Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2022

Greyson Goody
GOODY LAW GROUP

Kieran Doherty
THE SIMON LAW GROUP

The spine and spineless defense tactics

TREATING DOCTORS CAN PROVE CAUSATION, TALK ABOUT MEDICAL BILLS, AND BLOW DEFENSE THEORIES OUT OF THE WATER

It's Tuesday again. You sit in your office doing paperwork, maybe answering discovery, shopping online, or getting ready for a deposition later in the week. A woman walks in off the street and asks if you can help her. She explains she was in a car wreck. Her neck and back are hurting, and she has numbness running down her legs. She's been having accidents and wetting her pants.

The numbness in her legs is probably from a herniation compressing her nerves and causing what's commonly known as radiculopathy. Most importantly, we should see she needs to see a neurosurgeon immediately because of a serious neurological condition causing her incontinence.

As attorneys, we have a duty to understand our client's condition. This is not just to "win" cases. It's so that we can ensure our clients, like our family, have the best care and representation available for them. It's important to remember that with great power comes great responsibility.

"The spine is simple!" said the neurosurgeon

The spine may seem complicated. It can, however, be extremely simple. A solid foundation on spine medicine will give you the confidence to see and understand a spine injury. The purpose of this article is to provide that foundation. We hope to give you the confidence to help each client from intake through trial cross of the defense doctor the insurance company hired to conceal justice.

There are countless ways someone can injure their spine. One of the most common involves discs, the soft tissues between each vertebra. Herniations, radiculopathy, myelopathy, stenosis, decompressions, and fusion surgeries are terms we confront each day.

The spine has three sections: the cervical spine or neck (numbered C1-7), thoracic spine or mid-back (numbered T1-12), and lumbar spine or low-back (numbered L1-5). Each section has vertebrae with discs in between. You often hear the lowest level of the spine is L5-S1, with "S1" indicating the sacral level. The spinal cord does not run from the brain all the way to the sacrum. Instead, it terminates in the area around L1, in a little tail called the conus.

Discs – being soft tissues – are the most common place for injury. Discs are like jelly donuts. The annulus is the outside or covering of the disc, much like the fried covering of a jelly donut. Inside the disc is a thick viscous liquid called a nucleus, much like the jelly inside the donut. When a disc is injured, it herniates out, often causing an annular tear, and pushing the nuclear material out into a herniation. In other words, the donut is squished, often causing a rupture, thereby pushing the jelly out of the donut.

Radiculopathy or radiculitis can be caused in different ways too. If the disc herniates and touches the corresponding nerve root (compression or stenosis), it can lead to radiculopathy. Similarly, if the nuclear material seeps out of the disc, it can cause chemical radiculitis. Chemical radiculitis occurs when nuclear material leaks from the disc to cause irritation to the nerves.

The most important thing for us to know is how these injuries manifest into symptoms. First, you can have axial (localized) back pain simply by virtue of having an injured disc. You do not need nerve compression, stenosis, or impingement. Second, if you have impingement, it can cause radiculopathy or myelopathy. Radiculopathy consists of numbness, weakness, pain, or pins and needles running down one or more extremities. Myelopathy can affect all extremities, and usually is the result of actual spinal cord compression.

Be on the lookout for words in the MRI report like stenosis, compression, annular tear, nerve compression, nerve root abutment, or spinal cord compression. All these issues can lead to pain and radiculopathy, which you will need to prove by correlating the subjective symptoms with the objective findings.

Correlating spine symptoms

In every case, you should correlate your client's symptoms with objective studies such as MRIs, dermatome maps, and neurological tests like straight-leg raise exams. In doing so, use as many demonstratives as possible. Psychological studies show juries remember pictures much better than written or spoken words. Dermatome maps, pain diagrams, spine models, illustrations, X-rays of surgical hardware, and animations often prove your case. These can be used in demands, discovery, and of course, at trial.

Dermatomes are nerve paths throughout the body. For example, a nerve being irritated in the L5-S1 area would typically cause symptoms to be felt down the back, to the calf/shin, and into the toe. By matching up your client's complaints to the dermatome affected, then sealing the deal with imaging findings, you can have very powerful demonstratives in your examinations.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2022

Here is also a good example of using demonstratives during depositions.
Q: And, doctor, do you know what a dermatome is?
A: Yes.
Q: What is a dermatome?
A: Dermatome is defined as the area of skin that's covered by a specific nerve. And so, there are maps of these throughout the body with all the different nerves. And it helps us to determine which nerve is involved.
Q: So, what I'm going to do now is I'm sharing what I'm marking as Exhibit 2, which is a dermatome map. Do you recognize this, Doctor?
A: Oh, yes.
Q: So, Doctor, in looking at this dermatome map, can you tell us where Rose was complaining of this radiculopathy on this first visit?
A: Yeah. She had an L-5 radiculopathy on the left side.
Q. So, if we're looking at the dermatome map, it would be the lowest level of that – those purple levels labeled L-5?
A: That's right.
Q: Those symptoms that she complained to you of, that severe low back pain with the L-5 radiculopathy, would those be consistent with a herniation at L4-5?
A: That's exactly right. That's where the L-5 nerve is pinched in her case.

Understand, however, that dermatomes are not exact. There can be overlapping dermatomes and your client may feel pain in different areas. Don't fall into the trap of permitting defense attorneys to claim your client's pain doesn't match the dermatome. Establish their overlap and that radiculopathy can come and go depending on activity.

Litigating spine cases

Arguably the most important part of a case is your client's deposition. It is imperative to prepare them in spine cases. If they have radiculopathy, show them a dermatome map. Explain where they would have pain given their MRI findings and make sure they describe it right. Importantly, they need to know the full amount of their current medical bills; that they are on a lien (or not) and they owe the lien in full no matter the outcome of the case.

Prepare your client to describe how treatment has helped them. Typically, treatment such as injections help, but the relief is temporary. If that is the case, the client needs to say the treatment helps, but it is just temporary and the pain returns. Finally, do not let the defense ask questions about whether their attorney referred them to doctors – it is a protected attorney-client communication and out of bounds. We've won this motion many times, so don't give in to overzealous defense attorneys. The best way to get aggressive defense attorneys to backpedal is to notice and take treating doctor depositions.

Treating-doctor depositions

Treating doctors can win your cases; they prove causation, can talk about medical bills, and blow defense theories out of the water. (See *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120.) Juries usually cancel out the paid experts and listen to the most intriguing, non-biased witness. If you can get treating doctors on your side, you will win your case.

We routinely depose doctors who can help us as well as those who hurt us. Video these depositions to play them at trial under Code of Civil Procedure section 2025.620, subdivision (d). You'll typically have a psychological advantage for a few reasons. If you notice the deposition, the doctor will naturally think they are there to help you – they want to protect their patient and will do their best to do so. You also can set the tone and frame the narrative before the defense attorney adds any toxicity. Additionally, the associate on the file, who often isn't prepared for an effective cross-examination, will usually be at the deposition. Finally, you can use demonstratives, practice your trial examinations, and show the defense you are confident in your case.

Here is a good example of a doctor who hurt our case because he believed our client, who eventually had surgery, was not a surgical candidate. He needed to see a neurological issue before coming around:
Q: What would you need to see, to refer Benjamin over to a neurosurgeon or an orthopedic spine surgeon, for an orthopedic spine consultation?
A: A clear and present danger of foot drop; or a permanent nerve injury that was rapidly deteriorating; or evidence of nerve injury so severe that he was rapidly deteriorating. So, the example would be this patient comes in. Patient states, "I have pain down the leg."

We thereafter deposed another doctor who saw our client after this treating physician. He was able to establish that the treating physician's pre-requisite for surgery had been met:
Q: And he has got more defined radiculopathy. It looks like you've noted it radiates to his left leg, his left buttock with numbness, weakness, and tingling; is that right?
A: That's what it says, correct.
Q: Does it seem like over the time that you've been treating him, his radiculopathy is progressing; getting worse and rapidly deteriorating?
A: Radiculopathy-wise, yes. Since presentation, it seemed to be more prominent throughout time since initial to now; what we're talking about at this date.

Try to talk to treaters before their depositions. It's important they know why they were subpoenaed. It's also an opportunity to feel them out and see where their testimony will fall. Often, they like to know what the defense is saying, so you can forecast the issues that will arise during the deposition. Be careful about telling them too much or providing them any records outside the scope of their treatment as they can be disqualified as non-retained experts. You can, however, tell them you'll be using a dermatome map or other demonstratives, and we've even had pain-management specialists show us epidural needles or percutaneous decompression instruments simply because we asked in a phone call.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2022

Deposition necessities

When deposing a treating doctor, there are five main areas that we typically focus on: their expertise, the treatment, causation for injuries, defense arguments, and reasonable cost of billing. To show how this looks in practice, we have included excerpts from actual depositions below.

Education, training, and experience

While it may seem monotonous to you to go over a doctor's background, understand this deposition has a good chance to be played at trial. Juries love doctors who have won awards, volunteer their time, or are Chief of Surgery at a local hospital.

Ask where they went to school, about their fellowships, board certifications, any specialties, or whether they have won awards. We stalk our treating doctors and research their credentials before their depositions, so we can make them look like gods:

Q: Have you received any awards over the course of your career?
A: Yes.
Q: I stalked you a little bit on the Internet, and I saw that you received the Patient's Choice Award from 2015 to 2018. Is that right?
A: That sounds right.
Q: As well as the On-Time Doctor Award for the same years?
A: Yes.
Q: And the Compassionate Doctor recognition from 2016 to 2018?
A: Yes.

These awards probably don't mean much to the doctor. But to a jury, they can mean the difference between believing the doctor versus the defense. And we can assure you the defense will make sure the jury knows their hired gun used to work for the NFL.

Treatment

You need to show the jury what symptoms your client had, the treatment they underwent, why they needed that treatment, and that it helped them (at least temporarily). Also correlate the symptoms with the MRI and the doctor's exam to show your client is not a liar, exaggerator, or faker like the defense wants. Dan Kramer – a local and amazing trial lawyer – once told me to ask every treating physician if they believed your client was truthful, honest, and following the doctors' orders. I love this approach because inevitably the defense will say they are not, opening the door to you rehabilitating them at trial.

Causation

Let the treating doctor explain how the patient's symptoms match objective tests and what that means. Once you establish correlation, then explain why the treatment was performed, and move on to causation:

Q: Now, Dr. [treating MD], the findings in that February 2, 2018, objective lumbar MRI, do those correlate directly with your exam findings and Ms. [Client]'s symptoms?
A: Yes, they did.
Q: Do you have an opinion as to the cause of Ms. [Client]'s radicular symptoms and back pain?
A: Yes. Based upon the fact that she never had pre-existing back pain or radicular symptoms, sciatica, this all happened after the accident and the disc herniation is severe enough to cause compression on that nerve that correlates with her symptoms, it was my impression at the time and remains today that the accident caused the disc herniation and caused the radiculopathy.

Degenerative-disc disease

The defense loves pointing towards degenerative-disc disease as the cause of our client's pain (it has a nice ring to it, doesn't it?). Make degeneration your best friend and you can easily overcome this argument. We like to show jurors we are all the same; we all have degeneration, degeneration does not mean pain, and folks with degeneration can be asymptomatic, then made symptomatic by a traumatic event. If your jurors are taught they have degeneration and aren't needing treatment or surgery, they won't buy the DDD argument the defense is selling.

We use this same approach with treating physicians, plaintiff specialists, and even defense experts – it's common medical knowledge. The goal is to make the jury believe degeneration is a red herring. Juries have come up to us after multiple trials saying they are sick and tired of hearing about degeneration. And that's fine by us.

Minor-impact defense

Another favorite defense argument is that the "minor-impact" collision couldn't have caused the claimed injury. Again, treating doctors can help dispel this argument:

Q: Have you had other patients who you believe herniated a disc because of a car wreck?
A: Yes.
Q: And does it matter in those other cases whether that car wreck is big or small?
A: No. I mean, essentially what matters to me as the treating physician is just level of symptoms and the level of herniation. So, the actual causation mechanisms are somewhat variable in terms of the amount of the impact. But I've seen people, you know, who herniated a disc from just a fall from standing. It doesn't have to be a car accident.
Q: Have you ever seen folks herniate a disc because of sneezing?
A: Yes. It can happen.

Doctors can completely undermine the defense theory on the case, and you should use them to do that. Now imagine the defense biomechanical engineer taking the stand to say the impact was like bumper cars colliding. Hopefully, your jury will remember someone can sustain a disc injury from simply sneezing.

Defense medical examiner claims

If your client has undergone an "independent" medical examination, make sure you get the report. Under Code of Civil Procedure section 2032.610, you are entitled to it within 30 days of the examination or within 15 days of trial, whichever is earlier. Shockingly, the

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ADVOCATE
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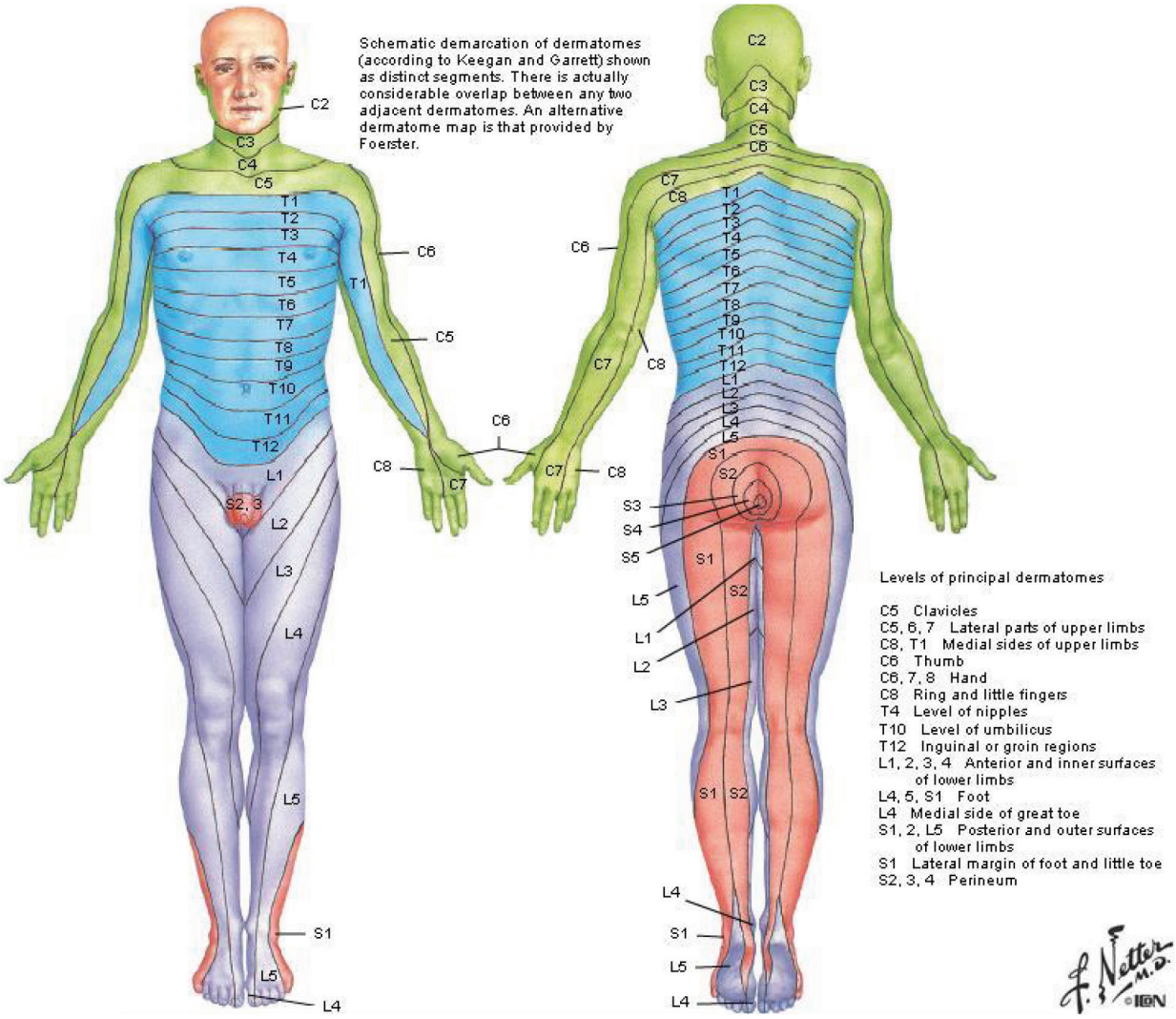

defense expert always says the injury was minor, the treatment was unnecessary, and the bills are too high.

If the defense claims inappropriate treatment, get the doctor fired up about it. It gets fun when the defense questions them and they are already on the defensive.

Q: Let me ask you this. Hypothetically, Dr. [treating MD], the defense expert, Dr. [defense expert], in this case says the spinal cord stimulator is inappropriate because Benjamin only has three out of 10 pain and is working 60 to 70 hours a week. Do you agree or disagree with that?

A: Well, based on what I know, his pain is not three out of 10. His pain is eight out of 10 and 10 out of 10, and it varies with his activity. And once again, what people do during the day doesn't preclude people – it doesn't mean that people don't have pain and it's not affecting them. It's like if I told you, you know, you don't need your root canal or cavity filled because you're still eating food. It's not reasonable. You still do what you do to survive, but you suffer because of it, so I disagree with that.

Medical billing

Defense attorneys always try to convince the jury that the bills are extremely inflated. It's easy to have treating physicians give opinions that their bills are reasonable. Make sure you also discuss what a lien is, why it is helpful, and why they want full payment of their liens.

Additionally, if the defense designates a billing expert, the best way

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2022

to counter is the treating physician who rendered the care. Make the case about the defense wanting to get out on the cheap and pay the doctors, who help people who need it most, pennies on the dollar. You can set the stage for great closing points on the bills by walking the doctor through the expenses associated with their practice such as the costs to maintain certification, the cost to purchase equipment, the cost of staff, etc. Make it clear to the jury that a lot more goes into the cost of the surgery than just the time spent performing the surgery.

Q: And I will also represent to you that Ms. [defense billing expert] is using Medicare numbers.

Q: Does Medicare pay you what is reasonable and customary for your treatment?

A: In general, no. You can ask any physician that. But it is the contracted rate.

Q: And Dr. [defense spine expert] agrees with you. I deposed him yesterday. If you accepted these rates that Ms. [defense billing expert] references, would you be able to keep your doors open?

A: Absolutely not. I can tell you as a fact.

Q: How about the surgery center's doors?

A: I'm sorry?

Q: Would [name of surgery center] be able to keep their doors open if they accepted these numbers?

A: No, they can't. And I have proof. I actually had to close the surgery center because of that.

Q: Wow. Okay. And when we talk about surgery centers, I know that there is a lot of overhead with a surgery center. Is there a cost to certify a surgery center?

A: Yes.

Q: Is there a cost to purchase equipment, like MRI machines and fluoroscopic guidance?

A: Yes.

Q: Do you have a payroll for doctors and nurses?

A: Staffing, yes.

Q: Is there a ridiculous amount you pay for electricity?

A: Yes. We had to have a generator, so yes.

"The spine is simple!" said the attorney

As you can see from above, the spine and spine conditions can be made simple if you have a solid foundation on spine medicine. Once you have a solid foundation you will be able to walk your treating doctors through explaining to the jury what your client's injuries are, what their treatment was, how the injuries and treatment are related to the incident, and what effect the injuries will have on their future health. You will also be prepared to anticipate and defend against defense counsel's most common arguments and even get defense experts to concede to many of your points.

Greyson Goody is a partner and trial attorney at Goody Law Group, *where he specializes in prosecuting personal injury cases. He has tried more than 20 cases to verdict.*

Kieran Doherty is an attorney with The Simon Law Group. *Before law school, he worked as a physical therapy assistant and an insurance adjuster. His practice focuses mostly on spine-surgery cases.*