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Are You Ready for the New World of Medlegal? Take the Acid Test

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When I came out of chiropractic school in the early 1980s, I had no idea I would be treating so many cases of whiplash and related injuries. When I went back to the notes I had taken during my training, I came up with a scant two notebook pages on the subject - and I consider myself a fairly copious note-taker. None of the textbooks I had studied - medical or chiropractic - discussed whiplash traumatology in any depth. Nevertheless, it seemed rather self-evident that this was a unique type of injury, not comparable to most sports injuries or other disease processes that afflict humanity, so it seemed equally likely treatment and management of this injury would be most successful if tailored to the complexity and uniqueness of the disorder. But where could one learn more? There was the problem; there were no textbooks on whiplash back then. So, we wrote one, learning much as we went along.

In the 1980s, the defense community (speaking here in terms of lawyers, not the Pentagon and the military-industrial complex) didn't need much sophistication when it came to defending the claims leveled against their insurance company clients, because ignorance was an equal opportunity affliction. Both sides groped and floundered with equal lack of aplomb, and the outcome was usually a small-risk crapshoot (at worst) for the defense. Just about all of our rather simplistic notions about whiplash during that time (which were probably not terribly convincing for jurors, even back then) have since been replaced with more complex, scientifically validated theories and a much greater overall understanding. This newer epistemology is necessary, of course, if one is to solve the problem of the injury in the first place, either through crash prevention or improved crashworthiness strategies. However, it is also necessary for other reasons.

As time wore on, defense attorneys, initially blindsided by our growing understanding of whiplash mechanisms and our ability to explain these problems to jurors, gradually developed a counterlogic

designed to provide the logical or factual ripostes to our testimony. This has spawned an entire industry, which caters to this growing requirement for plausible dissimulation strategies. Seminar series have been developed, and many law books have been written, on how to deal with soft tissue claims. The legal profession has even coined its own acronym for low-speed crash injuries: MIST. This stands for "minor-impact, soft-tissue," an unfortunate term that trivializes such injuries. Any trauma that costs American companies \$19 billion, afflicts three million individuals, and results in 500,000 new cases of lifetime disability annually to workers who are in the prime of life hardly seems to merit the label "minor." "Soft-tissue" is another term generally used to convey a sense of triviality, despite the fact that the vast majority of all physical disability and disease develops from soft tissues.

Recently, I saw a series of Allstate training videotapes featuring an actor posing as an engineer (complete with pocket protector and assorted pens, horn rim glasses, and a Sherlock Holmes sleuth hat). He explained how biomechanics could solve the insurance adjustors' dilemma in terms of these "pesky" low-speed crash injury claims. In one scene, we see our hero sitting bravely in a car, explaining to the audience that even a 5-mph delta-V collision (which, by the way, is the magical number in the defense of these claims) is not only survivable, but is less than trivial. Having said that, he experiences both frontal and rear impacts at a claimed delta-V of 4-5 mph. In both cases, the car moved no more than a couple of inches, and his head movement was virtually nil.

In reality, the vehicle clearly did not achieve anything close to a 4-5-mph delta V. In my experience observing crashing cars at these speeds, the occupant experiences a relatively violent kinematic response, usually striking the head restraint quite sharply, and the bullet vehicle will typically move out at least 10-12 feet from the impact zone. The noise level is also quite surprising! (It is noteworthy that in the Allstate training video, you could not see the vehicle or object striking the actor's car, and there was virtually no sound.) The actor went on to explain how injuries simply don't occur in these crashes, making imputations of dishonesty in even honest folk. Whole families often take advantage of the opportunity of a jackpot settlement, he noted, illustrating a family and its dog all sporting cervical collars.

Throughout, the video provides claims adjustors with various tactics and strategies for defeating these claims. Auto crash reconstructionists and biomechanical engineers were recommended in all cases of "questionable claims." What constitutes a questionable claim? Any in which there is no significant vehicle damage (i.e., about 50 percent to 60 percent of whiplash claims). This, of course, follows the "no crash-no cash" doctrine established long ago as the single most successful duplicity with which to plague whiplash

victims.

It is disheartening to report that training programs such as in this video series are really nothing more than large-scale industrial brainwashing. The Allstate employees, for the most part, have no reason not to accept this cartoon-like presentation as scientific gospel. So, here we have yet another reason to understand whiplash traumatology from the ground up: your very survival.

Throughout the 1980s and 1990s, defense lawyers simply responded to a progressively more aggressive plaintiff bar, devising a series of counterarguments and strategies to vanquish these "pesky" low-speed crash claims. By far, the "no crash-no cash" deception has been the most effective strategy, largely because it is alluringly intuitive, but there are dozens of others, depending on the circumstances. Rather remarkably, the former has been so successful that many plaintiff attorneys have actually begun to believe the ruse themselves, and will turn away prospective clients whose vehicle damage does not exceed some arbitrary threshold.

And so, we might lament, the tide has turned - at least for the present - and the plaintiff attorney bar has collectively yielded its mantle of success under this growing sense of beleaguerment. Sound familiar? (It should if you've been living anywhere other than in the cabin next to Ted "Unabomber" Kaczynski.) And, of course, I have written rather extensively on how to deal with these problems. It is really no more difficult than knowing the truth. Just like it stated over the pulpit in the church I attended as a child, "Know the truth, and the truth shall set you free." (Interestingly enough, as one enters the foyer of the CIA headquarters in Langley, VA, one sees these words as part of the agency's credo and heraldry.)

So, here is a quick self-test for you, to see if you really know enough truth to survive the changing course and surging currents of the medicolegal sea and be free of worry. Since life is really not a multiple-choice quiz, the answers are in a brief narrative format. If you want to make this even more realistic, you should really be able to answer these questions within five seconds, just as you would have to do under oath in a deposition or in court.

Questions From The Defense

1. All crash test studies have shown that injuries don't occur in crashes in which the delta V is under 5 mph. Our reconstructionist has shown that the crash speed change was less than 5 mph. So how can the plaintiff possibly be injured?

2. Our expert has testified that whiplash injuries heal in 6-12 weeks and do not result in permanent sequelae. So how do you explain the plaintiff's ongoing complaints in this case?
3. Our radiologist has shown us that the plaintiff had pre-existing degenerative changes in the neck and that these most likely explain his current neck pain. In the corollary to this scenario, the defense expert medical examiner wants to apportion for the pre-existing degenerative changes. Is this a valid argument?
4. How about the MIST argument?
5. Isn't it true that 50 percent of all normal people have disc herniations?

Answers You Might Give

1. *Au contraire, mon frere!* While defense lawyers will enlist this argument in the form of a question, they do not expect you to know the answer. If you say, "I don't know," they win. If you agree, they win. If you say, "I don't think so," you had better be prepared to go into it. Then (assuming you can) you win. Nearly every crash test study using human subjects has reported minor injuries not requiring treatment. A follow-up question is often, "Yes, but no study has ever reported long-term symptoms from these crash tests, correct?" Answer: Nobody has ever really followed these crash test subjects long or adequately enough to determine whether any long-term effects occur.

The second part of the question deals with this magic number I mentioned earlier: Five (mph delta V). It has long been argued that since this is the approximate speed change at which human volunteers report minor complaints of headache or neck pain, it must be the threshold for human tolerance. However, remember that these are volunteer subjects, usually selected because they are at low risk for injury. They are not representative of the universe of crash victims. They are aware of the impending crash, and generally are ideally positioned to reduce the risk for injury. In fact, we generally do all that we can to prevent injury in these subjects.

Real-world crash victims, however, often have other known risk factors for injury. Moreover, risk - at least from a scientific and epidemiological standpoint - cannot be established with a mere handful of crash tests. The epidemiological literature, on the other hand, tells us that at 6 mph delta V, the risk for injury in a rear-impact crash is in the range of 30 percent to 50 percent. However, there is no way to determine the risk for any one individual. Moreover, one should be extremely hesitant to accept the validity of any low-speed auto crash reconstruction in the first place. We (and others) have

demonstrated repeatedly that the delta V can be 7 mph or more in these crashes, and still leave no sign of vehicle damage.

2. Again, a common theory offered by defense experts, but one that has no basis in fact. The very first thing I suggest is to ask them for the source of this revelation; it simply does not exist. (If you think I'm pulling your leg, for many years I have had a standing \$5,000 reward for anyone who can produce it.) The second thing I would do is point out the 50 or so outcome studies which have been published in the past 40 years. They nearly unanimously present a very different picture than the fatuously sanguine story promulgated by most defense IMEs. In truth, about 30 percent to 50 percent of whiplash victims are left with some form of residual pain or dysfunction.
3. Here it is important to understand, first, the fact that 50 percent of individuals in their middle age will have radiologically demonstrable degenerative changes in the spine (80 percent of persons older than 50 years of age) and that there is only a poor correlation between symptoms and such degenerative changes. Secondly, I usually point out that apportionment is made on the basis of disability - not pathology. And, since the correlation between degenerative changes (i.e., pathology) and symptoms (i.e., potential disability) is poor, one cannot apportion degenerative changes in the absence of symptoms. At this point, and to make the apportionment argument valid, it is incumbent upon the defense to make the case that the patient did suffer from the effects of these degenerative changes prior to the injury in question. This could be done using prior treatment records, for example. But without such evidence, any such apportionment is nothing more than conjecture.
4. I have written fairly extensively on this "no crash-no cash" subject, largely because it has become the most single successful defense strategy in defeating cases. It has virtually no basis in fact and, in my opinion, borders on fraud. I say this because most of those who level the argument know only too well that it is pure fiction. **Of all of the critical issues in this arena today, this is one you need to know cold, or you can count on losing the lion's share of cases you are involved with.** Also, since I can count on the fingers of one hand the number of plaintiff attorneys who know how to successfully handle this problem, you shouldn't count on them to educate you. Rather, this training will need to go the other way.

Besides my previous articles for DC, I would also recommend reading chapter 1 in my third-edition textbook, *Whiplash Injuries: the Cervical Acceleration/Deceleration Syndrome*, or taking a seminar on the subject. In a nutshell, everything we know about whiplash countervails the notion, "no crash-no cash." If you lose a case on this argument, shame on you.

5. This question, or something like it, can generally always be expected when an MRI or CT scan has disclosed a herniated disc. And this one actually does have a traceable origin. In 1984 a paper appeared in *Spine* reporting that when radiologists made a blinded review of a series of CT scans (i.e., they were blinded as to whether these were patients or normal subjects), they reported that about 19 percent or so had what appeared to be disc bulges or herniation. They also reported that about 50 percent of those over the age of 40 had "abnormalities." These abnormalities included a variety of relatively unimportant findings, such as eburnation, minor facet arthrosis, etc.

In subsequent years, this type of study has been repeated several times, and the figure of 19 percent disc herniation seems to be fairly constant. Thus, it is clear that the question from the defense represents a misunderstanding of the original paper: it was 50 percent with abnormalities (in the age 40 and over group), not 50 percent herniations. However, there are a couple of other things to think about with this question, as well. Most of these studies are lumbar studies. Findings from these studies cannot be extrapolated to the anatomically distinct cervical spine without a good deal of caution.

Secondly, when the subjects are normal, meaning they have no problems with back pain, the proportions of subjects with disc herniation (typically about 19 percent) offer no inherent probative value in terms of subjects with back pain, since they belong to a distinctly different population. No trained scientist would attempt to extrapolate between populations that way.

What is the proportion of disc herniation in a population with back pain? Who knows? One should ask why some subjects could do well with a herniation. A large canal and a relatively small cord and herniation in the lumbar spine may be more tolerable than a less capacious canal with a larger cord and the same size herniation. There is also the potential effect of *ligamentum flavum* infolding and disc bulging, which is increased during extension, etc. Finally, you should be able to explain why it is that the herniation in the case at hand does not fall within the category of asymptomatic herniation. This would be accomplished using patient complaints, physical examination findings, and perhaps other tests.

Scoring

Each question is worth 20 points, so you can only miss two before you consider yourself in way over your head - not a good place to be. Of course, you might have even better answers than mine... if so, I salute you. Good luck, and have a great year!

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