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Trial Preparation for the Personal Injury Defense

Harley J. McNeal

The work of the defense attorney in a personal-injury case does not begin the day that he steps into the courtroom. Long before the inception of the trial, counsel must prepare his case with meticulous effort. The tasks of investigating, interviewing witnesses, inspecting the scene of the accident, obtaining medical reports and conferring with medical experts and others are sometimes arduous, but they are the foundation upon which the client's case must rest.

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Of course, in modern defense practice the attorney usually does not carry out these activities alone. Because of the magnitude of thorough preparation, and the frequent complexity of technical aspects of the

case, he must rely on professional investigators and photographers and various other technical experts to aid in gathering the evidentiary material from which he will construct his case. Also, in cases in which the defendant is covered by insurance, the lawyer will have the benefit of the information obtained by the insurance company, which usually has conducted a preliminary investigation even before the attorney receives the case. But the availability of this assistance does not lessen the importance of the attorney's personal role in pre-trial preparation. Upon this man, who will try the case, is placed the ultimate responsibility to evaluate the evidence, determine the questions of liability, and decide the best defense for trial. This article will consider some of the important details of the defense attorney's preparation for trial.

EARLY DETERMINATION OF LIABILITY

Usually, the attorney for the defendant does not learn of the case until after the plaintiff's lawsuit has been filed. The plaintiff's attorney, by this time, has had an opportunity to conduct a preliminary investigation and to make at least a tentative decision as to liability. To offset this initial disadvantage, the defense attorney must become acquainted with the case as quickly as possible.

One immediate source of the facts, if the defendant is insured, would be the insurance company's investigation report. The thoroughness of

the insurer's investigation varies, depending upon the company's policy and the competence of the individual investigator. But at least this report will furnish the attorney with a general outline of the facts, and the identity of some of the witnesses.

Interviewing the Witnesses

It is never good policy for counsel to use a witness in a trial without having interviewed him personally. In an important case, the lawyer should talk to every witness whom he plans to put on the stand at least two or three times. The benefit of the personal interview is twofold. First, it gives the attorney the opportunity to scrutinize the witness's story. Patent discrepancies which occur in the witness's narration of the facts can be raised by the attorney and explained by the witness. Secondly, the attorney may evaluate the narrator's potential effectiveness as a witness before a jury. Many trial lawyers have experienced the anguish caused by examining a witness on the stand, whose signed statements made to an investigator before trial lucidly described the accident, but whose testimony at trial was replete with inconsistency and totally unpersuasive to the jury. Obviously, it is self-defeating to place a witness on the stand whose testimony consists of a morass of hearsay, imagination, speculation and prevarication. This undesirable result can be avoided by the personal interview in which the attorney can test the credibility of the witness's story, evaluate the personality of the individual, and determine the most effective method of examining him on the stand. The dull, unimaginative witness, for example, must be examined slowly and in simple terms. The intelligent but timid witness must be reassured; his fears concerning cross-examination should be allayed.

All witnesses should be interviewed as soon as possible after the accident. The shorter the time interval between the accident and the interview, the more complete and accurate will be the witness's recollection of the facts. Furthermore, the witness usually will be more cooperative if the interview is conducted shortly after the accident than if a great amount of time has elapsed.

The manner in which to conduct the interview will depend to a large extent upon the witness himself. Each witness is an individual who will require individual treatment. In general, the interview should be conducted on an informal and friendly basis. Most witnesses will be acting in that capacity for the first time, and consequently will be somewhat wary. The attorney should attempt to put the person at ease. This can be accomplished by engaging him in a general conversation at the outset of the interview. When it becomes apparent that the witness is beginning to feel at ease, the attorney can then subtly guide the conversation

toward the more important topic — the witness's knowledge of the facts of the case.

The most effective method of eliciting the witness's story is to permit him to give it in narrative form. In this way the lawyer is able to note any inconsistencies in the witness's narration, and to see what particular facts the witness most clearly remembers. Also, the narration may bring out facts of which the attorney was not aware and which, therefore, might not have been uncovered in a question-answer type of interview. After the witness has related his story, the attorney can then resolve inconsistencies, and fill in sketchy parts of the witness's story through specific questions.

In addition to obtaining factual information from the witnesses, particular attention should be given by counsel to having each witness describe and locate the areas of injury, or state the lack of any objective sign of injury, from his observance of the plaintiff.

Visiting the Scene of the Accident

A visit by counsel to the scene of the accident is another essential step in thorough preparation. The trial attorney must be intimately acquainted with the facts in order to present the case effectively to the jury. By visiting the scene personally, the attorney would acquire a more complete knowledge of the physical conditions of the accident situs than he would by relying on photographs or witnesses' descriptions. The latter representations of the situs may omit details which are vital to the case.

Observing the accident scene personally also gives the attorney the opportunity to check the accuracy of the witnesses' narrations of the accident. The lawyer who relies on the uncorroborated statements of eyewitnesses shows an unwarranted faith in the infallibility of human observance. It is impossible for any human being to be entirely accurate and objective in relating what "he saw" on some previous occasion. Therefore, the attorney should ascertain whether the witnesses' statements of the events of the accident are credible in the light of the static conditions of the accident scene.

The attorney's visit to the situs should be made as soon as possible to insure that the physical conditions will be substantially the same as when the accident occurred. Obviously this is important if the attorney is to be able to check the accuracy of the witnesses' statements relating to the accident. It is also important if the attorney wishes to take photographs of the scene at this time, since such photographs must depict conditions as they existed at the time of the accident to be admissible as evidence.

Researching the Law

After the defense counsel has read the investigation report and has interviewed the eyewitnesses, he is in a position to make a working diagnosis of the case relating to the issue of liability. From his knowledge of the facts, the attorney by this time should be able to recognize the major legal questions which will have to be resolved to determine the existence of liability.

Probably the only time an individual comes close to knowing "all the law" is when he has completed his formal legal education and has just prepared for the state bar examination. After that enlightened but ephemeral period, the attorney must resort to researching the reported case law and the statutes.

Fortunately, the majority of personal-injury cases fall within well-defined areas of tort law. In such cases, the attorney's task of legal research is relatively simple. But the attorney should always be aware of the danger of superficial research. Tort law is one of the most rapidly expanding and changing areas of the law. What was settled law yesterday may be unsettled today and may be completely the reverse of its former position tomorrow. For example, the doctrine of immunity of charitable institutions, which was well-established in Ohio only a decade ago, was completely abrogated as to charitable hospitals in 1956. Whether the doctrine is still applicable to other types of charitable organizations in Ohio is still not definitely settled. The attorney must be constantly aware of current trends in tort theory.

In addition to the general legal encyclopedias, law review periodicals, texts and statutory compilations, which are the usual tools of legal research, there are a number of publications which deal specifically with negligence law. These personal-injury publications are extremely beneficial to the practitioner since they furnish a ready source of recent negligence cases, often particularly indexed according to the facts, for example, automobile accidents involving brake failures or cases involving rear-end collisions.

After the attorney has satisfied himself as to the legal merits of his case, he is then ready to make a more detailed investigation of the facts.

MEDICAL PREPARATION

The main objective of the defendant's attorney in collecting the factual evidence and researching the law is to negate the question of liability. The preparation of the medical portion of the defense may also be directed toward this objective, but more frequently, its purpose is to reduce the plaintiff's damages. To achieve this latter purpose, the defense seeks to find evidence that will establish: (1) that the plaintiff's

injury was not a result of the trauma which allegedly was caused by defendant's negligence; or (2) that the trauma merely aggravated a pre-existing condition of ill-health; or (3) that the injury which the plaintiff sustained left no permanent disability.

Information concerning the plaintiff's medical history may be available from several sources. One of the most fruitful sources is the plaintiff's hospital records. It is generally a routine procedure in the hospitals, when a patient is admitted, to have the admitting physician prepare a "history" of the maladies and medical treatment which the patient has previously experienced. This portion of the hospital records may reveal to the defense the present existence of previously acquired pathological conditions which would have a causal relationship to the plaintiff's claimed present injuries; or it may at least furnish valuable investigative leads, such as the names of physicians who treated the plaintiff in the past, and dates of hospitalization.

Another available source of information to the defense in Ohio, as in many states, is a physical examination of the injured party. This examination will reveal the presence (or absence) of any objective symptoms of injury, which may answer the question of the legitimacy of the plaintiff's allegations of injury. In addition, it may offer clues as to the previous condition of the plaintiff's health, for example, post-operative scars, or scars indicating some prior trauma.

The importance of the medical examination requires that the defense counsel select the examining doctor with care. If the plaintiff's injuries are of a complex nature, the attorney should enlist an experienced specialist to conduct the examination. The selection also should be made with a view toward the possibility that the doctor may be called upon to testify at trial. Thus, the attorney should choose a man with a sound reputation in his specialty, and, preferably, with some experience as a medical witness. If the case goes to trial it is not enough to have obtained medical evidence to refute the plaintiff's claims, or minimize his damages. The problem still remains of convincing the jury. By selecting an experienced doctor, who can explain the medical problems simply and convincingly to a jury, and who can anticipate and avoid the pitfalls of cross-examination, the defense strengthens its position immeasurably with respect to the medical issues.

Finally, the defense attorney's preparation of the medical aspects of his case should include medical study. This is another one of the trial attorney's "non-delegable duties" of pre-trial preparation. It is essential that the defense counsel have a basic understanding of the medical theories involved in order to evaluate the strength of his case. Furthermore, it is unwise for the attorney to accept unquestioningly the opinions of the examining doctor for the defense. Even though the doctor strives

to give an objective report of his examination, it often happens that he subconsciously associates himself with that side of the lawsuit which enlists his professional services. This association may color his opinion to some extent. Therefore, the attorney should test the verity of the doctor's report in the light of existing medical knowledge.

The attorney who specializes in personal-injury defense work should regard medical texts as an essential part of his professional library. Even the practitioner who only occasionally handles personal-injury suits would find it beneficial to acquire some fundamental texts on medicine. The first book with which the lawyer should equip himself is a standard medical dictionary. *Stedman's Medical Dictionary*, (Williams and Wilkins, Baltimore, Maryland, 18th ed. 1953) is widely accepted. Secondly, a text on anatomy is desirable. *Cunningham, Textbook of Anatomy*, (Oxford University Press, New York, New York, 9th ed. 1951) is recommended. Other texts dealing with the specialized branches of medicine may be added later to the attorney's library.

THE DEPOSITION

The value of the deposition in modern personal injury practice cannot be over-emphasized. The tremendous mobility of the population today has considerably increased the necessity of taking depositions. The attorney who is willing to rely on the possibility that a witness will be available at the time of trial is taking a grave and unnecessary risk. Through the deposition, the testimony of a key witness may be perpetuated for use at trial in the event that the witness himself is not available because of death, or absence from the geographical jurisdiction of the court.

The deposition is also an effective tool of discovery. In theory, the Ohio deposition procedure is available solely for the purpose of perpetuating testimony. But, the liberality of the deposition statutes is conducive to the use of depositions as a means of pre-trial discovery. Ohio Revised Code section 2317.07 provides that "At the instance of the adverse party, a party may be examined as if under cross-examination, orally, by way of deposition. . . ."

This right to subject the plaintiff and other witnesses to deposition, often enables the defense counsel to resolve questions of liability and of the extent of injury early in the progress of the case. In addition, it permits the defendant's attorney to evaluate the plaintiff and other individuals as witnesses. This knowledge may have direct bearing on the attorney's decision as to whether the case should be settled or litigated. Also, as a result of the use of depositions, the parties and witnesses are definitely committed to their versions of the facts, since any variance in

the testimony of a witness at trial will open the door to impeachment by opposing counsel on cross-examination. Thus, the deposition procedure is, in a sense, a detailed synopsis of the trial itself, providing the attorney with an appreciation of the relative strengths and weaknesses of his case.

It should be pointed out that the effectiveness of the deposition as a discovery aid is limited somewhat by the existence of section 2317.02 of the Revised Code which provides in part:

The following persons shall not testify in certain respects: a) An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient. . . .

It is not within the scope of this article to consider the various types of communications to which these privileges may or may not attach, nor to set out the ways in which these privileges may be waived. The statute is mentioned merely to indicate that the attorney must be thoroughly familiar with its operation prior to taking depositions so that he may anticipate its use by the adverse party, and may know when to take advantage of its protection himself.

Generally, the physician-patient privilege will not greatly hinder the defense attorney from ascertaining the plaintiff's injuries resulting from the accident in issue in the case. The plaintiff, realizing the necessity of revealing this information if settlement is to be achieved, will usually permit the defense to examine the hospital records. In addition, the plaintiff will usually depose the physician who treated him so as not to run the risk of having this testimony unavailable at the trial. In the unusual case in which plaintiff's counsel does not desire to take the deposition of the treating physician, the defense lawyer, as a matter of precaution, should attempt to obtain the deposition of the doctor. This attempt would probably be met with a claim of privilege, but at least the defense would then be in a position to demonstrate to the court and jury that every effort had been made to learn of the physical condition of the plaintiff, but that he was prevented from obtaining such information by the plaintiff's own acts.

Deposing the Medical Witness

The plaintiff's injuries may be one of the vital issues in a personal injury case relative not only to the extent of damages, but to the presence of liability. Since the treating physician for the plaintiff and the examining physician for the defendant are often key witnesses, it is common practice to insure the availability of their testimonies through depositions.

The possibility that these depositions may be used at trial should stimulate counsel to prepare as diligently for the deposition as he would for trial.

Faced with the task of cross-examining the plaintiff's physician, the attorney for the defense must thoroughly familiarize himself with all the details of the plaintiff's injury which are available and, in addition, must educate himself in the particular field of medicine in which the plaintiff's physician specializes. The defense attorney should attempt to obtain all hospital reports, X rays and statements of treatment and prognosis. He should then read medicolegal texts relevant to the plaintiff's class of injuries and other specialized treatises which will inform him of the new, as well as the traditional, techniques of treatment which are recommended for the plaintiff's type of injuries. With this knowledge he will then be able to bring out any flaws in the doctor's conclusions as to the probability of the causal relationship between the injury and the alleged trauma, the propriety of the treatment, the extent of present disability, or the chances of complete recovery.

The defense lawyer's knowledge of the plaintiff's injuries and of the medical lore involved will also be beneficial in preparing the deposition of the examining physician or medical expert for the defense. A proper understanding of the doctor's position is essential in order to conduct a direct examination which can convincingly rebut the testimony of plaintiff's medical witnesses.

In addition to preparing himself for the deposition of the medical expert, the attorney must make sure that the expert is prepared. Counsel should confer with the doctor before the deposition takes place. The purpose of this conference should not be to "coach the witness," an objectionable and completely unethical practice, but rather to acquaint the witness with procedures of deposition, and to insure that his testimony will be understandable and in conformity with the rules of evidence. The lawyer for the defense should advise the expert to frame his testimony in simple layman's terms, anticipating that the deposition may have to be read by a jury. The doctor should, in addition, be instructed in the rules of evidence on hearsay testimony, personal knowledge, the use of hypothetical questions and the necessity of using the term *probability* rather than *possibility*, when stating opinions of causal relationships.

If the medical expert is a novice in his role as a witness, it will be necessary for the attorney to explain the purpose of cross-examination, and to warn him of its pitfalls. The neophyte witness is apt to become impatient and sarcastic when pressed by a searching cross-examination. This is especially true when the uninitiated witness is a professional man, who is accustomed to having his technical opinions accepted without question. An explanation of the essential fairness of giving the other side an equal opportunity to examine will probably induce the medical ex-

pert to accept this portion of the procedure more graciously. Another pitfall about which the doctor should be informed is the use of medical texts on cross-examination. Before testifying, the physician should renew his knowledge of the standard medical texts on the subjects on which he will speak. As an additional safeguard, the expert, when being cross-examined, should insist that he be given the particular medical text so that he may read the passages about which he is being questioned, and thus be in a better position to defend his statements intelligently.

Cross-Examination of Plaintiff

A discussion of the subject of depositions from the defense counsel's viewpoint would not be complete without some consideration of the taking of the deposition of the plaintiff. Mention was previously made of section 2317.07 of the Ohio Revised Code, which permits the deposition of the adverse party as if upon cross-examination, and of the merits of this procedure as an implement of discovery. The remaining portion of this article will deal with the defense counsel's technique of discovering, defining and delimiting the plaintiff's injuries through cross-examination.

Meticulous preparation, which is the golden rule of trial practice, encounters no exception with respect to taking the deposition of the adverse party. In order to take a searching deposition of the plaintiff, the defense attorney must first conduct an investigation into the plaintiff's past life, habits, activities and avocations. Such investigation may well uncover past accidents or events which resulted in injuries, or some malady which could possibly have a direct bearing on his present condition. Interviewing former employers, friends and other acquaintances of the plaintiff is a fairly routine, but often rewarding, method of discovering past accidents involving the claimant.

Generally, the deposition should not be taken immediately after the plaintiff has filed his lawsuit. In the opinion of the writer, this procedure should be delayed until at least six months after the petition is filed. The shorter the time interval between the filing of the action and the deposition, the more benefit will inure to the plaintiff rather than the defendant. In most cases the lawsuit is filed rather soon after the accident. The plaintiff, at this time, is still thoroughly familiar with the facts of the accident, and probably still objectively exhibits some of the remnants of the injuries he allegedly sustained therein. From the standpoint of the defense, the plaintiff's recollections at this time are too vivid to justify taking a deposition. The only exception to the rule of delay in deposing plaintiff exists when the defense's avenues of investigation are all dead-ends. If this is the case, the defense may wish to depose the plaintiff early since there is nothing to gain by delay, and the deposition may provide some investigative leads.

After the defense has conducted its investigation and has uncovered any previously existing injuries, or is satisfied that none exist, the deposition may be initiated. This is effected by serving notice on the adverse party, as required by section 2319.15 of the Ohio Revised Code, although generally, the requirement of notice is waived. The preparation for taking plaintiff's deposition should be as complete as if the plaintiff were actually to be cross-examined by counsel in the presence of a jury. The deposition of the adverse party should never be regarded as a mere perfunctory proceeding. In a number of cases, damaging admissions have been won from the plaintiff by skillful cross-examination. Even though plaintiff's deposition may not be admissible at trial, because he is available, these admissions may be introduced into evidence, as exceptions to the hearsay rule, and may be a decisive factor in the outcome of the case.

Pre-Existing Injuries

Usually the party should not be openly questioned concerning any information obtained by the defense relating to prior injuries or pre-existing illnesses, unless he categorically denies the existence of any such injuries. The practice of browbeating the plaintiff, or any witness for that matter, either at the deposition or during trial, is to be avoided. At trial, such tactics are often more detrimental to the examiner's side than to the side of the person testifying, since they serve to create sympathy on the part of the jury for the defenseless individual being so questioned. It should be the practice of the examiner to treat each witness fairly and with courtesy until it becomes apparent to all concerned that the person on the stand is deliberately lying or exaggerating. The defense attorney should be subtle in his inquiries regarding prior injuries, not disclosing his information until the plaintiff has finally been forced to take a stand one way or the other concerning the existence of these injuries. The defendant's attorney may then confront the plaintiff with this information and request that he admit or deny it.

In most cases, a disclosure of damaging information relative to pre-existing injuries should be made at the time of deposition. The old technique of withholding such information until trial, for the purpose of "springing a trap" has long since passed into oblivion. The defense attorney who wishes to serve his client properly, is interested in a quick and equitable disposition of the case. To force a case to trial, unnecessarily, is a disservice to the client since it increases his legal expenses and subjects him to the uncertainties of litigation. A satisfactory settlement can usually be achieved when the plaintiff is made to understand that he has seriously hurt his case by failing to admit the existence of prior injuries of which the defense has knowledge.

Mechanics of Cross-examination

It is not possible to set out a definitive list of rules which may be religiously observed to produce good cross-examination. The suitability of the method will depend upon the personality of the individual examiner, the characteristics of the witness, and the particular result which the attorney is trying to achieve. Nevertheless, there are a few mechanics of cross-examination which, although not suitable in every instance, are generally appropriate. The cross-examination should not follow the same order of inquiry as was used in direct examination. Altering the order of questioning will serve to preclude the plaintiff from anticipating the next question and thus will elicit a spontaneous reply rather than a pat answer. The defense counsel's cross-examination in most instances should be as brief as possible. The purpose of the questioning is to strike and probe important weaknesses in the plaintiff's testimony; a long, drawn-out examination in which the attorney is "fishing," is usually of no value, and may be harmful. By wandering over the whole range of direct testimony, the cross-examiner gives the plaintiff the opportunity to reiterate and emphasize, or even improve upon his answers. This unhappy result can be avoided if the examining attorney will pose each question with a definite objective in mind, and in such manner that the plaintiff will be compelled to answer unequivocally, without being able to expatiate on each answer.

The cross-examiner should zealously guard against the tendency, frequently found in neophyte practitioners, to dwell inordinately on damaging admissions made by the witness. Once the damaging statement is made, the examiner should immediately withdraw from that line of questioning. The over-ambitious attorney who attempts to capitalize on the witness's mistake by making him repeat the admission, often finds to his chagrin that, given a second chance, the witness is able to recoup his loss by explaining away the damaging admission.

The defense attorney should be particularly careful in questioning the plaintiff regarding his injuries. Questions which are loosely framed enable the plaintiff to elaborate upon the seriousness of his claimed injuries. Also to be avoided are questions which lead the plaintiff merely to confirm his claims of injuries. For example, the plaintiff should never be asked, "Did you have a headache?" or "Where in your back do you feel pain?" Such questions can only bring forth responses damaging to the defendant. Instead, the questions should require the plaintiff to locate the areas of injury himself.

The defense attorney should attempt to discover any injuries which the plaintiff may have suffered subsequent to the accident in issue. Such information may be obtained through investigative means prior to the

deposition. However, even if the investigation reveals no subsequent injuries, the attorney for the defense should interrogate the plaintiff regarding the possible existence of such injuries. A denial by the plaintiff will seriously impair his case if the defense later learns that such injuries exist.

It should be pointed out that the objectives of the defense in cross-examining the plaintiff differ somewhat at the deposition stage and at trial. In the former proceeding, the attorney is interested not only in emphasizing the weaknesses in the plaintiff's story, but also in discovering the strength and weakness of his own case. At the trial, however, the defense's purpose in cross-examining is primarily to discredit the plaintiff's testimony. Consequently, the attorney will want to ask the plaintiff many questions at the deposition which could not be asked at trial because of the potential inimical effect on the defendant's case. In short, the deposition proceeding should be used to full advantage as a fact-finding method. It is better to be aware of all the facts, both good and bad, before the trial begins. Of course, the defense attorney should not be entirely imprudent in his questioning so as to give the plaintiff an opportunity to increase greatly the value of his testimony; nor should the cross-examination leave the plaintiff with the idea that it would undoubtedly be to his advantage to proceed with trial, rather than to attempt to settle.

CONCLUSION

The outcome of a trial can never be stated with certainty until the jury returns its verdict. But it can be stated with certainty that personal-injury cases are seldom won without thorough and imaginative preparation. In the specialized practice of personal injury, the diversified activities of pre-trial preparation may be allocated to several individuals such as professional investigators and photographers and other technical experts. The final responsibility, however, remains with one person — the attorney who will present the case in court. This responsibility demands that the attorney not merely direct the activities of those who aid in the preparation of the case, but that he participate personally in this activity. It is only through personal effort and observation that the lawyer acquires a "feeling" for the case, that is, an awareness of the intangible factors in the lawsuit which may contribute decisively to its outcome.