Preparing and Trying a Soft Tissue Injury Case

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Special thanks to Ronald Farabaugh, D.C. for the attached position papers. View more at www.chirocolumbus.com.

Keith Karr is the founding principal of Karr & Sherman Co., LPA. Mr. Karr has published many articles including "Chiropractors are Experts," Ohio Trial; "Is It Worth the Price of the Paper on Which It is Written? The Validity of Medical Providers Assignments," Ohio Trial, Summer 2005; "Ethically Complicated Disbursements: New Ohio Rules of Professional Conduct Add Ethical Duties toward Third Parties," Ohio Trial, Spring 2007; and an online article published by the Ohio Foundation of Chiropractic: "Doctors Beware: Unauthorized Practice of Law before the Ohio Industrial Commission," Winter 2007. Karr & Sherman Co. LPA is currently the general counsel for The Ohio State Chiropractic Association. Mr. Karr is a frequent lecturer for the National Business Institute and the Ohio Foundation of Chiropractic. The speaker would like to personally extend his gratitude to his Senior Law Clerk, **Jim Coutinho,** for his valuable insight in preparing for this seminar.

A. Juries

a. Jury trial or Nonjury trial

i. Jury Demand. A demand for a jury trial must be served in writing not later than fourteen days after the service of the last pleading directed to that issue. Civ. R. 38(B). General practice is to include the jury demand in the complaint. The phrase "Jury Demand Endorsed Hereon" must appear in the caption of the case. Civ. R. 38(B).

ii. Factors to consider when choosing between Jury or Nonjury trial

1. Consider the Judge
    a. Training/background knowledge
    b. Personal traits
    c. Previous rulings
2. Consider the case
    a. Strengths/weaknesses on factual v. legal matters
    b. Strength/weakness/complexity of evidence
    c. Strength/weakness of witness testimony
    d. Extent of damages
3. Consider everything else
    a. Differences between forums

b. Calendar considerations

c. Costs

iii. Ethical Considerations

1. Under the new Rules of Professional Conduct 1.2 and 1.4, an attorney is responsible for keeping the client informed of how the adjudication of his claim proceeds. An attorney must "reasonably consult with the client about the means by which the client's objectives are to be accomplished" Prof. Cond. Rule 1.4(B)

2. Attorneys should consult with their client on whether to have a jury or nonjury trial. Written informed consent is always good to obtain

b. Jury Selection – Voir Dire and Jury Questionnaires

i. Goals of Voir Dire

1. Ideally, a jury will be unbiased, impartial and unprejudiced. However, since that is next to impossible given human nature, the main goal of Voir Dire is to guarantee that the biases and prejudices of the juror help your case. *Civil Rule 47(A)*

2. Try and ensure that the juror will make up his or her mind only on a basis of the law and evidence presented in the case, not by any personal prejudices brought into court with them.

ii. Preparation

1. Find out from the court when the jury questionnaires will be available for pickup.

2. As soon as possible, review all of the jury questionnaires. A form used to classify potential jurors will be helpful in quickly determining who you want and don't want. You may not have much time to do this, so be prepared to work fast.

3. Know how the judge will handle voir dire. Know whether you question the potential jurors individually or as a group.

4. Create and practice your voir dire questions well ahead of the actual date of the trial. Use a staff member, or other person as a practice jury member.

iii. Best Practices and Other Information

1. Understand the rules regarding and be prepared to make any necessary challenges for "good cause." Use this when the juror is shown to have a bias, prejudice or partiality on one of the central issues to the case. *RC §§ 2313.42(A) – 2313.42(J)*

2. Use your peremptory challenges wisely. Remember that removing one juror will make the next juror in line become a member of the jury or an alternate. Examine both jurors carefully to ensure you are making the wisest choice. *Civil Rule 47(B)*

iv. Questions and issues to place before potential jurors

1. ***Ohio Constitution Article I Sec. 16***: All of us have a constitutional right to bring a claim for compensation from a personal injury as provided by our own Ohio Constitution—Do you all agree with this basic concept of fairness and due process?

    a. All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law. *Ohio Const. Art. I §16*

2. ***Freedom of choice of medical providers***: In this case, Defendant has hired some one other then the treating doctor to give an opinion as the extent of treatment should be, even if one is still in pain. This is similar to when your own HMO's deny your treatment contrary to your request. Do you believe that when appropriate medical treatment is necessary, everyone should have the freedom of choice for that treatment?

3. ***Tort Reform question for juror***: I am sure you have heard about frivolous lawsuits and tort reform. No one believes that Judge Judy would allow a frivolous suit to trial do they? Especially dealing with full and fair compensation for shoulder surgery and chronic neck pain. Mr. Juror, do you think Judge Judy would allow that?

4. ***Personal prejudice question*** – Ms. Brown is obviously African American. We all have our own personal prejudices whether they deal with food, clothing, color of hair or the color of one's skin. Obviously, this should have no bearing on your verdict. Does every one agree?

5. ***Money Questions***

    a. Can I assume that no one, as you sit here today, has any idea of a value that should be placed on a tear of the labrum (rotator cuff and chronic severe neck spasms another person)? Would you agree with that Miss Juror? Is that a fair statement?

    b. Does everyone realize that as inadequate as it may seem, the only way the American Civil Justice System compensates a victim of an automobile collision for a surgically repair shoulder and severe acute and chronic neck injury is by money. Does everyone realize that?

c. We cannot make Jane's shoulder and neck like it was prior to the June 13, 2001, collision. The only remedy that the law provides to her is an award of monetary damages for their loss. Do you all agree with this concept of basic fairness?

B. The Basics of an Opening Statement

a. Goal of the Opening Statement

i. The opening statement is the initial presentation of the plaintiff's case to the jury. It is an important first impression on the jury members. *R.C. 2315.01*

ii. Counsel should make sure the jury knows the purpose of the opening statement as well: to set an outline of the factual evidence to be heard at trial. The Jury will hear the basic case and facts for the first time; the opening statement is an outline that will help them understand the witness statements and exhibits at trial.

iii. The opening statement also presents for the first time the "theme" of the trial. All of the statements made through the opening statement, direct and cross-examinations, and closing statements should point to the central argument by the plaintiff. The opening statement should be used wisely in relaying that theme.

b. Preparation

i. The preparation for an opening statement can and should start as early as the investigation stage of the case. This early preparation should focus on finding the ***theme*** for the opening statement, and subsequently, the trial.

ii. Examine all of the documents, witness statements, depositions, photographs and other evidence in preparing an opening statement. Ensure that the evidence in the case and the opening statement match each other in content.

iii. Preparation of an opening statement should not be left to the night before trial. It is an important aspect of litigation that should be carefully and dutifully created over the course of the pre-trial litigation.

iv. Preparation of an opening statement will lead to the unearthing of holes and inaccuracies in many cases. Use the preparation of your opening statement to find and fill potential holes in the cases. If there are negative aspects of your case, it is imperative that you explain them and **not** defense counsel. Trial preparation checklists can help with this.

c. Best Practices and Other Information

i. Be careful in the opening statement not to give any unwanted admissions to the opposing party about the case. Listen carefully to opposing counsel's opening statement for any admissions.

ii. Do not exaggerate any of the facts of the case.

iii. Without misstating or exaggerating facts, be dramatic and forceful towards your cause. A well-thought-out theme is essential to making your opening statement "stick."

iv. Do not hesitate to use evidence in your opening statement. Pictures, charts, and diagrams can be especially helpful. Be extra careful though to use evidence that you are sure to use evidence that will be subsequently identified at trial and introduced into evidence. You might want to get court approval of the exhibits prior to your opening statement.

v. Timeline is an excellent tool for a jury to understand your case. The Facts speak for themselves.

vi. Avoid improper arguments that are outside the scope of the case or present prejudicial and inadmissible matters.

C. Presentation of Evidence

a. Preparation

i. Ensure that all exhibits are marked with the appropriate form of identification. Provide a list of the exhibits to the court and opposing counsel.

ii. A tabbed notebook of all of the exhibits may be extremely helpful when lots of pictures or documents are involved.

iii. With each exhibit, be sure that you are prepared to authenticate and identify the item.

b. Best Practices and Other Information

i. If there is a particularly controversial piece of evidence (such as a gory photograph), show it to the judge and opposing counsel prior to the trial. This will avoid unnecessary and potentially embarrassing delays in the trial.

ii. Know and understand the rules on evidence authentication. Be prepared with copies of the evidence, especially when the evidence is a blown up item used in a demonstration.

D. Demonstrative Evidence

a. Preparation

i. Blowups of exhibits should be prepared long before the trial date.

ii. Have your experts review the demonstrative evidence for accuracy and usefulness.

iii. Ensure that your computer equipment and projectors are running properly. A "dry run" of the presentation is essential.

iv. Use an associate to help with the presentation of evidence (such as for advancing between slides). Rehearse the presentation.

v. Ensure that the courtroom has the proper hook-ups for your equipment

b. Best Practices and Other Information

i. Computer programs are available that assist greatly in the presentation of evidence. A program called "Sanctions" can be used to create a polished and professional display.

ii. Tape and video recording can be especially useful in cross-examination. For example, in the Darling case, cross examination was obtained by pointing to a video and saying "isn't it true that you said this," which was then followed by a clip of the witness's video deposition.

E. The Direct and Cross of Treating Physician

a. Goal of the Direct and Cross of Treating Physician

i. The goal in examining the treating physician is to analyze the data presented with reliable procedures and opinion to help the layperson jury understand the extent of the injury.

ii. Counsel must show that the expert opinion is needed, that the expert has the special skill and knowledge needed to give his opinion, and that the expert uses a sound and rational system to perform the evaluation.

b. Preparation

i. Like any other witness, the preparation of an expert like a treating physician must start well before the trial.

ii. Review the expert's written opinions and deposition to ensure that you are familiar with what they plan to say.

iii. It will be helpful to get background information on your expert and perhaps read past opinions to ensure high quality.

c. Best Practices and Other Information

i. Examine potential weaknesses in the expert's testimony and address them where needed. Look at the questions you would normally pose to discredit another expert and make sure to tackle those concerns.

F. The Cross-Examination of the Defense Doctor

a. Goal of the Cross-Examination of the Defense Doctor

i. The main goal of the cross-examination of the defense doctor is to isolate and nullify the adverse testimony.

ii. Try to obtain admissions from the defense doctor that can both help your case and discredit his own examination of the plaintiff.

iii. The defense doctor will try to deny that there were injuries, that the injuries were extensive, that the injuries were caused by the defendant's conduct, or that if there were injuries, the effects were minor. Counsel should focus on minimizing the effect of this testimony.

b. Preparation

i. Most defense doctors will have prepared their report on the plaintiff some time in advance of the trial. Prepare your cross examination from that report, as well as by using the reports of your own examiners.

c. Best Practices and Other Information

i. Cross-examination of an experienced professional witness will differ greatly from an inexperienced one. Do not allow for an experienced expert witness to restate or repeat what he said on direct examination.

ii. Expert witnesses will often dodge the question to digress about direct testimony. Counsel must establish control over the witness early to prevent the witness from talking to the jury on tangents.

iii. Look for and point out potential sources of expert bias, including the exorbitant fees for testifying, friendship with the attorney who called him, or exposing prior testimony for the same defendant on the same types of issues.

iv. Start early with subjects that will place the expert in a defensive posture. Challenge the expert's objectivity

v. Treat the examination of an inexperienced witness differently than an experienced one. Challenge them on the basis for their opinion, their preparation for the opinion and the ability of that opinion to hold up against other expert opinions.

G. Direct and Cross-Examination of Witnesses

a. Direct-examination

i. Goal of Direct-examination

1. The overall goal of direct examination is to have the witness state the facts that are helpful to your case.

2. If may be helpful to identify any potential points for cross-examination by opposing counsel and discard them quickly on direct.

ii. Preparation

1. The starting point for direct examination is the theme of the case. Look to the goals of your case-at-large and establish what you specifically need to gain from each witness.

2. Refer to the witness statements and deposition of the witness when preparing for the direct.

3. Coordinate the direct examination of one witness with that of the others. Ensure that the questions will lead to consistent and helpful answers. Use your time efficiently; make sure you have prepared to get the evidence from the best and most reliable source

iii. Best Practices and Other Information

1. Familiarize yourself with the rules regarding the forms of questions. Leading questions are normally not allowed on Direct examination, but you may be allowed to use leading questions on direct against a hostile witness.

2. Be sure to know the rules of and prepare yourself for the potential need to refresh a witness's recollection.

3. Know the Risk Factors that are important for trying your case. See the attached articles by Dr. Ronald Farabaugh

b. Cross-examination R.C. §2317.37

i. Goal of Cross-Examination

1. Have the witness confirm crucial facts of the case

2. Gain admissions from the witness concerning liability or damage issues

3. Have the witness contradict other witnesses on factual or opinion matters

4. Impeach the witness

5. Advance an alternative theory of fact

6. Attack the credibility of a witness, i.e., that the witness is not telling the truth

7. Show that the witness has a bias or is prejudiced

8. To establish elements in plaintiff's case by getting the witness to admit certain facts

9. To show that the witness is incompetent

ii. Preparation

1. Naturally, the beginning points for cross-examination is during discovery. Look to the witness depositions for facts that you wish to bring out at trial. Mark possible inconsistent statements that might be used for impeachment.

2. Create and study a deposition summary for each witness. The witnesses will be better prepared at trial; ensure that you are as well.

3. Pay attention to the direct examination of the witness. Statements made on direct that might contradict the witness's deposition are important to note and confront on cross-examination.

iii. Best Practices and Other Information

1. Stand in a place that will ensure that all of the attention is on the cross-examiner, and not the witness. Keeping both the witness and jury focused on you will help to emphasize the questions you are asking.

2. Use your ability to lead on cross-examination to contain the witness's statements; ask not for a restatement of the facts from the witness, but for an agreement or disagreement to the facts you just stated.

3. Focus on each witness to identify ways to discredit or otherwise subvert his testimony. Things like the inability for the witness to really observe the incident, prior inconsistent testimony, a financial interest in the case, or potential bias can help to reduce the impact of an adverse witness.

4. With evasive witnesses, ask simple questions that may be answered with a yes or no. When an evasive witness continues to refuse those simple answers, he will hurt his credibility with the jury.

5. Know the Risk Factors that are important for trying your case. See the attached articles by Dr. Ronald Farabaugh

iv. Statutes:

1. RC §2315.01 – Trial Procedure

2. RC §2317.07 – Examination by deposition or interrogatory, rebuttal
3. RC §2317.37 – Cross-examination by adverse party
4. Evid. R. 405 – Methods of proving Character
5. Evid. R. 407 – Subsequent Remedial Measures
6. Evid. R. 607 – Who May Impeach
7. Evid. R. 611 – Mode and order of interrogation and presentation
8. Evid. R. 613 – Prior statements of witnesses

H. Proving Economic and Non-Economic Damages

a. Goal of Damage Provisions Generally

i. The main goal of damage provisions generally is to put the plaintiff who suffered loss back in the same position he was in prior to the act.

b. Ohio Wrongful Death Statute: See attached document.

i. (B) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

1. (1) Loss of support from the reasonably expected earning capacity of the decedent;
2. (2) Loss of services of the decedent;
3. (3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;
4. (4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;
5. (5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

c. Economic Damages

i. For economic damages, the jury may consider permanent injuries, expenses incurred, loss of time and loss of earning capacity.

ii. Need may arise for the use of economist in examining what the economic damages are

iii. Collateral Benefits, R.C. 2315.20

1. The General Assembly has modified the collateral source rule through the enactment of R.C. 2315.20, effective April 7, 2005. The statute allows the defendant in any tort action to "introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury…" R.C. 2315.20(A).

2. The statute excludes the introduction of evidence if the source of the collateral benefits "has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurances payment or a disability benefit." *Id.*

3. This statute was enacted on the heels of twenty-one other states enacting statutes aimed at limiting the collateral source rule.

iv. *Robinson v. Bates* (2006), 112 Ohio St.3d 17, 857 N.E.2d 1195.

1. The court noted the enactment of R.C. 2315.20, however, it found that the statute did not apply because it became effective after the cause of action accrued and after the complaint was filed.

2. Background: Tenant who injured her foot when she fell in driveway of her residence brought negligence action against her landlord. At trial, Robinson proffered her medical bills of $1,919. She also stipulated that the insurance company had negotiated the amount down to $1,350.43 as payment in full. The conflict between the trial court and the Court of Appeals revolved around whether the original bills should have been admitted. The trial court held that only the amount *actually paid* by the plaintiff was payment in full. The Court of Appeals reversed, relying on the collateral-source rule to allow Robinson to seek recovery of the entire original bill amount.

3. The court held that the original medical bills are admissible into evidence because R.C. 2317.421 makes bills prima facie evidence of the reasonable value of charges for medical services. Further, allowing the original bill allows the jury to determine more accurately the extent of the injuries; the actual amount billed is more reflective of the actual value of the services rendered, which juries often use as a benchmark in deciding the seriousness of the injuries.

4. The court held that the collateral-source rule does not apply to write-offs of expenses that are never actually paid. "Because no one pays the write-off, it cannot possibly constitute payment of any benefit from a collateral source." *Robinson* at 23.

5. Finally, the court held that it is the jury's job to decide if the "reasonable value of medical care is the amount originally billed,

the amount the medical provider has accepted as payment, or some amount in between." *Robinson* at 23.

6. The Supreme Court's decision brings to light new questions as to how determination of reasonable medical expenses should be found at trial. Because the defendant can bring into evidence the amount actually paid for the services, it may now be necessary to examine hospital officials to determine if the contractual amount negotiated down by the insurance companies is truly reasonable.

7. It may also be necessary for the defense to prove that the provider has "written off" the balance remaining. If the defense just submits the amount paid by insurance without more, it will still appear to the jurors that the plaintiff owes the rest.

8. There is also an incentive now to have the subrogated health insurance provider negotiate its own claim. Joining the subrogated interests in the action is an option: make them prove their own bills. Joining the third parties will prevent Plaintiffs from having to work for the insurance companies' benefit.

d. Non-Economic Damages

i. For non-economic damages, the jury may consider lack of family support, loss of consortium, loss of earning capacity of an emancipated minor.

ii. Generally, non-economic damages may only be proven through the use of witness testimony.

iii. Pain and suffering cannot be ignored. Be prepared to explain Acute and chronic pain and how it effects your client's life.

iv. Close family members can be put on the stand to testify as to how their life has been impacted by the loss of a loved one.

v. Beware of opposing counsel's effort to dismantle damages claim by saying that the family members eventually moved on regardless – loved one was still injured/killed.

e. Non Death Personal Injury Case, Examine The Following Examples Of Damage

i. Medical specials

ii. Future Medical specials

iii. Lost wages

iv. Future lost wages

v. Miscellaneous cost

vi. Acute Pain

vii. Chronic Pain-permanency

f. The Make-Whole Doctrine and the Lawson Decision

i. The make-whole doctrine is a "general equitable principle of insurance law that, absent an agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries." *Barnes v. Indep. Auto. Dealers Assn. of California Health & Welfare* (C.A.9, 1995), 64 F.3d 1389, 1394. The insured must be "made whole" prior to the insurer's recovery.

ii. In Lawson, *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson* (2004), 103 Ohio St.3d 188, a health insurer brought an action against its insured for reimbursement of benefits given after the insured recovered an amount from the tortfeasor. Despite the fact that the amount recovered by the insured was not enough to make her whole, the insurance company claimed a right of subrogation and a priority to the money due to language contained in the insurance agreement. The court allowed the insurer to recover against the insured, relying on general contract principles to uphold the clause in the insurance contract.

iii. The Lawson decision essentially allows insurance companies to bypass the make-whole doctrine through additions to their insurance contracts.

iv. The Supreme Court held that "a reimbursement agreement between an insured and a health-benefits provider clearly and unambiguously avoids the make-whole doctrine if the agreement establishes both (1) that the insurer has a right to a full or partial recovery of amounts paid by it on the insured's behalf and (2) that the insurer will be accorded priority over the insured as to any funds recovered." *Id.*

I. Delivering a Powerful Closing Argument

a. Goals of the Closing Argument

i. The main goal of the closing argument is to once again define the major issues and reinforce the evidence presented at trial. *R.C. 2315.01*

ii. The Closing argument should relate to the theme used throughout the opening statement and the trial itself to give completeness and closure to the case

b. Preparation

i. Preparation for the closing argument should occur simultaneously with the preparation of the opening statement and the rest of the case. This is not work to be done on the last day of the trial; rather, it is a task that is as involved and as important as anything else in the trial.

ii. During the course of the trial, it is quite important that you take notes of what to mention in your closing argument. If the opposing counsel, for instance, made an important admission during the course of the trial, you will want to work that into your prepared remarks.

iii. Review your opening statement and other trial notes prior to giving your closing argument. Make sure to connect all of the elements of your case and stick to the standard theme.

iv. Be prepared to make a thorough closing argument – do not save anything for rebuttal that should be said initially.

v. Review the jury instructions and emphasize any that you particularly want the jury to pay attention to.

vi. Be sure to have a complete list of damages for presentation to the Jury at this time.

vii. Prepare your presentation in front of others for practice. Ensure that you are not talking to fast. Watch your posture and hand movements. A good verbal presentation is essential.

c. Best Practices and Other Information

i. Be prepared to request curative instructions for the jury and object to improper closing statements by opposing counsel. Failure to do so at this time will waive appeal on those issues.

ii. Remind the jury of the basics of each element of the case; this can be an extension of your recurring theme.

iii. Do not expound endlessly on evidence that has already been presented thoroughly to the jury. Come to conclusions of what the evidence was presented to prove.

iv. Make the main point of your closing argument early – do not force the jurors to listen to an endless diatribe that has little meaning to the big picture.

v. Examine your case from the juror's point-of-view: try to satisfactorily answer the questions that a non-aligned party would have at the end of a trial. Address those concerns in your closing.

vi. Do not be afraid to use demonstrative evidence. Diagrams, Charts, Pictures, enlarged transcripts and other demonstrative aids can be used.

d. Rebuttal

i. Use the rebuttal as a short and succinct opposition to the defendant's position. *R.C. 2315.01*

ii. Examine the inaccuracies of the defense's argument. Do not, however, rebut every single argument that was put forth. Choose the important items to highlight.

J. Post-Trial Relief

a. Post Judgment Interest

b. Appeals Deadlines

c. Proposed Entries

d. Jury Interrogatories

e. Post-Trial Negotiation to avoid appeals

- **Chapter 2125. Action for Wrongful Death (Refs & Annos)**

1. 2125.01 Civil action for wrongful death

- When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.

- When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

- The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance of such cause of action.

2. 2125.02 Proceedings; damages allowable; limitation of actions; statute of repose for product liability claims; abandonment of deceased child; definitions

- (A)(1) Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. A parent who abandoned a minor child who is the decedent shall not receive a benefit in a civil action for wrongful death brought under this division.

    - (2) The jury, or the court if the civil action for wrongful death is not tried to a jury, may award damages authorized by division (B) of this section, as it determines are proportioned to the injury and loss resulting to the beneficiaries described in division (A)(1) of this section by reason of the wrongful death and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

    - (3)(a) The date of the decedent's death fixes, subject to division (A)(3)(b)(iii) of this section, the status of all beneficiaries of the civil action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action.

        - (b)(i) In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

            - (ii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence of the cost of an annuity in connection with an issue of recoverable future damages. If that evidence is presented, then, in addition to the factors described in division (A)(3)(b)(i) of this section and, if applicable, division (A)(3)(b)(iii) of this section, the jury or court may consider that evidence in determining the future damages suffered by reason of the wrongful death. If that evidence is presented, the present value in dollars of an annuity is its cost.

            - (iii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence that the surviving spouse of the decedent is remarried. If that

evidence is presented, then, in addition to the factors described in divisions (A)(3)(b)(i) and (ii) of this section, the jury or court may consider that evidence in determining the damages suffered by the surviving spouse by reason of the wrongful death.

- (B) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:
    - (1) Loss of support from the reasonably expected earning capacity of the decedent;
    - (2) Loss of services of the decedent;
    - (3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;
    - (4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;
    - (5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.
- (C) A personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of a civil action for wrongful death, may settle with the defendant the amount to be paid.
- (D) (1) Except as provided in division (D)(2) of this section, a civil action for wrongful death shall be commenced within two years after the decedent's death.
    - (2)(a) Except as otherwise provided in divisions (D)(2)(b), (c), (d), (e), (f), and (g) of this section or in section 2125.04 of the Revised Code, no cause of action for wrongful death involving a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.
        - (b) Division (D)(2)(a) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

- (c) Division (D)(2)(a) of this section does not bar a civil action for wrongful death involving a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the decedent's death, has not expired in accordance with the terms of that warranty.

- (d) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section but less than two years prior to the expiration of that period, a civil action for wrongful death involving a product liability claim may be commenced within two years after the decedent's death.

- (e) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, a civil action for wrongful death involving a product liability claim may be commenced within two years after the disability is removed.

- (f)(i) Division (D)(2)(a) of this section does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is a substance or device described in division (B)(1), (2), (3), or (4) of section 2305.10 of the Revised Code and the decedent's death resulted from exposure to the product during the ten-year period described in division (D)(2)(a) of this section.

    - (ii) If division (D)(2)(f)(i) of this section applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death based on a cause of action described in division (D)(2)(f)(i) of this section shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

- (g) Division (D)(2)(a) of this section does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is a substance or device described in division (B)(5) of section 2315.10 of the Revised Code. If division (D)(2)(g) of this section

applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death based on a cause of action described in division (D)(2)(g) of this section shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

- (E)(1) If the personal representative of a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from a civil action for wrongful death or if any person listed in division (A)(1) of this section who is permitted to benefit from a civil action for wrongful death commenced in relation to a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from the action, the personal representative or the person may file a motion in the court in which the action is commenced requesting the court to issue an order finding that the parent abandoned the minor and is not entitled to recover damages in the action based on the death of the minor.

    - (2) The movant who files a motion described in division (E)(1) of this section shall name the parent who abandoned the deceased minor and, whether or not that parent is a resident of this state, the parent shall be served with a summons and a copy of the motion in accordance with the Rules of Civil Procedure. Upon the filing of the motion, the court shall conduct a hearing. In the hearing on the motion, the movant has the burden of proving, by a preponderance of the evidence, that the parent abandoned the minor. If, at the hearing, the court finds that the movant has sustained that burden of proof, the court shall issue an order that includes its findings that the parent abandoned the minor and that, because of the prohibition set forth in division (A)(1) of this section, the parent is not entitled to recover damages in the action based on the death of the minor.

    - (3) A motion requesting a court to issue an order finding that a specified parent abandoned a minor child and is not entitled to recover damages in a civil action for wrongful death based on the death of the minor may be filed at any time during the pendency of the action.

- (F) This section does not create a new cause of action or substantive legal right against any person involving a product liability claim.

- (G) As used in this section:

- (1) "Annuity" means an annuity that would be purchased from either of the following types of insurance companies:
    - (a) An insurance company that the A. M. Best Company, in its most recently published rating guide of life insurance companies, has rated A or better and has rated XII or higher as to financial size or strength;
    - (b)(i) An insurance company that the superintendent of insurance, under rules adopted pursuant to Chapter 119. of the Revised Code for purposes of implementing this division, determines is licensed to do business in this state and, considering the factors described in division (G)(1)(b)(ii) of this section, is a stable insurance company that issues annuities that are safe and desirable.
        - (ii) In making determinations as described in division (G)(1)(b)(i) of this section, the superintendent shall be guided by the principle that the jury or court in a civil action for wrongful death should be presented only with evidence as to the cost of annuities that are safe and desirable for the beneficiaries of the action who are awarded compensatory damages under this section. In making the determinations, the superintendent shall consider the financial condition, general standing, operating results, profitability, leverage, liquidity, amount and soundness of reinsurance, adequacy of reserves, and the management of a particular insurance company involved and also may consider ratings, grades, and classifications of any nationally recognized rating services of insurance companies and any other factors relevant to the making of the determinations.
- (2) "Future damages" means damages that result from the wrongful death and that will accrue after the verdict or determination of liability by the jury or court is rendered in the civil action for wrongful death.
- (3) "Abandoned" means that a parent of a minor failed without justifiable cause to communicate with the minor, care for the minor, and provide for the maintenance or support of the minor as required by law or judicial decree for a period of at least one year immediately prior to the date of the death of the minor.
- (4) "Minor" means a person who is less than eighteen years of age.
- (5) "Harm" means death.
- (6) "Manufacturer," "product," " product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

- (H) Divisions (D), (G)(5), and (G)(6) of this section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after the effective date of this amendment, in which those divisions are relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to the effective date of this amendment.

K. Final Reminders:

- Know your **INSURANCE POLICY LIMITS** involved. Keep the eye on the compensation of your client vs. the expense of litigation.

- Before trial, attempt to **STIPULATE** to all of your admissible medical records and invoices in order that the custodian of records of the particular medical provider needs not come into trial.

- You must try to get stipulated the requirements under **R.C. §2317.40, 2317.421 and 2317.422,** and that the following exhibits are true and authentic copies and qualify under the business records/public records exception to the hearsay rule. Both parties reserve their right to challenge the admissibility of all or any part of the exhibits listed on Exhibit "A".

- Prepare your **JURY INSTRUCTION** in the beginning of your case so that you know the law and all the elements you need to proof prior to trial and for that matter, prior to taking any depositions.

- Prior to trial, it is imperative to prepare **MOTIONS IN LIMINE** in order to keep inadmissible evidence from being heard by the Juror. Remember, if the court overrules your motion in limine or any part thereof, it is imperative that you indicate your objections at trial or else you will waive your rights on that particular evidentiary issue on appeal.

- Use **COMPUTER SOFTWARE** to bring your evidence to life for the Jury. We recommend Sanctions or depending on the complexity of the evidence, PowerPoint. You might also want to invest in deposition software that organizes your depositions and provides powerful search engines.

- Know your **ELEMENTS** to your case. If you are the Plaintiff, you want to proof your elements, by a preponderance of the evidence, effectively and then sit down. Keep your case concise and to the point.

- **FINALLY**, remember- you are presenting your case to the 8 people in your Jury Box. You are not at battle with Defense counsel. Keep your eye on the war and not the battle of the moment. Losing an evidentiary objection probably will not hurt your case overall, depending on the issue. It is important for you to think ahead of your evidentiary issues while you are with your client prior to trial and during battle at trial.

Position Papers by Ronald Farabaugh, D.C.

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Risk for acute injury:

The following risk factors (based on solid scientific research) help explain why some patients involved in Low Speed Rear Impact Collisions (LOSRIC) get injured and others do not. These risk factors are associated with the potential to develop acute pain after a LOSRIC. Other issues to consider include, change of velocity, G force, threshold of injury, vehicle mass, and examination findings.

- Female gender
- Weighing less than 130 lbs.
- History of neck injury
- Head restraint below head's center of gravity (males & females); large topset.
- History of CAD injury
- Poor head restraint geometry/tall occupant (e.g., _80th percentile male)
- Rear vs. other vector impacts
- Use of seat belts/shoulder harness (i.e., standard three-point restraints)
- Body mass index/head neck index (i.e., decreased risk with increasing mass and neck size)
- Out-of-position occupant (e.g., leaning forward/slumped)
- Non-failure of seat back
- Having the head turned at impact
- Non-awareness of impending impact
- Increasing age (i.e., middle age and beyond)
- Front vs. rear seat position
- Impact by vehicle of greater mass (i.e., _25% greater)
- Crash speed under 10 mph
- Rear Struck Occupant, when bullet vehicle has longitudinally mounted motor
- Other issues: DMX Findings, PT Age and the life expectancy chart for future meds, ROM good predictor of pain and disability, muscle strength or imbalance, military spine / reverse curvature, length of time after the accident pt was first seen, symptoms that come and go

Risk for Late (Chronic) Whiplash

The following risk factors (based on solid scientific research) help explain why some patients involved in Low Speed Rear Impact Collisions (LOSRIC) get injured and others do not. These risk factors are associated with the potential to develop chronic pain after a LOSRIC. Other issues to consider include, change of velocity, G force, threshold of injury, vehicle mass, and examination findings.

- Female gender
- Rear vector vs. other vectors
- Body mass index in females only
- Immediate/early onset of symptoms (i.e., within 12 hours) and/or severe initial symptoms
- Ligamentous instability.
- Initial back pain
- Greater subjective cognitive impairment
- Greater number of initial symptoms
- Use of seat belt shoulder harness. For neck (not back) pain; non-use had a protective effect.
- Initial physical findings of limited range of motion
- Neck Pain on palpation
- Muscle pain
- Initial neurological symptoms. Radiating pain to the upper extremities.
- Past history of neck pain or headache.
- Headache
- Initial degenerative changes seen on radiographs
- Loss or reversal of cervical lordosis
- Increasing age (i.e., middle age and beyond)
- Front seat position
- Target vehicles manufactured from late 1988s through the 1990s (OR=2.7 vs in the early 1980s vehicles. (Rear Impact Only)

PHYSICIAN DEPENDENCY and PASSIVE CARE

A commentary by Dr. Ronald J. Farabaugh, D.C., C.C.S.P.

This paper will critically examine the truths and myths surrounding the controversial issue of physician dependency (PD) as it pertains to Chiropractic healthcare. Research on the topic is difficult to find, because at least to date, there is none. In running the keywords through Pubmed (an internet search engine linked to Medline/Silver Plater), under physician dependency there are 468 returns, none of them are associated with manipulation. Under ligamentous laxity/manipulation = 0. Under passive modality/side effects = 0, etc.

Chiropractic chronic pain management is often inappropriately denied due to concerns over physician dependence, even when care provided is rendered at only 1-2 visits per month. In general, concern over Chiropractic physician dependency is unwarranted, except in extreme cases, and denials are probably based more on limited understanding of the current literature (or lack thereof), personal bias, and/or secondary gain (deny-minded consulting can be very profitable), than on solid scientific investigation. One of the most lucid statements concerning PD can be found in the Journal of the American Chiropractic Association, *Focus: Chronic Back Pain*, October 2000. In an interview with several notable researchers/clinicians, Dr. Hansen stated, **"In the same way a doctor can give patients too much medication, which makes them dependent on it, chiropractors can make patients dependent on them. I see no reason for chronic pain management to include chiropractic visits greater than *TWICE A WEEK* [emphasis added]."** Quite literally, there is no scientific evidence to indicate that adjusting someone frequently would do any damage, let alone cause physician dependency, especially if the frequency of chiropractic spinal adjustments was only 1-2 ***per month***.

The issue of physician dependency was presented in print in Mercy, Chapter 8, page 118, but it is not referenced.

*"**Supportive Care**: Treatment/care for patients having reached maximum therapeutic benefit, in whom periodic trials of therapeutic withdrawal fail to sustain previous therapeutic gains that would otherwise progressively deteriorate. Supportive care follows appropriate applications of active and passive care including lifestyle modification. It is appropriate when rehabilitative and/or functional restorative and alternative care options, including home-based self-care and lifestyle modifications, have been considered and attempted.*

Supportive care may be inappropriate when it interferes with other appropriate primary care, or when the risk of supportive care outweighs its benefits, i.e., physician dependence, somatization, illness behavior, or secondary gain." [page 118]

Despite warnings against taking statements out of context and using isolated statements for denial purposes, this section is probably the most mis-quoted and misinterpreted portions of Mercy. Notice that the definition when read closely, does NOT prevent ongoing care, if the benefits of care outweigh the risks (ie, drugs, work loss, etc). Most critics of chiropractic chronic pain management fail to acknowledge Mercy page 125 which certainly supports passive care including manipulation as part of a multidimensional chronic pain management program.

Supportive Care: Supportive care using passive therapy may be necessary if repeated efforts to withdraw treatment/care result in significant deterioration of clinical status. (Mercy Guidelines, Chapter 8: Page 125.)

In general, passive care alone (whether it be pharmacological or spinal manipulation) may be considered poor chronic pain management in advanced cases. However, mild to moderate chronic pain is often managed quite effectively with singular treatment interventions, along with home care recommendations. Mercy supports the use of passive therapy, in combination with active care recommendations.

Without research, how do we manage chronic pain? In the absence of hard-core scientific evidence, professional consensus opinion remains the gold standard. Currently, the consensus opinion in Ohio (which is consistent with Mercy) is that with proper documentation in certain cases, 1-2 visits per month, and/or 2-6 visits per episode are appropriate along with instruction on active care, and home management. You can obtain the entire Supportive Care Consensus Opinion from the Ohio State Chiropractic Association by calling (614) 221-9933, or by accessing their website at OSCA.org.net. Suggestions on documentation, "The Supportive Care Worksheet/Medical Management of Chronic Pain" can also be obtain by contacting the OSCA.

In summary, when a patient attains maximal therapeutic benefit, was unable to achieve complete resolution of the condition, soft tissue residual damage is evident, active care recommendations provided, and therapeutic withdrawal from care attempted, several scenarios exist:

1. Patient remains stable, no ongoing care necessary, instructed to return PRN,
2. Patient managed with acute episodic care, 2-12 visits/episode,
3. Patient scheduled for supportive care, 1-2 visits per month on average, if therapeutic attempts failed to sustain recovery, to be re-evaluated every 6-12 months.

Treatment of chronic pain using spinal manipulation is supported by the literature and includes four primary goals:

1. Relieve/control pain,
2. Maximize joint function which keeps the patient functional,
3. Minimize use of drugs,
4. Keep the patient employed.

Chiropractic management of chronic pain, when appropriately administered, is safe, effective, cost efficient, and useful in keeping the patient employed.

PHYSICIAN DEPENDENCY and PASSIVE CARE

Recommended reading to fully understand the scope of chiropractic chronic pain management includes the following references.

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