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Recommended Citation

Aaron J. Broder, *Aspects of Personal Injury Litigation: Cross-Examination of the Defendant's Medical Expert and the Summation*, 21 DePaul L. Rev. 121 (1971)

Available at: <https://via.library.depaul.edu/law-review/vol21/iss1/7>

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ASPECTS OF PERSONAL INJURY LITIGATION: CROSS-EXAMINATION OF THE DEFENDANT'S MEDICAL EXPERT AND THE SUMMATION

AARON J. BRODER*

INTRODUCTION

THE PURPOSE and function of this paper is to advance effective ideas and suggestions for the plaintiff's attorney in connection with the presentation of damages in personal injury litigation. The paper will concentrate on two aspects of the trial itself, namely, the cross-examination of the defendant's medical expert and the final summation. It will take the perspective of the plaintiff's attorney and by way of concrete examples present positive advice for these types of litigation. For supplementary material on the pre-trial preparation, the medical proof required for the plaintiff, as well as specifics on various injuries, see the other articles in this issue.¹

From the plaintiff's point of view, the attainment of a just award which will properly and adequately compensate the innocent victim of another's wrongdoing is the fundamental basis upon which the trial proceeds. From the defendant's point of view, even where liability is established, the purpose of the trial is to minimize the damage claim or as commonly phrased "hold down" the verdict. This paper is designed to demonstrate techniques of cross-examination and summation which effectively counter the defendant's efforts.

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1. See also Hastings, *The Impact of Serious Injuries Medical Proof for the Plaintiff*, 18 DEPAUL L. REV. 602 (1969); Wolfstone, *The Role of the Attorney in the Investigation and Preparation of the Personal Injury Case*, 18 DEPAUL L. REV. 501 (1969).

CROSS-EXAMINATION OF DEFENDANT'S MEDICAL EXPERT

Although the points covered on cross-examination are frequently governed by the peculiar facts of a given case, there are many factors which are universally applied. Thus, there will always be disagreement between the plaintiff's medical expert and the defendant's medical expert. Most often, the plaintiff's medical expert will have had a greater opportunity to have observed the injuries and the defendant's expert will have seen the plaintiff only once, and then for a relatively short time. Frequently he will not have had the opportunity to review the entire hospital record. Furthermore, the defendant's medical expert will have been retained by the defendant's lawyer with the understanding that his testimony might be required upon trial, and this understanding would have been made at the very time that the expert concluded that the plaintiff's injuries had minimal or no future effect.

In addition, the defendant's doctor generally prepares his report with dispatch because his contract for hire provides for payment only upon submission of the report. It is also true that the defendant's expert will probably be a specialist in forensic medicine and will have examined hundreds of patients during the course of the year on behalf of attorneys. For these reasons it is often possible to circumvent the testimony given by the defendant's medical expert by a line of questions designed to augment these deficiencies.

At the outset the defendant's doctor may be requested as follows in order to relax him and to prevent possible undue and harmful comment:

May we agree, doctor, that wherever possible for the economy of time, or for the sake of brevity, you will attempt to answer the question "yes" or "no." Please understand, doctor, that if you are unable to do so, advise me of that and I will simply let the question go and proceed on to some other area of inquiry.

The hospital record may be reviewed with great advantage:

Did you observe, doctor, that the plaintiff was given emergency treatment; that the doctors at the hospital observed her injuries and that the injuries were plainly observable about her body and limbs—her knee, her arm, her low back and her neck?

It will, in most instances, be advantageous to review the history taken by the doctor at the time he examined the plaintiff and proceed into a review of the complaints received by the doctor from the plaintiff at the time of the examination. This provides an oppor-

tunity to reiterate for the jury each of the symptoms manifested by the injuries. In order to emphasize the importance of this review, the doctor may be asked if he took a *very careful* history. And then go on: "Is this process of recording the patient's history and symptoms vital to a mature and responsible diagnosis?" And also: "The history is important because you can always make a more accurate diagnosis, if you know what has happened to your patient, isn't that correct, doctor?" By first questioning the doctor on those matters which reflect upon his credibility and thereafter reviewing extensively the diagnosis, treatment and symptoms, the attorney will successfully provide the jury with a dramatic review of his client's history of suffering from the lips of the defendant's expert.

Thus far, the discussion has centered on techniques of cross-examination which might be helpful in almost every case. However, each case also provides opportunities to directly attack the doctor's conclusions. For example, suppose that a client suffered a major disability after an accident involving a minor impact. If the plaintiff's attorney has prepared in advance, he merely asks: "Is it not true, doctor, that intervertebral ruptures occur following relatively minor strains and sprains in accidents?" If the doctor answers in the negative, qualify Key and Conwell's well known work in this area entitled *Management of Fractures, Dislocations and Sprains*,² and query the doctor on the following quotation: "It has been our experience that most of the intervertebral disc ruptures occur following relatively minor strains or sprains in accidents"³

It is most helpful to lead the defendant's expert through an explanation of the structure and function of the area injured in the accident. This can be done only if the attorney has mastered the subject and has available in court a source to corroborate his questions. For example, in a whiplash case it would be valuable to lead the doctor through the structure and function of the spine. For example:

Q: The movable spine is divided into three areas, is that correct?

Q: And the area with least mobility is the thoracic?

Q: The lumbar spine is less mobile than is the cervical spine, is that right, doctor?

Q: And the cervical spine then is the most mobile part, is that right?

2. KEY & CONWELL, *MANAGEMENT OF FRACTURES, DISLOCATIONS AND SPRAINS* § 333 (7th ed. 1961).

3. *Supra* note 2, at 11.

- Q: And the head, doctor, weighs from seven to eight pounds, and rests directly upon the cervical spine?
- Q: And, doctor, the cervical spine is not only the most mobile, but, in addition, it is the weakest portion of the spine, is it not?
- Q: Therefore, doctor, we have a weight of from seven to eight pounds resting upon the cervical spine which is not only the most mobile but also the weakest portion of the spine?
- Q: The base of the cervical spine is the seventh cervical vertebrae, is it not?
- Q: And it rests upon the adjacent thoracic vertebrae which are the least mobile of the vertebrae?
- Q: So that the base of the vertical spine forms a junction of greater stress and strain and is extremely vulnerable to injury, is it not?
- Q: This junction, doctor, is the fulcrum of the dynamics of the whiplash injury?
- Q: Doctor, when an automobile is struck from behind, the head and neck flex backwards, is that right?
- Q: And if the automobile moves forward and strikes another vehicle in front there is a flexion of the head and neck by reason of the deceleration, is that right?

Buttressed by sound authority, in the event that the doctor should become intransigent, it is possible to achieve a solid foundation for your summation by demonstrating the dynamics of the whiplash injury through the testimony of the defendant's own witness.

Perhaps it will be vital to elicit the testimony that there are fifty or sixty muscles in the neck in addition to soft tissues which are subject to damage and which X rays do not disclose. The point of this testimony is that this intricate and complicated portion of the anatomy with all of its architectural perfection, becomes damaged (or, if serious—destroyed) in a split second because of the carelessness of the defendant. Cross-examination should lay a firm and authoritative basis for this comment to be made on summation.

These techniques of cross-examination should eliminate direct controversy with the defendant's medical expert. As indicated, the use of standard medical textbooks is crucial. Needless to say, in order that such textbooks be used, the defendant's medical expert must first acknowledge their authenticity. The first rule, therefore, is to be certain that the books selected are, in fact, standard treatises accepted by the medical profession. Avoid preparing the case in this regard by the use of lawyers' medical books and little recognized sources, or esoteric and controversial articles relating to new and experimental viewpoints which are not as yet generally recognized as authoritative by the medical profession.

But even if the material is carefully selected, there remains the problem of obtaining the witness' acknowledgement of authenticity. The defendant's medical expert will have been forewarned and, consequently, may well deny the authenticity of the proposed offer, thereby preventing its use on cross-examination. Avoid the direct question to the doctor which merely inquires as to whether the book is authoritative and proceed along the following lines:

Q: You certainly are familiar with this text, are you not?

Q: It may be found in all of the medical libraries of the various county medical societies, may it not?

Q: It would also be found in the library of the New York State Medical Society, would it not?

Q: As a matter of fact, I recall seeing it on your shelf, in your library, when I was present for the physical examination of this patient, isn't that correct?

Q: And this is a well regarded text book, is it not?

After having qualified the textbook, the material read from the text will no doubt be contradictory to the expert's testimony. Therefore, a good attorney will seek to establish the authority of the statement which he has read and then procure an admission from the witness that he disagrees with the text. Hence, the following may be attempted:

Q: Doctor, you do not deny that the views expressed, that I have just read to you, are responsible views, do you?

Q: You are not prepared to call these views irresponsible, are you?

Q: Now, I presume, doctor, that you have committed your views with regard to this subject to writing? (Doctor's answer will generally be "Yes, I have submitted a report in this case.")

Q: The authors of this book were not at all concerned with this litigation, were they doctor? In fact, doctor, this textbook was written primarily for the education of persons studying medicine, and not concerned with either side in litigation, was it not? In short, this textbook was not prejudiced by the interest of litigants?

This series of questions, when used in concluding the cross-examination, should demonstrate to the jury that the doctor's conclusions are contrary to those contained in the standard reference works which have been placed into evidence. The result of this is the accomplishment of the following: (1) The doctor is an interested witness; (2) the doctor's examination of the plaintiff was hasty, prejudiced, performed without reference to all available tests, limited in scope, performed without the use of all necessary instruments, conducted without a careful review of the hospital record or hospital X rays and, in general, hastily prepared; (3) also by review of the

history and symptoms and possible treatment received by the patient it was shown that the injuries were grievous at best or existent at worst; and finally (4) that the doctor's conclusions are not only based upon one cursory examination but in addition are in substantial conflict with recognized medical textbooks.

There are, of course, an infinite number of individual items which may appear in one case and not in another. It is not possible within the purview of this article to detail all of the many situations which may be brought out to great advantage in the cross-examination. For example, suppose the witness testifies that the spasms noted in the hospital record are of no great significance. It may then be pointed out that in the report submitted by the witness he carefully noted that at the time of his examination there were no spasms. Plaintiff's attorney may want to question the witness as to why it is that the spasms noted in the hospital report are of no particular importance, whereas the lack of spasms at his examination are given particular notice. Frequently, on his direct examination, he will have made much of the lack of spasms in the musculature of the injured area and this will further emphasize that the witness' easy rejection of their significance in the hospital record is one more manifestation of his bias and prejudice.

Let us consider the case of a spinal injury. Frequently, the defendant's expert will attribute this to a pre-existing osteoarthritic condition. The fact is that such a condition can be found in the spines of at least fifty percent of the population over thirty years of age. However, in most instances this arthritis is not productive of symptoms. In the given case it may well be that the plaintiff never received any treatment, never manifested any symptoms, and followed a pattern of living which was completely consistent with a symptom-free spine. There are numerous textbooks on this subject which will corroborate the fact that a person who had a pre-existing minimal osteoarthritic condition, in all probability, had no symptomatology and was entirely unaware of the changes that had taken place in his spine. These changes are consistent with the aging process, as evidenced by such things as wrinkles in the skin or gray hair. Actually, by reason of these changes the plaintiff had become more vulnerable to serious injury and subsequent disability. The law, however, fully supports the thesis that the tortfeasor is responsible for all resultant injury

that his tortious act inflicts and if an individual is predisposed to more serious injury, such does not mitigate the damages. It has been said that the weak and infirm have as much right to collect for injury inflicted upon them as do the healthy and the robust. In order to establish the predisposition of the arthritic plaintiff to more severe injury, it might be well to know something about the development of this condition.

Osteoarthritis, on the X ray, demonstrates itself with lipping and spurring of the bony surface at the corners of the body. Since all of the vertebrae are connected by joints, and since there is mobility within the joint, there is a constant wearing action upon the surfaces, which is medically referred to as degeneration. This wearing of the bony surface results in a lipping, spurring and productiveness of tiny bony deposits, which then show up on the X ray plate and are referred to usually as minimal arthritic changes. These changes make the involved section of the spine more rigid or brittle, and less elastic, mobile or bendable. Accordingly, they are fair game for trauma, and more vulnerable or more subject to injury. In order to establish this before the court it would be helpful to ask: "The accident didn't do this osteoarthritis any good, did it?"

The point is that the doctor must, under proper questioning, concede that medical experience would corroborate the fact that greater injury is expected when it is imposed upon a pre-existing osteoarthritic spine. Sometimes, a doctor will testify on direct examination that the patient was asymptomatic except for certain subjective complaints at the time that the witness conducted his physical examination. Thereafter during the course of his testimony he may indicate that the patient had a pre-existing osteoarthritic spine that was sufficiently advanced to have produced symptoms. In such a situation the basis is laid for a blistering cross-examination which would elicit the contradiction in the doctor's testimony. For example, it might be demonstrated for the jury that, when it suits his purpose, the doctor testifies that symptoms of pain, etc. do in fact exist and at all other times, when it suits his convenience, he testifies that there is no symptomatology. On the other hand, the injuries in the given case may be such as to manifest symptoms which *do* appear and disappear at irregular intervals, and this may be elicited on cross-examination in order to negative the conclusiveness of the doctor's state-

ment denying the existence of symptoms at the time he examined the plaintiff.

Thus, in the case of an injury to an arthritic joint you will have available an authoritative statement to the effect that: "The symptoms come and go without rhyme or reason and occasionally a mild injury to a joint may inaugurate a long period of pain and disability."

Even in a case where all of the complaints are subjective, the medical literature on the subject will be sufficient to lend credence to the claim of the plaintiff. The cross-examiner should not rest until he wrings an admission from the defendant's expert that medicine accepts these complaints. Only through confrontation with authoritative work can such a concession as well as the further concession that subjective pain is an upsetting factor in the life of the patient be obtained from the defendant's doctor. The doctor, after all, must admit that he treats human beings and not merely specific parts of the anatomy. Thus, a person with complaints of pain in the spine will become irritated, nervous, worn-out and easily fatigued a good deal of the time. Pain is disabling. In treating a patient the doctor is concerned with the "process occurring not only in the local area of impact, but also in the organism as a whole. We have continued to stress the importance of looking upon the injured individual as a whole being."⁴ It is, therefore, necessary to closely examine the doctor on the issue of the extent to which localized pain can disable the patient.

The preceding represents a partial and not a complete resumé of all of the material available on the subject—material which amply corroborates the fact that injuries to the back frequently have periods of remission, and frequently produce symptoms which come and go and return once again to plague the victim. The point is that adequate preparation in advance of cross-examination will result in plaintiff's attorney's having anticipation of many of the points upon which the defendant's expert is vulnerable. Obviously, then the good attorney will be able to enter into controversy with the defendant's expert and dispute his conclusions.

4. *Supra* note 2, at 11.

Never forego the opportunity to cross-examine the defendant's medical expert. It is recommended that every trial lawyer grasp the opportunity which cross-examination provides. Even though the conclusions of the defendant's expert are valid and may be attributable to conflicts in medical science on the point at issue, it is important simply to get a concession of this from the expert. However, in every case, the collateral attack on credibility is warranted and should be made. Furthermore, in every case a review of the history, symptoms and complaints should be made.

SUMMATION

From the outset of the trial a good attorney is in the process of preparing his points for summation. Summation should be directly responsive to the evidence presented during the course of the trial and take into account all of the incidents which have transpired and which in any way—subtle or otherwise—affect damages. Toward this end, it is always helpful to order certain portions of the daily record in order to pinpoint key testimony on the issue of damages. If there are areas of agreement between the plaintiff's medical expert and defendant's medical expert, the attorney should highlight them. Certain points on cross-examination of the defendant's expert are most effectively recreated during summation by reading directly from the transcript. Extracts of medical texts which have been used during the course of the trial may also be used with great effect. It is imperative that a summation hit hard on the crucial proofs of damage, and the statements made by opposing counsel in his summation must be thoroughly refuted wherever possible. A proper summation makes numerous specific references to the proof and specifically attacks the defense.

The summation must be directly responsive—consider the case of the defense attorney who has injected much humor and wit into the lawsuit. In such a case the jury should be reminded that they were alerted on the *voir dire* not to be misled by comedy, jokes, and the master-of-ceremonies approach. It is fine to enjoy a good laugh, but if that mood of laughter, smiles and relaxed entertainment affects the jurors in their deliberation of the serious damage done to one's client, then only a travesty can be made of justice. Further inform the jury that the defense counsel is right when he says that he is seeking jus-

tice—but wrong when he seeks justice obscured with a few well-spotted laughs—even justice itself can be violated by laughter, smiles and wit. In short, it is still possible to laugh a case out of the courtroom. In a proper case, add that they must not be guided by the amused sneer, the sarcastic voice and the elevated eyebrow. This arsenal of skepticism—used by the defendant's lawyer—must not throw doubt upon the pain and suffering of the plaintiff for such might result in the defeat of a valid claim for damages resulting from personal injury.

The same applies if the defense has intruded with an orgy of mud-slinging, insults and prejudice. Do not let this go without direct and vigorous comment. Such tactics may operate to deprive the plaintiff of a fair consideration of the issues in the lawsuit and, therefore, must not be permitted to demean the plaintiff's claim for damages.

Frequently, the defendant will have presented an indistinct and confused defense to the damages. For example, he may take the position that the plaintiff does not have the condition for which he seeks damages and, alternatively that even if he does have pain, it is because of a pre-existing condition. To offset this argument sum up the defendant's position thusly: "Counsel for the defense states that there is nothing wrong with the plaintiff and he did not cause it," or, "The position of the defense is that the plaintiff has nothing wrong with him and *it* was caused by a previous accident." That is, help the jury to understand that there is a complete absence of any real defense to the claim for damages—the defense is merely a ploy.

Thus far it has been demonstrated that it is important to respond directly to the case presented by the defendant. Each individual will, of course, proceed forward to present systematically his case in damages which is based upon evidence supported by reason. Personal injury cases are generally simple to understand. They are simple in the manner of their occurrence but tragic in their consequences. Even if the case involves the aggravation of a pre-existing condition, it nevertheless involves a simple issue: a minor condition, an occasional ache or pain has been changed to a major disability with constant pain, often severe and unremitting. Thus, stripping away unnecessary verbiage, successful presentation of the issue to the jury in a precise, accurate and helpful manner is quite facile.

In summing up on damages one must, of course, be aware of the law on the subject and be guided by what he believes the court will charge. Submission of requests to charge will undoubtedly be of assistance in formulating a summation on damages. In addition, it is well to remember that our system of justice is not one based upon class or caste. Thus, pain and suffering are denominated in the law as items of general damage. Hence, explain to the jury that pain and suffering are equally destructive of the human capacity to survive with dignity, whether a man be of high and noble birth or whether he be the personification of the average individual. His disablement, his inability to participate in those pursuits which, prior to the accident, formed an important part of his life processes, are valid criteria for the jury to use in assessing his damages.

The area of special damage should be very specifically delineated and separated from general damages. Special damages must be specifically proved but the salient point to get across to the jury is that they are separate, apart and in addition to the general damages sustained. If the jury believes that the special damages incurred were reasonable and necessary, then they must understand that they shall add such amounts to their award for general damage. The same is true when special damages are claimed for future care, treatment, or loss of earnings.

A very special damage issue is loss of earning capacity. This is separate and distinct from loss of earnings. Part of the element of disablement is the inability to work and this element involves general damages. In the case where a plaintiff has in past years elected to work only part of the time, his earnings may have been low. But the point is that it was his choice, whereas now this choice has been taken from him and he has no alternative. He cannot work even if he wants to.

Psychic harm, embarrassment, humiliation and worry are aspects of human response to physical injury. If properly put into evidence during the course of the trial, these elements of damage should be clearly presented to the jury. Many kinds of injury bespeak of impairment in the struggle for survival and need little embellishment by the lawyer. The empty eyesocket, the scarred face, the missing limb, are but a few examples. Justice Cardozo once said that this kind of injury speaks for itself in the handicap it represents in the

struggle for survival.⁵ No jury should be permitted to deliberate on the issue of damages without a clear statement of the impairment of the life process which such injury implies.

If the law be a triumph of humanity over bestiality, then the agony of the plaintiff must be understood by the jury and full compensation must be rendered therefor. Thus, a mother lay in the gutter waiting for an ambulance full of fear and apprehension for the well-being of her family; a child is deprived of the opportunity to function with his contemporaries—no more ball playing, no gym classes, or dancing—a breadwinner is deprived of his manhood. It is flat and hollow to speak of a three-inch shortening of the leg or a twisted member of a body while ignoring the impact of the injury upon the life process. By way of example, envision the deprivation to a plaintiff of the opportunity to continue the one sporting activity in which he had participated—bowling. Here is a man who had led a completely undistinguished life. To be sure he was a responsible person who held a mediocre job, earned a mediocre living, but supported his family to the very best of his ability. The one spark, the one achievement which gave him personal pleasure and prestige before his family and the world was the high proficiency he had attained in this sport. He had won trophies; his picture had been in the newspaper on several occasions and he was the hub of a bowling community. Life is characterized by turmoil, conflict and disappointment. When a tortfeasor intervenes to eliminate a part of life that compensates for all the hardship, the jury must understand that full compensation must include payment for this tragic loss.

In preparing a summation spend the time to find out what kind of a person the plaintiff is—what makes him tick, what impact his injuries have had upon his design for life. All too often, attorneys get lost in a chamber of horrors when they contemplate the damage issue. Since the incidence of accidents does have a socio-economic aspect—a high percentage of accidents occur in groups of low socio-economic status because of the increased exposure to the hazards of accident—many plaintiffs present a picture of low special damages. Their earnings are low, therefore their loss of earnings are frequently low; they receive charity treatment at city hospitals so their period of

5. *Sweeting v. American Knife Co.*, 226 N.Y. 199, 123 N.E. 82 (1919).

confinement to a hospital bed may be short; they frequently depend upon outpatient care at a public hospital so their medical bills are frequently lower; they seldom employ special nurses; they rarely go to nursing homes during their period of recuperation and they certainly do not retain the services of high-priced specialists on a private visit basis. Nevertheless, none of this is important. If one's client has been permanently crippled and the summation places the plaintiff in the perspective of the underdog struggling for equality, the jury will not return a verdict which penalizes him for his low socioeconomic status.

One peculiar area of damage is found in the wrongful death case. Here the statute requires that the damage to the survivors be measured by the pecuniary loss sustained by reason of the wrongful death. But pecuniary damage has been given a humanitarian interpretation by the courts. Fair and just compensation for pecuniary injuries resulting from the decedent's death include: (1) The loss to his survivors of his care, guidance, advice, moral and religious training and the like (for death of a parent); (2) the potential advancement in the life of the deceased, the increased earning capacity in future years; (3) the life expectancy of the deceased and survivors; (4) his health; (5) his habits; (6) his qualities; (7) the number, age, sex and situation of those dependent upon him for support; and (8) his disposition to support his family. Any one of these variables may be successfully put forward as the basis for a substantial award for the death of a person who never reached membership in the affluence of this affluent society. If properly prepared and presented, a case in damages for wrongful death will yield a just verdict regardless of the station in life of the deceased. Take, for example, the case of a widow and one child of a thirty year old male who is earning one hundred dollars per week as a common laborer in the construction trades. His life expectancy is forty-one years according to the latest charts. Upon that basis if he died today his loss of earnings might well be forty-thousand dollars. However, his superiors may come to court to testify as to his abilities and capabilities, his diligence and effectiveness and his opportunity to proceed forward to other job categories based upon their observations and their expertise in having dealt with the promotion of laborers through the years. The progression in the wage scale may be mathematically determined so that

the current earnings of one hundred dollars per week can be projected at higher levels through future years. The jury under such circumstances will have before them figures which are considerable, but even this is only one element in the damage claim. He may have been a practicing Catholic, a member of several lay Catholic societies, a devoted father who accompanied his wife and child to church and gave them religious training and instruction at home. Even if his surviving child were four years of age, it is clear, and most juries are well aware of this, that the early years of childhood are of deep significance to the child. The jury may consider that the child and the widow were completely dependent upon the deceased for their support. They may consider the disposition of the deceased to support them.

When summation is made on these points of damage involving the wrongful death, is there any doubt that a heavy six figures in terms of just compensation for damages inflicted by a wrongdoer is a strong possibility? Thus, it is evident that even the pecuniary standard does not require the finder of fact to indulge in a process of bloodless bookkeeping. The unexpressed major assumption of the law is very simple: Human affairs are to be guided by principles of morality and are to be humane and it is the job of a good attorney to accomplish this in his summation.

CONCLUSION

In conclusion, the sum total of these comments may be set out in a few short words, the import of which should be an axiom for any attorney. That is: (1) cast doubt on the credibility of any evidence which is harmful to one's client and (2) present as much evidence as possible of the value of one's client and emphasize this in summation.

Expanding on this axiom, damages are the direct result of the belief of the jury in what has been presented to them and what they believe is a direct result of the energies or lack of same by the attorneys in the case. Thus, it is imperative that an attorney actively research his client's medical history, the law and the medicine regarding this type of injury, the client's station in life, as well as his personal, political, social and economic background. And most importantly, be sure that the jury is made aware of all these things.