DIRECT EXAM OF TREATING DOCTOR

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Dan Christensen has a personal injury practice in Austin, Texas. Mr. Christensen works with The Carlson Law Firm doing the firm's litigation and trial work. He is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization, as well as Board Certified in Civil Trial Law by the National Board of Trial Advocacy. He is also a Graduate of Gerry Spence's Trial Lawyer College and an Adjunct Professor at University of Texas School of Law teaching trial advocacy. Mr. Christensen is "AV" rated and was recognized in 2004 by *Texas Monthly* as one of Texas' "Rising Stars" and in 2009 and 2010 as a "Super Lawyer". He is licensed to practice law in federal and state courts in both Texas and California.

Before beginning the practice of law, Dan graduated from the University of Iowa earning his B.B.A. with distinction and honors in Finance. He then acquired his J.D., with distinction, also from the University of Iowa. During his final year, Dan was Editor-in-Chief of the JOURNAL OF CORPORATION LAW.

Upon graduation, Dan served as a prosecutor and defense counsel in the U.S. Army Judge Advocate General's Corps (JAG). He then joined The Carlson Law Firm, P.C., and has tried cases involving negligent security, commercial trucking collisions, product defects, highway design, medical malpractice, FTCA, premises liability, and car wrecks. Dan also contributes substantial time to writing articles for local and national publications and organizations, as well as speaking to groups on various legal topics.

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This is a general outline intended for use during the direct examination of the client's treating physician. Every client, every case and every doctor are unique, therefore, this outline can only serve as a starting point. Additionally, what can be accomplished during direct examination is largely dependant on the witness's personality, knowledge of the subject areas, familiarity with the case, and willingness to be prepared before trial. Therefore, some of the issues and techniques addressed in this outline may or may not be feasible on a particular case. It is my hope, however, that the outline and the live demonstration will provide some ideas that the trial lawyer can implement into his or her next direct examination.

INTRO

The first couple of minutes of the exam is spent just getting the witness (who is often not familiar with testifying) comfortable and the jury oriented as to who the witness is.

- NAME
- DO FOR A LIVING
- WHERE
- HOW LONG
- SPECIALIZED

BACKGROUND/CV

The objective during this section is to not only get the jury to respect the doctor as an authority, but also to get them to like and identify with the doctor as a person. This is best accomplished in the form of brief stories or vignettes about how and why the doctor got into practice.

For chiropractic doctors, spend time educating the jury about how they receive much of the same training as medical doctors, study from the same texts, and receive much more training in pathology and biomechanics than they do chiropractic specific course work. It is important to acknowledge and dispel the myths some jurors have about chiropractic doctors.

- EDUCATION
- STARTED PRACTICE
- WHY PRACTICE
- BOARD CERT'D
- WHAT'S FELLOWSHIP
- SMALL NUMBER GET FELLOWSHIP
- CURRENT RESEARCH
- CME – NOT ON CV [different than defense hired witness]
- EXPERIENCE – IN GENERAL AND WITH THIS SURGERY
- IS A CLINICIAN AND NOT A HIRED WITNESS
- NEVER TESTIFIED FOR ME OR FIRM BEFORE
- WHAT DO OUTSIDE OF PRACTICE

- BEFORE WE GET STARTED, WILL YOU AGREE TO GIVE ANY OPINIONS TODAY TO A REASONABLE DEGREE OF MEDICAL PROBABILITY

WHAT HAS RELIED UPON

After establishing that the doctor is smart, highly trained and personable, inform the jury of the doctor's knowledge and preparation for this specific case.

- BEGAN TREATING HER IN ___
- REMEMBER HER
- REVIEWED YOUR RECORDS COVERING HER
- ALSO, <u>YOU</u> ASKED TO REVIEW OTHER STUFF
    - RECORDS AND BILLS FROM OTHER PROVIDERS
    - PATIENT'S DEPO
    - LIFE CARE PLANNER'S DEPO
    - LIFE CARE PLANNER'S REPORT
    - VOC REHAB EXPERT'S DEPO
    - VOC REHAB EXPERT'S REPORT
    - POLICE REPORT

    - PHOTOGRAPHS
    - DEFENSE DOCTOR'S REPORT
- WHY ASK FOR STUFF – WANTED TO BE PREPARED
- SHE GOT TO HIM VIA OTHER DOCTOR

ANATOMY LESSON (USE DEMONSTRATIVE AID OR MODEL)

It can be helpful to educate the jury at this point about the relevant anatomy involved in the case. It is early in the exam and the doctor is still building upon his or her credibility. Additionally, this is easy for the doctor who may still be finding his or her rhythm as a witness.

- GO THROUGH THE CERVICAL SPINE AND TELL US WHAT A VERTEBRAE IS, DISC, NERVE, ETC. NOT TOO DETAILED, BUT ENOUGH TO FAMILIARIZE THE JURY WITH THE TERMS:
    - VERTEBRAE
    - DISC
    - DISC BULGE – PROTRUSION – HERNIATION
    - FACET JOINTS
    - ANNULAR LIGAMENT
    - STENOSIS

PROCESS OF DIAGNOSIS

Some of the purposes of this section is to stress to the jury the importance of the exam (which often the defense doctor has never conducted), de-fang the defense's position that the doctor is solely relying on subjective history and if applicable, to discuss how property damage to a vehicle has no relevance. Also, if a chiropractic doctor is involved, we are equating the processes he or she employs with those of medical doctors.

- HOW DO YOU DIAGNOSE

- HISTORY
- EXAM
- TEST
- DIAGNOSIS

- DO IT THIS WAY EVERYTIME
- DON'T JUST RELY ON WHAT PATIENT SAYS
- WE HAVE WAYS TO TEST WHETHER THEIR SYMPTOMS CONSISTENT WITH REPORTED HISTORY
- EXPLAIN

- IS THIS THE SAME PROCESS USED BY OTHER DOCTORS
- SO IF I GO TO THE ER OR MY FAMILY DOC, HE IS USING SAME PROCESS
- IS THIS REALLY THE GOLD STANDARD FOR DETERMINING WHETHER INJURED

- DURING THE COURSES YOU HAVE TAKEN, EVER SUGGEST LOOK AT CARS
- TO YOUR KNOWLEDGE, DOES ANY MEDICAL OR CHIRO SCHOOL SUGGEST
- THESE TEXTS WE DISCUSSED EARLIER, THEY DON'T SAY ANYTHING
- THE COURSES THAT YOU HAVE TAKEN OVER LAST __ YEARS
- IN PRACTICE, DO YOU
- EVER CONSULTED AN ENGINEER TO DETERMINE THE FORCE OF THE IMPACT
- EVER HEARD OF ANYONE ELSE DOING THAT
- WHY NOT

PATIENT'S INITIAL EXAM

Now, having covered the process of diagnosing patients in general, we can turn to the plaintiff's initial exam and diagnosis.

- WAS IN A LOT OF PAIN
- PAIN IN SHOULDERS, NECK AND BACK
- TENDERNESS
- LIMITED ROM
- DIMINISHED STRENGTH/MOTOR
- DIMINISHED REFLEX
- DIMINISHED SENSORY
- PROCESS
    - SUBJECTIVE HISTORY
    - EXAM

    - TESTING
- HER SYMPTOMS WERE CONSISTENT WITH WHAT SHE SAID HAPPENED

HER INJURY

Explain the injury suffered by plaintiff. The less obvious the injury, the more time should be spent on describing what exactly the injury is, how painful it is, and how certain treatment can be of benefit.

- YOUR DIAGNOSIS
- HOW PAINFUL
- HOW CAN AFFECT
- HOW LONG CAN IT LAST
- WHAT TREATMENT IS USED

RISK FACTORS

- ALL PEOPLE ARE NOT HURT IN ALL COLLISIONS

- WHAT FACTORS AFFECT THE LIKLIHOOD AND SEVERITY OF SOMEONE BEING INJURED IN A COLLISION LIKE THIS ONE
    - FEMALE
    - AGE
    - PRE-EXISTING CONDITION
    - HEAD TURNED
    - UNAWARE
    - SEATBACK BROKEN
    - SEATBELT

- DO ALL OF THESE RISK FACTORS APPLY

- WHICH ONES DO

- THESE RISK FACTORS CAN INCREASE THE LIKLIHOOD AND SEVERITY OF A SOMEONE'S CONNECTIVE TISSUE INJURY

MRI

As you proceed through the plaintiff's care, it is important to explain what each thing is, why it was done, and what the result was. Try to ask questions in a way that encourages the doctor to give plainly worded responses that are not filled with medical jargon requiring detailed (i.e., boring) explanations.

- ORDERED AN MRI
- WHAT IS AN MRI
- AN MRI IS A SERIES OF SLICES
- THEY ARE CLOSE TOGETHER, BUT WE ARE DEALING WITH THINGS THAT ARE EVEN SMALLER
- SO THEY CAN MISS THINGS
- MANY TIMES, INCLUDING THIS CASE, I HAVE DISCOVERED THINGS IN SURGERY THAT WERE NOT PRESENT IN THE MRI
- MRIs ARE JUST ONE TOOL
-
- WHEN GOT MRI, SAW THE DAMAGE
- DESCRIBE

- THE MRI REPORT SAID THERE WAS SOME DEGENERATIVE FINDINGS TOO
- WHERE WAS THAT ON HER SPINE
- THIS IS STUFF THAT WOULD HAVE BEEN THERE LONG BEFORE __[DOL]__
- DO YOU BELIEVE THIS DEGENERATION WAS THE SOURCE OF HER PAIN
- DO YOU BELIEVE THIS DEGENERATION WAS CAUSING HER TO NEED TREATMENT
- WHY
    - SHE HAD THE DEGENERATION BEFORE BUT NEVER HAD ANY ISSUES
    - TOO COINCIDENTAL THAT SHE WOULD SUDDENLY HAVE PAIN AND NEED CARE IMEDIATELY AFTER THIS INCIDENT IF IT WAS DUE TO THE DEGENERATION

PT

- I AM A CONSERVATIVE TREATER
- TRIED PT IN HOPES IT WOULD WORK
- SHE GOT TO WHERE SHE HAD RELIEF WHEN SHE WAS TREATING
- BUT, WHEN SHE WAS NOT TREATING, THE PAIN WOULD COME BACK

SHOTS

- SINCE SHE HAD ALREADY BEEN TO PT, SENT FOR SHOTS
- PAINFUL PROCEDURE WHEN DONE
- CESI's AT FIRST
- SHORT TERM RELIEF
- MEDIAL BRANCH BLOCKS AT THAT POINT
- SHORT TERM RELIEF
- THESE ARE FOR DIAGNOSIS AS WELL AS PAIN RELIEF
- JUST BECAUSE NOT THE "CURE" DOESN'T MEAN A WASTE

PRE-OP VISIT

- HER PAIN AND NEURO SYMPTOMS HAD GOTTEN WORSE
- NOT UNCOMMON IF MORE THAN STRAIN/SPRAIN
- IF SPRAIN/STRAIN, WILL OFTEN RESOLVE IN FEW MONTHS
- IF SOMETHING MORE INVOLVED, WON'T RESOLVE
- SYMPTOMS WERE:
    - BI-LAT ARM PAIN
    - + SPURLINGS (AFTER ALL NEG SPURLINGS BEFORE)
    - LIMITED ROM
    - FACET PAIN ON PALPATION
    - REFLEX L BR1+
    - DIMINISHED STRENGTH
    - DIMINISHED SENSORY
- DECIDED TO OPERATE
- IT IS A BIG OPERATION AND PATIENT WAS UNDERSTANDABLY SCARED, BUT AGREED TO GO FORWARD

OPERATION (GO THROUGH THE DIAGRAM)

- WHAT SORT OF OPERATION DID YOU DO
- INTRODUCE DIAGRAM
- DONE UNDER GENERAL ANESTHESIA
- NEEDS TO BE DONE AT "LEVEL __" FACILITY
- CAN'T BE DONE AT A LITTLE OUTPATIENT CLNIC, ETC. IN CASE OF COMPLICATIONS
- TAKE US STEP BY STEP THROUGH WHAT YOU DO
- CHECK PLACEMENT OF THE HARDWARE (POST-OP XR)

- DURING THE OPERATION, WHAT DID YOU FIND
- I FOUND "SIGNIFICANT STENOSIS" BEING CAUSED BY HERNIATIONS IN HER DISCS.
- STENOSIS IS…
- I DID FIND SOME DEGENERATION TOO, BUT NOT SIGNIFICANT AND NOTHING THAT WOULD HAVE BEEN A PAIN GENERATOR

- IS THIS A MAJOR SURGERY
- HOW LONG STAY
- IS THE RECOVERY PAINFUL

POST OP

- HOW HAS SHE DONE
- REPORTS 85% OF PAIN GONE
- SURGERY HUGE SUCCESS
- HARDLY EVER GOING TO GET RID OF ALL PAIN
- HAS HAD SOME RESIDUAL PAIN SINCE, BUT TO BE EXPECTED
- I FOLLOWED UP WITH HER MULTIPLE TIMES
- I HAVE SEEN HER _____ THIS YEAR
- I EXPECT TO SEE HER OFF AND ON WHEN SHE HAS EXACERBATIONS
- EXACERBATIONS CAN'T BE AVOIDED AND WILL HAPPEN PERIODICALLY

BILLS

- YOU REVIEWED THE BILLS FOR THIS SURGERY AS WELL
- ARE THOSE BILLS WHAT YOU TYPICALLY SEE IN _____ FOR A _____
- WHERE YOUR CHARGES THE SAME AS THEY WOULD BE FOR ANYONE ELSE

FUTURE CARE

Even if the injury involved does not involve surgery, it is important to demonstrate that it is permanent and will require future care. A connective tissue injury that resulted in micro-tearing of the ligaments in the plaintiff's neck is a permanent injury. The scar tissue that forms will not have the same properties as the original tissue and will be more prone to re-injury, necessitating future care. If there is no life care planner, then go through in detail what future treatment is likely and what it will cost.

- HER CONDITION IS PERMENANT
- HER QUALITY OF LIFE WILL BE SIGNIFICANTLY BETTER IF SHE HAS SOME FUTURE CARE
- I HAVE REVIEWED [LIFE CARE PLANNER'S] REPORT
- I AGREE WITH THE CARE THAT HE HAS PROJECTED
- I BELIEVE IT WILL BE NECESSARY
- I BELIEVE THE COST HE HAS PLACED ON IT IS REASONABLE
- SHE HAS ABOUT A 20% CHANCE OF NEEDING ANOTHER SURGERY ON THE LEVEL ABOVE OR BELOW THE FUSED LEVELS IN THE NEXT 7-10 YEARS
- HE HAS NOT INCLUDED THAT IN HIS COSTS
- BUT, THAT RISK IS CERTAINLY PRESENT

INJURY CAUSATION

- FROM THE MATERIALS YOU REVIEWED AND YOUR EXPERIENCE WITH THIS PATIENT, DO YOU HAVE AN OPINION AS TO WHETHER _____'S INJURIES AND NEED FOR SURGERY WAS CAUSED BY THE INCIDENT AT WAL-MART ON 12-1-07
- WHY
    - NO PROBLEMS BEFORE
    - IMMEDIATE ONSET
    - SYMPTOMS CONSISTENT WITH REPORTED HISTORY
    - FINDINGS IN EXAM
    - FINDINGS ON MRI
    - **THE STENOSIS I SAW FROM THE HERNIATIONS I DISCOVERED DURING OPERATION WOULD CERTAINLY HAVE BEEN CAUSING HER PAIN HAD THEY EXISTED BEFORE THE INCIDENT**
- ANY DOUBT IN YOUR MIND? NONE.

GUIDELINES

- DO YOU EVER USE GUIDELINES OR "EVIDENCE BASED MEDICINE" IN MAKING TREATMENT DECISIONS FOR YOUR PATIENTS?
- GUIDELINES SUCH AS THE ODG ARE MOSTLY PUBLISHED FOR NON-PHYSICIANS TO GIVE THEM AN IDEA WHEN SOMETHING IS INDICATED OR NOT AND NEEDS TO BE PAID FOR LIKE BY WORKERS COMP OR AN INSURANCE COMPANY
- THESE GUIDELINES ARE JUST THAT. THEY CAN'T BE USED TO MAKE DECISIONS ABOUT REAL PATIENTS.
- EVERY PATIENT IS DIFFERENT
- GUIDELINES AND "EVIDENCE BASED MEDICINE" ASSUME THEY ARE THE SAME.
- COOKBOOK MEDICINE IS WHAT IT IS CALLED
- IT TAKES AWAY THE INDIVIDUALITY OF PATIENT TREATMENT

GETTING PAID

- ARE YOU GETTING PAID FOR YOUR TIME
- I AM SURE I AM. I AM NOT SURE HOW MUCH BECAUSE MY OFFICE HANDLES ALL OF THAT.
- IT COSTS QUIT A BIT TO HAVE ME OUT OF THE CLINIC

DR. DEFENSE

- YOU ARE AWARE THE DEFENSE HAS HIRED DR. _____
- YOU KNOW DR _____
  - EVERYONE KNOWS _____
- WHY DOES EVERYONE KNOW DR. _____
  - HE HAS GIVEN OPINIONS AGAINST MOST OF THE ORTHOS IN TOWN
- SO THIS IS NOT THE FIRST TIME YOU HAVE SEEN HIM COMMENT ON ONE OF YOUR CASES
  - NO
- DR. _____ BELIEVES THAT THE SURGERY YOU PERFORMED ON _____ WAS UNNECESSARY, DOESN'T HE
- WHAT DO YOU THINK ABOUT THAT
  - WELL, THAT IS HOW HE MAKES A LIVING.
  - BUT, HE HAS NEVER SEEN MY PATIENT, FOR ONE
  - HE CAN'T KNOW WHAT I SAW, FELT, HEARD WHEN I EXAMINED THE PATIENT
  - HE CAN'T KNOW WHAT I SAW WHEN I PERFORMED THE SURGERY AND SAW THE STENOSIS AND HERNIATIONS
  - AND, ULTIMATELY, THE SURGERY RESOLVED 85% OF HER SYMPTOMS
- WHAT DOES THAT FEEL LIKE TO HAVE SOMEONE ALLEGE THAT YOU HAVE PERFORMED AN UNNECESSARY SURGERY