikipedia is often the best source of detailed data on injuries and treatment. Obviously, the

more you know about an injury the better. Make sure you are actually saving the data and articles you obtain, as they will be useful throughout your case and especially during expert discovery.

Some of you are probably thinking, "Wikipedia? Really?" Yes. Really. Wikipedia will generally provide a more accurate and thorough summary of physical injuries and conditions than virtually all other websites. The Wikipedia "references" section provides links to peer-reviewed medical literature. This section is almost always the most comprehensive compilation of supporting medical literature available on the internet. You should always obtain the full text articles from peer-reviewed medical journals relating to the injury and treatment. You can access full text articles from peer-reviewed medical journals through "Pub Med," which is the US National Library of Medicine (www.ncbi.nlm.nih.gov/pubmed/). For the pronunciation of medical terms, you can use www.howisay.com.

While the credibility of Wikipedia and other sites can always be debated, the web remains the first, and likely last, place a juror will go to research an injury despite instructions from the court prohibiting such conduct. Right or wrong, you simply cannot ignore the web. Several years ago, a well-known defense expert once contradicted the symptoms associated with a brain hemorrhage that were set forth in Wikipedia (not to mention numerous other, more traditional sources). The expert, seeing the questioning was coming from a Wikipedia printout, said, "Wikipedia and other websites are garbage and can't be trusted." The response: "What do you think the jury is going to look at when they go home after opening statements?" The room went silent, and the defense lawyer looked appropriately uncomfortable.

Unique injuries often result in a unique life experience for your client.

What your client feels and how he or she copes might be completely different than what you would expect. Your job is to connect the life experiences of your client with the jury. With an injury so strange and obscure, it might be tough for a jury to connect with your client. Creating that connection between your client and the jury starts with listening, and imagining. If you simply listen to your client, and imagine, then he or she will create that connection for you. Just ask questions about the simplest daily activities: How did you get dressed today?...How did you eat?...etc. Imagine what they go through and how they cope. You will learn more about your client's injury than you ever thought possible.

Finding your expert(s)

Finding an expert should be pretty easy. Hopefully your search will end with your client's treating physician, but do not bank on a treating physician's willingness to help out his patient. Reach out to your client's treating physicians as soon as possible to make sure they are willing to serve as experts. Make sure you familiarize your client's physicians with the litigation process. Many physicians do not want to step foot in a courtroom, or even talk to lawyers. Generally, physicians that treat unique injuries are not the type of physicians that regularly testify in personal injury cases, so this will be unfamiliar territory for many of them. You must make your client's treating physicians comfortable.

The best way to make a treating physician comfortable is to talk about medicine. Physicians love to talk about medicine, and generally hate talking about the law. Do not talk about testimony, courts, depositions, or the defense attorneys in your first meeting with a treating physician. Simply show the physician you have made efforts to

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understand the nature of your client's injury and their medical history. Explain to the physician your understanding is only a baseline, but you need his help to gain as much information as possible. Provide the physician with the medical research and data you have already compiled. Ask him if there is any medical literature he recommends you should be familiar with. Ask the treating physician how he would explain the injury in lay terms to his own patients.

With these efforts, the treating physician will see you are a lawyer who actually wants to understand and help the patient. The physician will then, in turn, want to help you.

If your client's treating physicians refuse to help, then start asking other lawyers and physicians for recommendations. Consider starting with a lawyer who specializes in medical malpractice. Medical malpractice lawyers know experts in all areas of medicine.

Preparing your expert for deposition and trial

Once you select your expert, preparing the expert for deposition and trial is really no different than any other case. Remember though, jurors will have much less personal experience with a unique injury. Because of this unfamiliarity, jurors might rely heavily on expert testimony. While a battle of the experts happens in nearly every case, it could be paramount in cases with unique injuries.

The use of medical literature you and your expert have gathered in working up the case could tip the scales in your favor. Defense medical experts rarely produce actual peer-reviewed medical studies in support of their opinions. Most cannot even specifically identify studies that support their opinions. Make sure your expert produces the actual printed medical studies that support his or her opinion. The more, the merrier. In a battle of the experts, a jury is more likely to believe the expert who can

identify and show a number of peer-reviewed medical studies that support his or her opinion.

Medical illustrations and animations should be used extensively in all cases, especially in cases with unique injuries. Sometimes jurors have to see it to believe it. Illustrations help convey the seriousness of an injury, along with providing a visual understanding of the anatomy and pathology involved. With unique injuries, that pathology might only be visible at the cellular level. If that's the case, then illustrate the cellular level. Seemingly innocuous injuries, like minor respiratory abnormalities, for example, look gruesome at the cellular level.

Sometimes a unique injury will be in conjunction with a number of more common injuries. For example, your client might have major spinal injuries from a car crash, along with a lacerated liver. We can all agree the liver injury would be less common than the spinal injuries. If the less common liver injury is downplayed throughout discovery, you might be able to gain a tactical advantage at trial. Identify the liver injury in discovery responses, but downplay the significance of the liver injury in comparison to the spinal injuries. Make the defense believe the case is essentially a case involving spinal injuries, and the liver injury is merely an afterthought.

In that scenario, the defense will surely designate experts relating to the spinal injuries (a spine surgeon, radiologist, etc.), but might fail to designate a hepatologist or gastroenterologist who treats liver diseases and injuries. Plan accordingly for this contingency by working with the treating liver specialists and designate them as non-retained experts. Hopefully, the defense will not even take the depositions of non-retained experts.

Even though non-retained experts are percipient witnesses, they are not limited to personal observations. A non-retained expert can offer opinions as to causation and standard of care. (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 35;

Cal. Evidence Code section 801(b).) Non-retained treating physicians can also offer opinions on the reasonable value of medical services. (*Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 140.) Presumably, you could have a non-retained treating physician who was never deposed testify at trial to the nature, extent, causation, past economic damages, and future economic damages of your client's unique injury, and without any counter expert testimony from the defense. There are some obvious risks involved with this strategy, so be prepared with bench briefs that fully set forth the supporting legal authority, and be prepared to lay the foundation necessary for the expert to testify on the particular subject matter.

Consider dropping a unique injury

Not all injuries need to be alleged at trial. Think about the following questions: Do you even want to allege a unique injury if your client has other substantial injuries? Will alleging unique injuries allow the defense to muddy the waters and discredit your client? Will it confuse the issues and hurt your case? Will you be perceived as overreaching? If so, consider dropping the alleged injury. Do not spend the time, money, and effort on something that could potentially sour the whole case.

Conclusion

Cases involving unique injuries can present some new challenges to any lawyer. However, you can overcome these challenges and potentially unlock substantial value.

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