

**CROSS EXAMINATION OF
NO FAULT SYMPATHETIC PLAINTIFFS**



Carl H. Green, Esq.
MOUNCE, GREEN, MYERS, SAFI & GALATZAN, P.C.
El Paso, Texas

AMERICAN LAW FIRM ASSOCIATION

Transportation Group Seminar
The Ritz Carlton
April 27-29, 2005
Amelia Island, Florida

CROSS EXAMINATION OF NO FAULT SYMPATHETIC PLAINTIFFS

The fact pattern in this case is a challenge for the defense. We have non-sympathetic Defendants, a truck driver and a trucking company, coupled with a Plaintiff driver who is not at fault for the incident. Although the Plaintiff driver in our scenario operated a motorcycle, that may not be an adverse factor for the Plaintiff in light of our liability circumstances. Additionally, the damage factors are inflammatory. We are presented with a young man in a wheelchair with a young wife and child. Such circumstances can create angry jurors and substantial exposure. The defense has the challenge of defusing this anger and attempting to focus the jury on a reasonable and reasoned resolution of the damages issue. The defense of the damages commences with pre-trial discovery and investigation. Through pre-trial discovery and investigation, a cross examination of the Plaintiff can be prepared which may help contain the anger and sympathy that competent counsel for Plaintiff will fuel.

1. **Pre-trial Investigation and Discovery:** In catastrophic circumstances, a complete investigation of the pre-accident and post-accident history of the injured Plaintiff and his family must be obtained.

This includes an investigation of the relationship/marital history of the couple. In our world, divorce and separation are commonplace. The investigation and discovery may show a marriage on the ropes that is now suddenly unified as a result of the tragedy. How this is handled is problematic. Hectoring a husband or wife with prior bad acts can actually increase the anger and provide further sympathy for the Plaintiffs. Professor Albert Jones of the University of Texas School at Law, a well experienced defense and plaintiff attorney, always reminded his trial procedure class that:

“The worst whipping I ever took was when I **ALMOST** proved the Plaintiff was a prostitute.”

A defense attorney examining a sympathetic Plaintiff must know the complete story of the marital and family relationship for purposes of an effective cross-examination. The practitioner will also want to know the history of the family. Did they take regular vacations? Did they participate in frequent activities demonstrating a close and meaningful relationship? The Plaintiff’s counsel will attempt to demonstrate a pre-incident history of a devoted and loving couple participating in many family activities. The defense must know whether this picture is accurate. Even if it is, the defense can use the “strong” relationship to show the future support and care the injured party will receive.

Obtaining information from neighbors and co-workers can also create problems as well as provide opportunities for obtaining meaningful information. In a catastrophic circumstance, most neighbors and co-employees will be very sympathetic to the Plaintiff’s position absent extraordinary circumstances. How such persons are approached by defense investigators can also cause problems. The Plaintiff will attempt to portray such activities as “digging for dirt” and “spying” on the victims. On the other hand, valuable information relating to pre and post accident activities may also be obtained. Such investigation must be handled very carefully and with reasonable concern and sympathy demonstrated to the Plaintiffs. In other words, neighbors and co-workers should not be questioned along the lines of: “Can you tell me any bad things about the Plaintiff?” You may be able to ascertain information relating to normal everyday activities that are pursued by the injured person even if that person is confined to a wheelchair. For purposes of cross-examination, you will want to demonstrate that the husband and wife, notwithstanding the incident, are participating in a number of normal everyday activities. Pre and post checking account and credit card records may

demonstrate post accident normal activities and pursuits. Plaintiffs will usually object to the provision of such information and the defense should be prepared to explain its relevance and legitimate discovery purpose. The defense will also want to ascertain criminal/arrest records, prior divorce/marital history and prior employment information on jobs held and reasons for termination or separation from employment.

Careful consideration should also be provided to retaining a rehabilitation expert/life care planner to actually conduct a home study. Such an expert, either by agreement or by order of the Court, can interview the family and ask detailed questions about the activities and abilities of the injured person. This can also provide substantive information for the cross-examination of the family. It may also be very beneficial to have a focus group or mock jury review different approaches on cross-examination for purposes of obtaining further information on how best to approach the damages in a particular case.

2. **Pre-Trial Strategy:** For purposes of setting up an appropriate cross-examination of no fault Plaintiffs, careful consideration must be provided to admitting liability/responsibility for the incident. This can be used in cross-examination by having the Plaintiffs acknowledge that the Defendants are accepting responsibility for the incident and that the Plaintiffs understand that Defendants regret the circumstances that exist. If a Plaintiff can acknowledge that the Defendants are demonstrating remorse, that may help defuse the anger that can permeate these cases. Such questioning should be brief. Over emphasizing Defendant's acknowledgment of responsibility and remorse may appear as pandering to jurors. The determination to admit liability should be made well in advance of trial or the Plaintiffs' counsel will assert that "the Defendants waited until the last minute to accept responsibility for this tragedy."

3. **Know Your Audience:** The defense must know the demographics of the jurisdiction where the trial occurs. Many of the points made in this paper are based on jury experience in El Paso County, Texas. Tactical considerations on the approach to cross-examination of no fault sympathetic Plaintiffs may involve different considerations in different jurisdictions. For example, fewer than one in five people show up for jury service in Dallas and Houston, Texas.¹ Texas jurors in most jurisdictions are paid \$6.00 per day. A Texas employer may not terminate a person who attends jury service, but the employer does not have to pay the employee's wages while the employee is attending jury service. As a result, in some large metropolitan areas, such as Dallas and Houston, Hispanics, African Americans, young adults and low income hourly wage earners are substantially under-represented.² However, in El Paso County, jurors are paid \$40.00 per day for jury service. This is one of the better paying jobs in El Paso County, Texas. As a result of this increase in pay, the show up rate for jurors in El Paso increased from 22% to 46%.³ The largest employers in El Paso are the federal, state and local governmental entities. Many of these people have an "entitlement mentality." Additionally, the median income in El Paso is 2/3rds that of the rest of the state and nation. The jury pool consists of government employees, low to no income citizens and is predominantly Hispanic since Hispanics constitute approximately 80% of the population of the county. The juror information form provided before voir dire in El Paso cases will inform counsel of the occupation of the prospective juror. In many instances, individuals will list their occupation as "disabled" since

¹Are We Getting A Jury of Our Peers? Bob Walters, Michael Marin and Mark Curriden; Texas Bar Journal, Volume 68 No. 2, Page 144 (February 2005).

²Id. at 145.

³Id. at 146.

disability is considered a form of employment by many people in El Paso. Such prospective jurors must be carefully scrutinized as many of them have already assumed the role of a “victim.” A Houston or Dallas jury pool is markedly different from an El Paso venire panel. It is vitally important to the defense of catastrophic cases to retain competent local counsel who understand their jury demographics and trends.

4. **Cross-Examination of Sympathetic Plaintiffs:** As a general rule, the injured person or the spouse of the injured person will be passed for cross-examination after a very sympathetic direct examination that will emphasize the devastating results of the “tragedy.” The jury will probably have been confronted with photographs of the happy days, lengthy narrations on the meaningful and fulfilling relationship that existed, the impact of the accident on that relationship, the brave stance that both the injured person and the spouse/family are taking, and the unknown and frightening future that the family must confront. It is the defense attorney’s job to demonstrate what normal and usual activities the family can complete and what effective assistance they have received for purposes of dealing with the catastrophic injury. Defense attorneys cannot be heavy handed in this area. Few points will be scored by demonstrating to the jury that the lucky victims can park closer to the stadium and the mall as a result of the incident. But, you can score points by demonstrating the family continues to go to the ball games, malls and enjoys out of town vacation trips. In El Paso, working class jurors place significance on vacation trips when reviewing quality of life issues. The following tips are not exclusive. Each case will present its own circumstances.

- a. **Be prepared for tears:** It is not uncommon for the spouse and family of the injured victim to cry or otherwise demonstrate extreme emotion during the cross-examination. Some judges may not permit such circumstances and may recess the

proceeding. How “over-emotional” circumstances can be resolved should be a topic of the pre-trial conference. If the judge does not intercede and the witness cannot obtain control, the defense attorney should request a recess. Over-crying and exaggerated emotion can sometimes backfire for Plaintiffs. It is the single tear that does the most damage.

- b. **Do Not Sweat the Small Stuff:** There may be minor inconsistencies or discrepancies in testimony of the injured party or the spouse/family. If a major contradiction, fabrication or otherwise incredible change or exaggeration in testimony does not occur, berating the injured no fault Plaintiff or the family on minor matters will only increase the anger level. If there is solid impeachment evidence, it should be demonstrated professionally, politely and in a manner where the witness is afforded the opportunity to correct the record so that the truth may be known. As a general rule, more points will be scored with professionalism rather than hostility in the catastrophic injury case.
- c. **Acceptance of Responsibility:** If the opportunity presents itself when liability is admitted by the defense, you should obtain recognition from the injured Plaintiff and the spouse that the Defendant recognizes its responsibility and the Plaintiff acknowledges their understanding of this recognition and acceptance of responsibility.
- d. **Humanize the Defendant:** If the opportunity presents itself, attempt to demonstrate through the Plaintiffs that the Defendant driver at the scene showed concern and demonstrated humanity. This can be done through evidence of the driver rendering

aid at the scene, immediately calling for assistance, attempting to comfort the injured Plaintiff or any other acts that show appropriate behavior. If the Defendant driver was injured, a brief examination on that fact can be used to demonstrate that the Defendant driver's life was impacted and that the incident was an "accident" rather than an act of malice or recklessness.

- e. Attempt to focus on the normal everyday activities that the Plaintiffs experience.
 - f. Attempt to focus on the concern and support of the non-injured spouse is providing her husband and the continued strength of the marital and family relationships.
 - g. Attempt to focus on the continued benefits that the children are receiving from the injured Plaintiff including care, comfort and guidance.
 - h. With regard to pain and suffering, attempt to demonstrate that the injured Plaintiff is no longer taking pain medication or that such pain medication has been significantly reduced. If the Plaintiff is only taking over the counter-medication, discuss the type of medication taken and how often it was required. Many of the jurors may use similar medication and that may provide some insight into the Plaintiff's actual pain and discomfort.
-
- i. With regard to mental anguish, in many cases there is an absence of or very limited demonstration of mental health counseling by mental health professionals. This can be the focus of a few brief questions on the counseling issue.⁴

⁴Psychologists have created a cottage industry on traumatic stress and injury. There is now in existence an industry group called The American Academy of Experts in Traumatic Stress. (See its website at info@crisisinfo.net.) If such an expert has been hired, the defense cross-examination of the "victims" must concentrate on rebutting some of the psychological assessments.

j. Focus on what activities the injured Plaintiff thinks he can complete or is completing. This is again to demonstrate that the injured Plaintiff is involved in many normal daily activities that are experienced by non-injured persons such as reading, watching television, attending movies, interaction and conversations with other persons, interaction with children, church, and club participation if applicable. (American Legion, VFW, Rotary, etc.) If the injured party did not participate in such activities before the accident, the jury should receive information on such circumstances. To the extent permitted, ascertain if the injured Plaintiff is disabled by governmental standards relating to physical impairment such as ratings issued by the Veterans Administration or Social Security Administration. Some jurors will appreciate the social security implications and it is a method of indirectly demonstrating a collateral source of income received by the Plaintiffs without asking if such benefits are received. If no such impairment rating exists, some jurors may question the extent of the impairment claimed. Expect serious objections from the Plaintiffs on these issues.

k. **A Good General Knows When to Retreat:** Get in and get out. Lengthy cross-examinations of injured no fault victims will only lead to larger damages if the jury feels the defense attorney is wasting their time and subjecting the “victim” to an unnecessary examination.

CONCLUSION

In the catastrophic injury case, a defense plan relating to the approach on damages must be formulated at the outset of the case, not during the trial. The defense must make appropriate decisions on investigation, discovery and tactical issues. Two excellent secondary sources on handling the catastrophic injury are:

1. The Catastrophic Accident: It Could be Worse, ALFA Transportation Practice Group Seminar (2002).
2. Attacking Damages in the Catastrophic Injury Case, J. Ric Gass, For the Defense - DRI, March, April, May 2003.