



Published 2-2-11 by DRI

Volume 10 Issue 5

This Week's Feature

Using Prior Claims and Lawsuits in Aggravation of Injury Cases

by Thomas J. Fay and Robert W. Stetson

The scenario is familiar. Your client is involved in a low to moderate impact rear-end trucking accident. Your client's tractor has no damage but the plaintiff's trunk is smashed in. Nevertheless, there are no serious injuries reported at the scene. Your client and his company fill out the appropriate paperwork and put the accident behind them. Years later, the accident reappears as a lawsuit. The lawsuit relates significant medical bills, lost income, permanent impairment and pain and suffering to the accident. The demand somehow reaches seven figures.

Through basic discovery or perhaps investigation by your client's insurance company, you discover that the plaintiff has a significant history of prior insurance claims and lawsuits. In fact, the plaintiff previously collected workers' compensation and/or settlements for injuries to the particular body part at issue in your case. However, it is unclear whether the judge will admit the evidence of the prior claims or lawsuits.

The professional plaintiff looms large in trucking cases if he or she is not exposed. The relevant jury instructions benefit the professional plaintiff in aggravation cases. For example, the instruction might read: where an injury arising from a cause which entails liability on the defendant combines with a preexisting injury to bring about a greater harm, the defendant may be held liable for all of the consequences. See *Wallace v. Ludwig*, 198 N.E. 159, 162 (Mass. 1935). Armed with this instruction, the plaintiff's attorney need only focus on the size of the tractor trailer, the damage to the plaintiff's vehicle, which even in low to moderate impact trucking cases can be significant, and the plaintiff's testimony that he or she was healthy before the accident. Fearing this scenario, your client's insurer may settle the case for substantially more than it is worth.

Juries dislike the professional plaintiff even more than the trucking defendant. Therefore, prior claims and lawsuits can even the playing field. To be admissible, you must clearly define the relevance of the evidence, understand its prejudicial value, and demonstrate that it is probative of an issue in addition to the fact of a prior injury, like a motive to lie or exaggerate. Given the potential benefit to your case, it is important to explore all avenues for getting prior claims and lawsuits admitted at trial.

Clearly Define the Relevance

Through discovery requests and keeper of the records subpoenas, you have compiled documents from insurance companies, other law firms and the plaintiff. The documents include pleadings, interrogatory answers, deposition transcripts, recorded statements, demand letters, expert reports, medical records and settlement documents from prior claims and lawsuits. The documents verify the plaintiff's status as a professional plaintiff. The first step is to define the relevance of each document.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence. (Fed. R. Evid. 401). In an aggravation case, the relevance will likely speak to the elements of causation or damages or both. For example, if the plaintiff admitted at a prior deposition that he is unable to play recreational sports due to a knee injury, such testimony is likely relevant to whether the alleged “aggravation” of the knee injury prevented him from the same.

In *Kilday v. Kennestone Physicians Center, L.P.*, 676 S.E.2d 271, 272-273 (Ga. App. 2009), the defense counsel used pleadings from a prior case to cross-examine the plaintiff on the issue of permanent impairment. The question was whether the prior lawsuit, which alleged back and neck injuries, was relevant to the head injury issues involved at trial. The Court of Appeals of Georgia upheld the use of the evidence because, even though the injuries were different, the plaintiff alleged permanent impairment in both proceedings. Therefore, the evidence was relevant to the extent of damages arising out of the head injury.

Further, in *Jenkins v. Kos*, 829 A.2d 31, 35-36 (Conn. App. 2003), defense counsel cross-examined the plaintiff on a disability rating from a prior lawsuit. The plaintiff argued that the lawsuit itself was irrelevant – even if the disability rating was not. The Appellate Court of Connecticut disagreed, holding that defense counsel was entitled to explore the “context” within which the disability rating was assigned because a complete understanding of the rating was relevant to the elements of causation and damages. The court also noted that the plaintiff opened the door by referencing the disability rating on direct.

The trial court’s ruling will be upheld absent an abuse of discretion so it is important to define relevance in a compelling manner the first time around.

Understand the Prejudicial Value

The legal analysis does not end with relevance considerations. Fed. R. Evid. 403, and similar state rules, provide: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

You may find that the plaintiff injured the same body part and filed three prior lawsuits in the past five years. However, without more, the trial judge will likely exclude the prior lawsuit evidence because the prejudice that the plaintiff may be seen as “litigious” substantially outweighs the probative value. This is particularly true where the evidence of injury can be introduced through another medium – like medical records or the plaintiff’s own testimony – without reference to the prior lawsuit.

Prior settlement values are generally excluded under this analysis. In *Leslie v. Higgason*, 779 So.2d 470, 470-471 (Fl. App. 2000), the trial judge allowed questioning regarding the plaintiff’s recovery of \$65,000.00 for identical injuries in a prior lawsuit. The District Court of Appeal of Florida reversed because “[w]hile [the plaintiff’s] previous injury was relevant, the settlement amount from the previous injury was clearly irrelevant to the issues being tried.” The court found that there was no probative value to the evidence.

To be admissible then, the evidence must have some independently relevant value in addition to the fact of injury that outweighs the prejudicial value. Again, the issue is addressed at the sound discretion of the trial judge so you must consider that the fact of injury alone will likely not overcome the perceived prejudicial value of prior claims and lawsuits.

Consider ‘Other Purpose’

Where the prior claim or lawsuit is probative of some other purpose, like the plaintiff’s motive to lie or exaggerate his injuries, the evidence may be admissible. According to Fed. R. Evid. 404(b), and similar state statutes, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person unless it is relevant for some other purpose, such a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Sonny v. Balch Motor Co.*, 917 S.W.2d 173, 175-176 (Ark. App. 1996), the plaintiff introduced evidence of a prior lawsuit in which he sued the defendant for failure to pay an unsatisfied bill. The evidence was introduced in defense of a counterclaim for malicious prosecution arising out of a second lawsuit for a second unsatisfied bill. The defendant argued that the evidence should have been excluded because it spoke only to his bad character. However, the Court of Appeals of Arkansas upheld the use of the prior lawsuit because it was probative of the plaintiff's state of mind in filing the second lawsuit – an element of the malicious prosecution counterclaim.

The same reasoning can apply in an aggravation case. For example, the plaintiff may complain of minor injuries at the scene. However, a day or two later, the plaintiff begins to complain of significant knee pain in a knee which he or she has injured in the past. The plaintiff seeks medical treatment and perhaps requires surgery. The critical issue is whether the jury believes the plaintiff's complaints because, despite the prior injury history, the plaintiff's attorney will argue that the plaintiff was in good health before the accident and the defendant should be liable for all the resulting aggravation – even if the medical evidence is to the contrary.

Through discovery and subpoenas, you may find that the plaintiff contacted a lawyer shortly after the accident. The lawyer may have represented the plaintiff on prior knee injury claims, which were lucrative for the plaintiff. If so, you may be able to convince a judge that the prior settlement values provided significant financial motivation for the plaintiff to lie about the knee pain. In an egregious fact situation where the defense is that the plaintiff stopped short, you may be able to convince the judge that the plaintiff's prior claims are probative of a "plan" to devise a lawsuit, which might be consistent with your theory of liability.

Limiting Instructions

No matter what theory of admissibility you devise, you should request a limiting instruction that directs the jury to focus on the specific purpose for which you intend to offer the prior claims or lawsuits. The instruction should also direct the jury not to consider the prior claims or lawsuits as evidence that the plaintiff files frivolous or meritless claims and to decide the case on the merits rather than passion or prejudice. The instruction may alleviate the judge's concern about prejudice because it is an "almost invariable assumption of the law that jurors follow their instructions." See *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

Conclusion

The use of prior claims and lawsuits in aggravation cases can be a formidable defense tool, particularly in the trucking context where the battle against juror bias is an uphill one. To introduce this type of evidence requires careful consideration of the relevance, prejudice, and other purpose, like a motive to lie, of each particular document you intend to use. Since these issues will be left to the judge's discretion, the more detail you can provide, the better.

[Thomas J. Fay](#)

Robert W. Stetson

Boyle Shaughnessy & Campo, P.C.

Boston, Massachusetts

(617) 428-9638