

PROVING DIFFICULT DAMAGES: SOFT TISSUE INJURIES

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I. SCOPE OF ARTICLE

“Medical practitioners of all disciplines glibly discuss pain and impairment on the basis of *soft tissue* injury, stress, sprain, or inflammation, yet soft tissues are not well defined in medical dictionaries, are not named in *Nomina Anatomica*, and are not so designated in most anatomic or orthopedic texts. Unfortunately, the soft tissues are not considered an organ system and, thus, are not on the curriculum of medical schools. Except for occasional symposia or post-graduate courses on musculoskeletal syndromes, the practicing physician receives no education in this area. This results in less knowledge and less interest in the scope of soft tissue damage. Therefore, it is the patient who suffers from this insufficient knowledge and concern - both in pain and in inadequate evaluation and treatment.” René Cailliet, M.D., *Soft Tissue Pain and Disability* (1982).

The foregoing illustrates the lack of knowledge that exists with respect to soft tissue injuries in the medical field. If most physicians do not have an adequate understanding of soft tissue injuries, imagine how little most lawyers must know. The purpose of this article is to shed some light on soft tissue injuries, and discuss methods for demonstrating these injuries, providing damages, and negotiating settlements.

II. SOFT TISSUE INJURIES

A. Definitions

For purposes of this article, the discussion of soft tissue injuries will be limited primarily to a discussion of soft tissues involving the joints in the human body, since these are among the predominate types of soft tissue injuries. Each joint in the human anatomy has its own unique structure and purpose and involves the following soft tissues: muscles, capsules, ligaments, tendons, menisci, disks, and cartilaginous surfaces. All of these soft tissues serve a purpose

in promoting nervous system motor control, innervation for sensation, receiving stimuli, and adequate blood supply. External stress such as injury or trauma irritates the soft tissues and, when these tissues contain pain-mediating nerves, the result is pain. *Soft Tissue Pain and Disability* at pp. 1-2.

B. Examples of Soft Tissue Injuries

One of the most common types of soft tissue injuries is a low back injury or neck injury. These injuries result in damage, scarring and nerve damage, to the muscles in the spinal area. These types of injuries are often associated with some damage to the intervertebral disk. Flexion, extension, or rotation of the spine may result in deformation or herniation of the disk. A herniation is merely a protrusion of some part of the natural cavity of the disk by an abnormal aperture. The herniated disk often impinges on one of the nerve roots emanating from the spinal cord. The result, obviously, is pain. A similar result can occur from injury to the ligaments and muscles of the neck.

Another type of soft tissue injury, which does not necessarily involve a joint, is fibromyalgia or fibrositis. This syndrome is often characterized by chronic aching pain, stiffness, and tenderness in the soft tissues of the musculoskeletal system including joints, muscles, tendons, and ligaments. Tender points, which are merely different locations on the patient's body which are tender, are also present. The patient's symptoms are usually aggravated by cold or humid weather and excessive physical exercise or psychological tension. These symptoms are often relieved by heat, rest and vacations. Although the fibromyalgia syndrome may be related to other causes, it may be caused by trauma, such as an automobile accident. Other symptoms include sleep disturbance, mood disturbance, such as a high incidence of anxiety and other psychological problems. Warren A. Katz, M.D., *Diagnosis and Management of Rheumatic Diseases*, 2nd Ed.

(1988). Myofascial syndrome, a related soft tissue injury, is diagnosed by the existence of trigger points. Trigger points are specific areas of the body that result in the production of referred pain upon the application of pressure. Both of these types of soft tissue injuries are difficult to treat and are many times permanent.

C. Tests

There are a number of tests which physicians use to diagnose soft tissue injuries. Some of these tests are very useful and others remain entirely inadequate, at least with respect to soft tissue injuries. "The capacity of plain film radiography to diagnose soft-tissue trauma is inferior; at best, plain films offer partial and indirect evidence of wounding, do not permit localization of injuries, and are burdened by very high rates of false-positive and false-negative findings." Ben-Menachem & Fisher *General Principles of Trauma* Section II (1982). On the other hand, computed tomography (CT) and magnetic resonance imaging (MRI) may be very useful in detecting soft tissues injuries. CT offers a relatively high resolution of the image and may be used to demonstrate tissue injuries in the third dimension. Both CT and MRI have the ability to differentiate between normal and abnormal soft tissue. *General Principles of Trauma* at p. 196. Additionally, there are other helpful tests which may be used to diagnose soft tissue injuries such as electromyography (EMG). This test consists of recording the variations of electric potential or voltage detected by a needle electrode inserted into skeletal muscle. Normally, when muscles are at rest no electric activity is detected, but during voluntary contraction the action potentials of motor units appear. When there is a disease of the motor unit, electric activity of various types may appear in the resting muscle and the action potentials of motor units may have abnormal forms and patterns of activity. Although this test can serve as an objective criteria that a disfunction of the motor unit exists, it does not provide a clinical diagnosis of the patient's injury. Mayo Clinic and Mayo

Foundation, *Clinical Examinations in Neurology*, 5th Ed. (1981).

An EMG is not a routine procedure, such that it would allow the examination to be performed by a technician and then later to be interpreted by a clinician, as is the case with CT and MRI. The muscles selected for examination must be selected according to the problem presented by the individual patient. For example, damage to the single nerve root resulting from compression by a protruded intervertebral disk causes denervation only in muscles which receive innervation from that root. Electromyo-graphic localization of the injury depends on the finding in those muscles of the extremity which receives innervation from the involved nerve. Further, the electric activity of the muscle is greatly affected by what the electromyographer does, what the patient does, and by the position of the electrodes at the moment when the records are made. A correct interpretation of the EMG, in light of these variables, must be performed at the time of the examination. *Clinical Examinations in Neurology* at pp. 300, 306.

III. APPROACH TO PRESENTATION

The difficult aspect of presenting soft tissue injury cases results from the fact that many times little or no objective means for demonstrating the injury exists. In essence, many times the entire presentation relies upon the believability or credibility of the plaintiff. The concept of reframing should be used. Reframing involves changing the point of view or belief system of jurors. This is necessary in soft tissue cases because of the popular belief or notion that soft tissue injuries generally heal and result in no permanent residual disability and that they are hard to prove because they are invisible injuries and lack objective basis.

From the outset, the lawyer must understand that many potential jurors have this perspective on soft tissue injuries. The lawyers job is to reframe the jurors to the point of view or perspective

about soft tissue injury cases to see it from the plaintiff's perspective. In other words, the jury must be refocused or retrained in order to better understand soft tissue injuries. This is accomplished by attempting to build a new belief based upon sound evidence and literature that indicates that permanent residual impairment does occur in a certain percentage of soft tissue cases. The job at that point becomes convincing the jurors that your clients falls within the percentage of cases that have resulted in permanent residual impairment in the soft tissue context. Until you have successfully reframed the jury into thinking about the soft tissue injury case from your perspective, you will have a difficult time winning a substantial award in a soft tissue case.

IV. DEMONSTRATING THE INJURY

A. Client Credibility

I believe that most, if not all, personal injury cases are affected to some degree by the credibility of the plaintiff. This is even more true in the context of the soft tissue injury case. In catastrophic injury cases, the jury can readily see the injury and the significant impact it has had on the plaintiff's life. In a soft tissue injury case, this is much more difficult to comprehend and is many times dependent upon the believability, likability and credibility of the plaintiff. In evaluating soft tissue injury cases, I generally place a great deal of weight on the likability, believability and credibility of the plaintiff. I believe credibility is the *single* most important element in any soft tissue injury case.

Credibility of the client generally determines whether or not I accept a soft tissue injury case. The credibility of the client in demonstrating and communicating his/her injuries and damages to the medical expert, insurance adjuster, lawyer, and jury weigh so heavily in realizing full and realistic value that serious consideration should be given by the attorney in the initial interview as to how effective and believable the client will be

in all phases of handling the case. By analogy, consider the attorney as a "salesperson," the client as the "product," and the adjuster, defense lawyer or jury as the "buyer." The sales person can be a great salesperson but have an unappealing product and thereby fail to sell the product to the buyer. Accordingly, a realistic evaluation of the case must be based upon the lawyer's ability to sell the client to the adjuster, lawyer or jury.

B. Get the Information - Initial Client Interview

The first step in demonstrating the injury consists of a thorough client interview. Counsel should have a checklist of questions in order to be certain that all information relevant to the medical component of the injury is provided. Also, you should identify all health care providers that have treated the plaintiff in the past ten years, even for conditions unrelated to the condition involved in the claim. Counsel should then use a matrix to record the identity of each health care provider and track the progress of the effort to gather the appropriate records. The letter requesting the records should include a Medical Records Affidavit in order to avoid the necessity of sending a second request at a later date.

Don't underestimate the contribution that a client can make in the preparation of the case. I suggest that in the first interview counsel should ask the client to sit down in the evening and write out a *detailed* statement of every fact that the client can remember about the event causing the injury, the medical treatment received, and the impact that the injury has had on the client's employment and other activities. This type of narrative is useful in answering questions asked by expert witnesses.

Encourage the client to list all activities that he or she could do before the injury that are more difficult to do or cannot be done after the injury. When tendering the client for deposition, or

answering interrogatories, don't allow defense counsel to minimize the impairment. For instance, defense counsel will usually ask the plaintiff to describe "all activities that the plaintiff could engage in before the injury which he/she cannot engage in after the injury." Most plaintiffs list a few things and are then asked "is that it?" The plaintiff should answer "yes" only if the list is exhaustive. No one expects the plaintiff to list *every* impediment. Accordingly, the plaintiff should feel free to answer by saying that the list is complete as far as he/she can recall sitting in the deposition.

Many clients compensate for their injury and don't fully appreciate the extent to which the injury has impacted their daily routine. An objective observer, such as a legal assistant or investigator, can provide you with valuable information as to the real impact of the client's injuries on his or her ability to work and engage in normal activities of daily living. This information can then be provided to the physician for purposes of his or her analysis.

One technique we use to obtain valuable information about the client and insight into the effect that the accident has had on the client is to dispatch a member of our firm, usually a forensic specialist, to the client's home to interview the client and take photographs of the client's home and surroundings. Valuable information can be obtained in the client's home. One can determine a lot about the client from mementoes and other surroundings. I have found that clients are much more at ease at their home than in a lawyer's office. Many clients become nervous and inhibited in a lawyer's office. It is important for the lawyer to fully understand and appreciate where the plaintiff is coming from. This is difficult if the lawyer has not taken the time to get to know the plaintiff and his or her surroundings.

C. Don't Stock Their Quivers

There are several reasons to get those records that appear to be irrelevant. First, the plaintiff may not always know which records are relevant and, for this reason, counsel should review the records before concluding that they are not useful in preparation of the case.

Second, defense counsel often request production of, or attempt to subpoena by deposition on written questions, *all* of plaintiff's medical records, even if it is clear that they are unrelated to the conditions involved in the plaintiff's claims. It is also customary for defense counsel to request a medical authorization to get copies of all of plaintiff's records, despite the fact that the physician/patient privilege requires disclosure of only those records relevant to the condition in issue. See Tex. R. Evid. 509(d)(4).

The Rules provide plaintiff's counsel with the option of producing copies of the records, moving to quash the request or subpoena requested, or filing a motion to quash on the grounds that the request or subpoena seeks, or would require the disclosure of, records which remain privileged because they are irrelevant. See Tex. R. Civ. P. 166b(2)(h).

D. Interviews of Plaintiff's Family and Co-Workers

The attorney will seldom make time to interview family members or others who have firsthand knowledge of the plaintiff's limitations, even in more complicated cases involving serious injury. Whether or not you conduct these interviews, it is essential that you acquire information relating to what persons with knowledge will say if asked questions about the plaintiff's limitations.

It is prudent to conduct these interviews outside of the plaintiff's presence so that the witnesses will feel free to discuss with you any concerns or reservations they might have about the plaintiff's activities. My experience has been that most

witnesses understate the seriousness of the plaintiff's injuries if the plaintiff is present for fear of the plaintiff becoming hypersensitive about the injury or condition. By contrast, witnesses are exceedingly open and descriptive about the limitation that the plaintiff faces in day-to-day living if the plaintiff is not present and, therefore, will not be offended by the observations.

E. Analysis of the Medical Information

Adequate analysis of the medical records involves reading and understanding what is contained in them. In most instances, this will include consulting with the treatment provider or other medical professional with knowledge of medical terms. Lengthy or complicated records might require consultation with several different experts, especially when the plaintiff's records contain the consultations of specialists in different fields.

Before consulting with a medical expert or treating physician, counsel should read in their entirety all of plaintiff's medical records. It is also prudent to prepare a written summary of the records and make notes as to any entries which are unclear. It is also essential that the attorney have access to the Physician's Desk Reference, an illustrated medical dictionary and, if possible, computerized anatomical software such as the Bodyworks program. These resources will provide significant assistance in interpreting medical records.

The Physician's Desk Reference is an encyclopedia of currently administered medications and prescription drugs. It includes drugs indexed by brand name and generic name, and provides information relating to dosage, contraindications, side effects, and chemical composition.

We use Dorland's Illustrated Medical Dictionary. It is extremely useful in attempting to carefully analyze the plaintiff's medical records. Another useful tool is the Bodyworks computer program. It is available for a minimal sum (approximately \$50.00) and operates exceedingly well on virtually any personal computer. It is a basic anatomy program with reasonably good graphics and is an exceedingly useful tool for the practitioner.

Attorneys with access to Medline, an on-line medical periodical database, will find it useful for

conducting searches of the literature discussing the condition or injury suffered by the plaintiff. It is also possible to conduct a manual search of medical periodicals using *Indexus Medicus*. *Indexus Medicus* can be found at most large public libraries and certainly at all medical school libraries. Additionally, don't underestimate the value of medical school textbooks. Most physicians or other health care providers are not particularly current, and periodicals and current medical textbooks can be used effectively to neutralize unfavorable testimony of an opposing expert.

Once you have completed your analysis of the records, prepared your notes for your interview of the treatment provider, and identified entries which are unclear, it is time to meet with the treatment provider for purposes of acquiring a full understanding of the plaintiff's injury.

F. Interviewing the Medical Professional

Many attorneys simply send a letter to the primary treating physician asking for the physician's opinion regarding a plaintiff's injuries. It is a mistake to do that.

A physician rarely has a full understanding of the impact that the injury has had upon the plaintiff. It is essential that you educate the physician before asking for a written opinion. Otherwise, you are likely to get a short and certainly incomplete assessment from the physician.

During your meeting or discussion with the primary treating physician or other health care provider, you should attempt to fully educate that person as to the limitations that your client faces as a consequence of the injuries. This will assure you that the physician does not end up getting boxed in by sending an incomplete or otherwise inadequate assessment of the plaintiff's condition. Offer to compensate the physician for the time required to evaluate the materials you have provided or otherwise discuss the facts of the case with you.

Make certain that the treating physician understands that he or she will probably be provided with additional information as the case develops. It is probably also prudent to advise that any inquiry from opposing counsel should be referred to you. Once counsel understands the information contained in the medical records and has had an opportunity to discuss that information with the treating physician, it is time for the second client interview.

G. Second Client Interview

The second client interview should consist of a frank discussion with the client as to your conclusions relating to his or her injury, loss of earning capacity and impairment, your findings after consultation with the treating physicians or health care providers, your review of the records and medical literature, and analysis of the information provided by the client in the initial interview and follow-up narrative.

It is advisable to make thorough notes of the second client interview and memorialize your conclusions in a letter to the client following the interview. The letter should set forth your conclusions as to the plaintiff's limitations and what you might be able to successfully present to a jury in the way of loss of earning capacity and impairment. It is not necessary at this point to put numbers on these elements of damage and, indeed, until such time as a vocational rehabilitationist and/or economist have been consulted, it may be practically impossible to do so, especially in more complex cases involving more serious injuries.

It is also a good idea in the second client interview to discuss specifics as regards the client's improvement or deterioration in condition since the first interview. During the time between the first and second interviews you should have encouraged the client to make notes or keep a diary regarding each and every impediment that the client has encountered during

the course of his or her work day or leisure-time activities.

Supplement the narrative provided by the client with the information acquired during the course of your investigation in the second client interview. This body of information should be synthesized into a useful form that can then be transmitted to the appropriate expert physician, rehabilitationist and/or economist.

H. Preparation of the Expert’s Retention Letter

A good expert, like a good lawyer, wants to know the parameters of his or her assignment. Additionally, tightly budgeted assignments and precisely focused questions will assist you in keeping a lid on an expert’s expenses.

1. Components of the Letter

Every communication with an expert should include the following:

- a. A complete and detailed list of everything that is being sent to the expert for review;
- b. A specific set of questions that the expert is asked to consider during the course of review of the enclosed materials; and
- c. A budget for the initial analysis.

2. Materials to Enclose

By way of example, materials that should be sent with the initial retention letter to an economist or other expert who will testify on loss of earning capacity should include:

- a. A copy of the relevant medical records and a summary of the health care providers’ conclusions and opinions regarding the plaintiff’s medical

impairment, including appropriate discharge narratives and treatment plans for the injured plaintiff;

- b. Summarized statements of witnesses, coworkers, family members, and employers regarding the impediments that they have seen the plaintiff face as a consequence of the injuries;
- c. Appropriate medical literature discussing your client’s injuries may also be helpful and save you the expense associated with the expert looking for these materials;
- d. A summary of the plaintiff’s work history, including:
 - (1) Educational background (including honors, class standing, etc.);
 - (2) Job history, including positions held, years employed at each employer, earnings history, and reasons for leaving;
- e. Copies of any depositions of the plaintiff, health care providers, persons with knowledge of the plaintiff’s injury or the effect that the injuries have had upon the plaintiff;
- f. An edited version of the plaintiff’s narrative statement relating to the impact that the injury has had upon work and daily living activities;
- g. A full description of the plaintiff’s pre-injury employment responsibilities and post-injury work related impediments; and
- h. A full and complete description of the activities (including household activities) that the plaintiff engaged in before the injury that have been made

more difficult, or impossible to do, as a consequence of the injury.

Obviously, you may not want to include all of these materials if one or more contain unfavorable information which is not necessary for the expert's evaluation. Remember, however, that in many instances, unfavorable materials should be disclosed to an expert in order to avoid having the expert ambushed in a deposition.

As noted above, statements may be in the form of deposition testimony, if you have it. Be aware, however, that if you send a 150 page deposition to an expert, it is likely to be read in its entirety at the rate of approximately \$200.00 per hour. Accordingly, I suggest that you send excerpts which relate specifically to the witnesses' observations of the plaintiff. Be careful to include all pertinent sections of the deposition lest the expert be interrogated about unfavorable testimony he or she was not provided.

There is no requirement that an expert reduce his or her opinions to writing. Don't ask your experts for a written report unless required to do so by court order, and only then after meeting with the expert to determine precisely what conclusions the expert has reached. This will give you an opportunity to discuss all of the variables involved in the analysis and advise the expert as to the salient points that should be included in the report.

3. Questions to Ask

Don't ever ask an expert a question that you don't know the answer to. Also, don't ever send a box of materials to an expert and simply ask the expert to "review" the materials.

Each expert you retain should be retained for a specific reason, not to shotgun or provide general support for the allegations of negligence or

liability contained in the petition. You should advise the expert that as he or she reviews the enclosed materials, you would ask that the expert consider specific questions. Examples of questions that might be asked in the initial retention letter are:

- a. Is the herniated disk the result of the automobile accident?
- b. Were all of the plaintiff's symptoms caused by the herniated disk?
- c. What is the medical likelihood of the plaintiff's condition improving?

It is probably prudent to discuss the case with the expert on the telephone or in person prior to providing the expert with written materials to review. This will help you determine whether or not the expert is likely to testify favorably. If it is clear from a preliminary discussion that the expert is not comfortable with the case, has testified against plaintiffs in other similar cases, or has published materials which may be used effectively against him for impeachment, it is prudent not to retain the expert.

4. The Budget

If you don't put an expert on a budget, you may be in for a rude surprise at the conclusion of the case. Physicians and other health care providers routinely bill at \$300 to \$500 per hour. It doesn't take many hours for the expert's fee to exceed \$5,000 to \$10,000.

As a rule of thumb, I budget \$500 to \$1,000 for an expert's initial review of the materials. This will generally involve two to five hours of the expert's time. I have never had an expert tell me that the initial file review could not be done for less than \$1,000. I also find that experts appreciate knowing what the budget limitations are so that they don't "build a watch" rather than simply telling you what time it is. Once you have prepared and transmitted the materials to be

utilized for the initial review, you should give the expert a time line within which to provide you with preliminary opinions. Typically, you can expect that a vocational rehabilitationist will want to interview the plaintiff or have the plaintiff prepare a questionnaire. I have found that this can take up to four weeks. It is best, however, not to leave it open-ended. If you do, you may find yourself in the situation where the expert's opinions are unfavorable and you are too close to trial to retain and designate another expert.

V. PROVING DAMAGES

A. What is Loss of Earning Capacity?

Loss of past and future earning capacity is one element of damage in a personal injury case. See *North Houston Pole Line Corp. v. McAllister*, 667 S.W.2d 829, 833 (Tex. App.--Houston [14th Dist.] 1983, no writ). Earning capacity is the measure of a person's ability to work and earn money. See *Brazoria County v. Davenport*, 780 S.W.2d 827, 832 (Tex. App. Houston [1st Dist.] 1987, no writ); *Trailways, Inc. v. Mendoza*, 745 S.W.2d 63, 68-69 (Tex. App.--San Antonio 1987, no writ); *Southern Pac. Transp. Co. v. Harlow*, 729 S.W.2d 946, 951 (Tex. App.--Corpus Christi 1987, writ den'd). Loss of earning capacity is the impairment of that ability. See *Bonney v. San Antonio Transit Co.*, 160 Tex. 11 (1959); *Trailways, Inc. v. Mendoza*, 745 S.W.2d 63, 68-69 (Tex. App.--San Antonio 1987, no writ).

The measure of damages for past loss is generally not past loss earnings. It is past lost earning capacity. See *Soriano v. Medina*, 648 S.W.2d 426, 429 (Tex. App.--San Antonio 1983, no writ); *Greyhound Lines v. Craig*, 430 S.W.2d 573, 575-76 (Tex. Civ. App.--Houston [14th Dist.] 1968, writ ref'd n.r.e.); see, also, *City of Rosenberg v. Renken*, 616 S.W.2d 292, 293-94 (Tex. Civ. App.--Houston [14th] 1982, no writ). At the same time, however, a plaintiff may elect to make a claim for lost earnings, rather than earning capacity, when evidence of actual loss is

compelling. See *Ryan v. Hardin*, 495 S.W.2d 345, 349-50 (Tex. Civ. App.--Austin 1973, no writ) (plaintiff may seek damages for actual loss of earnings). Whether measured as lost capacity or actual loss of earnings, the measurement includes fringe benefits, such as retirement benefits and medical insurance. See *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 457-58 (Tex. App.--Austin 1989, writ den'd); *Greyhound Lines v. Craig*, 430 S.W.2d 573, 574-75 (Tex. Civ. App.--Houston [14th Dist.] 1968, writ ref'd n.r.e.). The real test of adequate preparation is establishing lost earning capacity in the plaintiff who has not actually suffered a loss of earnings.

Many injured plaintiffs continue to work after an injury and some, in fact, earn more by being forced into a new, more lucrative profession. How does one prepare a credible "loss of earning capacity" claim in such a case? Initially, the plaintiff's attorney should remember that the measure of damages is the difference between what the plaintiff was **capable** of earning prior to the injury and what he was capable of earning after the injury, not what he **earned** before the injury versus what he earned after the injury. See *Kansas City Southern Ry. Co. v. Catanese*, 778 S.W.2d 114, 118 (Tex. App.--Texarkana 1989, writ den'd); *Mikell v. La Beth*, 344 S.W.2d 702, 707 (Tex. Civ. App.--Houston 1961, writ ref'd n.r.e.); see, also, Edgar and Sales, *Texas Torts and Remedies* (Matthew Bender 1992).

The courts have traditionally allowed recovery for loss of earning **capacity** even in cases where the plaintiff maintained his pre-injury employment, so long as the plaintiff provided some evidence of loss of capability involving physical or mental functioning. See, e.g., *Jones v. Wal-Mart Stores*, 870 F.2d 982, 990 (5th Cir. 1989); *Trailways, Inc. v. Mendoza*, 745 S.W.2d 63, 68-69 (Tex. App.--San Antonio 1987, no writ); *Soriano v. Medina*, 648 S.W.2d 429 (Tex. App.--San Antonio 1983, no writ). In the words of the Houston Court of Civil Appeals:

The fact that the injured party may continue to work and earn as much as or more than he formerly did, especially when in an employment he has been engaged in for years, as in this case, does not bar him for recovering for loss of earning capacity.

The undisputed evidence that appellee had declined overtime work because of his physical condition, and his lost time from work which was charged against his accumulated sick leave, even though his wages were paid, warranted inclusion of loss of earnings down to the date of trial.

Mikell v. LaBeth, 344 S.W.2d 702, 707 (Tex. Civ. App.--Houston 1961, writ ref'd n.r.e.).

B. Translating Medical Into Loss of Earning Capacity

Translating the medical component of a plaintiff's injury into loss of earning capacity is made more or less difficult depending upon the circumstances of the plaintiff. As a practical matter, a plaintiff generally falls into one of four categories:

1. An impaired plaintiff who is completely unable to work;
2. An impaired plaintiff who is completely unable to work in the job held before the injury;
3. An impaired plaintiff who is able to perform some of the tasks associated with pre-injury employment;
4. An impaired plaintiff able to perform all tasks associated with preinjury employment.

Evidence of what a person may be expected to earn during a lifetime may consist of a history of actual earnings or statistical probabilities based upon education and skill, or a combination of the two. This is true regardless of the category (1 through 4 above) into which the plaintiff falls. Practically speaking, the choice of the type of evidence utilized for any given plaintiff depends to a large extent on which of the four categories a plaintiff falls into and the availability of evidence which would tend to establish that the plaintiff would have a greater earning capacity than previously demonstrated.

For instance, college graduates in a particular line of work, such as chemical engineering, may earn, on average, \$45,000 per year in 1992 dollars. Your client, also a chemical engineer and college graduate, may be earning only \$30,000 per year. On the other hand, another plaintiff, also a chemical engineer and college graduate, may be earning \$60,000 per year. If, before the injury, the plaintiff is earning less than the national average for like-educated, skilled, and employed persons, it is prudent to use the average income and explain the plaintiff's failure to fall in the mean as a function of plaintiff's choice of working for a company that he likes or being required to stay in a geographic location for family reasons. In this instance, the statistical average is actually helpful in attempting to raise the amount that the jury finds the plaintiff has lost in earning capacity as a consequence of the injury.

A plaintiff earning greater than the national statistical average might also benefit from evidence of the average by arguing, that the plaintiff is doing much better than average and, accordingly, can be expected to widen the gap between his or her income and the average, over work life expectancy.

In order to determine what type of evidence is best used, it is necessary to categorize the plaintiff into one of the four categories set forth above. Once this is done, counsel should

determine whether or not actual earnings history, statistical averages, or a combination of the two should be the focus of counsel's discussions with the appropriate vocational rehabilitationist or economist.

Remember that statistical data exists for the average income of persons based upon race, sex, education, field of employment, geographic region, etc. These data are available from the United States Department of Labor. You should generally be familiar with what the data contains and how to get copies of it. The appropriate data for your case should be selected by your vocational rehabilitationist or economist, as the case may be.

Translating the medical component into loss of earning capacity must involve the analysis of plaintiff's impairment by a person capable of determining the extent to which the impairment affects the plaintiff's earning capacity based upon a particular model. For instance if one uses The Guides to the Evaluation of Permanent Impairment published by the American Medical Association (3rd Ed. 1988) (the *Guides*) as the model, a plaintiff who is able to continue pre-injury employment has suffered no "loss of earning capacity." At the same time, under guidelines provided by the statistical averages for income in the United States, a person suffering a twenty percent whole body impairment, as determined by the *Guides*, may arguably have a reduced earning capacity of twenty percent, when compared against the national average, regardless of whether the plaintiff has actually lost earnings as a consequence of the injury. In other words, use the national averages for income (or limited geographic statistics if they are more favorable) and multiply the average income by a fraction equal to the whole body impairment under the *Guides*. This will give you a benchmark from which to work.

C. What is Physical Impairment?

1. Definition

I have been unable to locate a satisfactory definition of "physical impairment." The question that is often asked relates to whether the plaintiff has actually been unable to engage in activities which he or she would have engaged in but for the injury. For instance, in *Terry v. Garcia*, 800 S.W.2d 854 (Tex. App.--San Antonio 1990, writ den'd), the court responded to a factual insufficiency argument by stating that:

In the instant record, the case reveals that appellee has substantial limitations in typing and playing tennis, and he can no longer play the saxophone because of his physical impairment.

Id. at 858. Obviously, the court responded to the factual insufficiency point by referring to evidence of actual inability to engage in activities which the plaintiff enjoyed before the injury. This appears to be consistent with the definition of "disability" used in the *Guides*. It is also, in my opinion, an incorrect measure.

I do not believe that it is necessary to establish impairment of ability to engage in activities which the plaintiff enjoyed before the injury, any more than it is to establish loss of earning capacity by the evidence of actual earnings. It is the fact that the injury forecloses opportunities that makes the injury compensable.

Physical impairment is not easily defined and distinguishable from diminished earning capacity or physical pain. The *Mikell* court stated:

Diminished capacity to work and earn money may and ordinarily does result from physical impairment, but physical impairment does not necessarily result in diminished capacity to work and earn money. It depends on the nature of the impairment and the nature of the work. Physical impairment, as well

as the result, diminished capacity to work and earn money, were both proper elements of damage. The physical impairment with its accompanying pain and suffering, was a scar on the forehead and at least a temporarily swollen knee. [Plaintiff] was entitled to recover for these injuries even had there been no diminution of his earning capacity because of them.

Id. at 708 (quoting *Riley v. Norman*, 275 S.W.2d 208, 209 (Tex. Civ. App.--El Paso 1955, writ ref'd n.r.e.).

As noted above, the *Guides* uses “disability” to mean what in law may be considered to be compensable “impairment”:

An individual who is “impaired” is not necessarily “disabled.” Impairment gives rise to disability only when the medical condition limits the individual’s capacity to meet demands that pertain to nonmedical fields and activities. On the other hand, if the individual is able to meet a particular set of demands, the individual is *not* “disabled” with respect to those demands, even though a medical evaluation may reveal impairment.

Id. at 2 (emphasis added). This definition underscores the danger of not understanding the potential confusion that may result in situations where counsel is cross-examining an expert on issues related to impairment and disability. Plaintiff’s counsel should always be prepared to address the argument that although the plaintiff is impaired, he or she is not “disabled” under the definitions contained in the *Guides*.

2. Physical Impairment vs. Loss of Earning Capacity

Damages for loss of earning capacity and damages for physical impairment are separate elements of damage, even though the same impairment that reduces earning capacity may ultimately cause compensable physical impairment. See *Green v. Baldree*, 497 S.W.2d 342 (Tex. Civ. App.--Houston [14th Dist.] 1973, no writ). For example, a house painter, active in sports, who suffers a broken arm may recover damages for loss of earning capacity and damages for physical impairment. See *Southern Pac. Transy. Co. v. Harlow*, 729 S.W.2d 946, 950 (Tex. App.--Corpus Christi 1987, writ den'd)(evidence of impairment of ability to engage in leisure activities supports an award of damages in addition to loss of earning capacity). The instruction “do not include damages for one element in any other element” should avoid any claim that the plaintiff has enjoyed a double recovery of damages. See *French v. Grigsby*, 567 S.W.2d 604, 608 (Tex. Civ. App.--Beaumont), writ ref'd n.r.e. per curiam, 571 S.W.2d 867 (1978).

3. Physical Impairment - Cover the Bases

It may at one time have been appropriate to argue that physical impairment is the loss of enjoyment of life. This argument, while seductive in front of the jury, may actually fail to clearly specify the distinct elements of damage suffered by an injured plaintiff.

Although most reported decisions designate “physical impairment” as the proper measure of damages, plaintiff’s counsel should plead, prove, and submit separate special issues on physical and **mental or psychological** impairment. The “physical impairment” model is unreasonably limited in view of current medical knowledge, especially that relating to closed head injuries, post traumatic stress syndrome, and other psychological injuries. In other words, properly prepared and presented, a jury will understand that blunt force head trauma can cause:

1. physical pain;
2. mental anguish (pain) such as nightmares, depression, psychosis, insomnia, fear, or anxiety;
3. physical impairment, such as blindness or hearing loss; and
4. mental impairment such as loss of memory or the ability to read.

The *Guides* recognizes the distinction between mental impairment and mental anguish. It devotes separate chapters to *The Nervous System* (Chapter 4) and *Mental and Behavioral Disorders* (Chapter 14). Chapter 4 (*The Nervous System*) commences:

This chapter provides criteria for evaluation of permanent impairment resulting from dysfunction of the brain, spinal cord, and cranial nerves, and those peripheral nerves not covered in Chapter 3.

Id. at 95. Chapter 14 (*Mental and Behavioral Disorders*) begins:

This chapter discusses impairments due to mental disorders and touches upon behavioral impairments which might complicate any condition.

An episode of depression following a stressful life event, for instance, is often a short-term, self-limiting illness that may clear up when the stressful situation is relieved.

Id. at 227-28. Of course, certain injuries to the brain will result in physical impairment, such as motor dysfunction.

I use the term “mental impairment” to mean loss of brain function (such as memory) as an element of damage separate from that involving any physical impairment that may result. The attorney should read the *Guides* and evaluate the plaintiff’s condition to determine whether it is appropriate to distinguish between mental impairment and mental anguish in pleading and proving the plaintiff’s case.

D. Translating Medical Into Impairment (Physical and Mental)

Translating medical into impairment involves effectively presenting to a jury the impediments that the plaintiff faces. This is most effectively done by:

1. Testimony from the treating physician;
2. Testimony from plaintiff’s family, friends, and coworkers;
3. Testimony from the plaintiff,
4. Testimony from persons who have suffered like injuries; and

5. Use of the medical records insofar as they contain references to the pain or limitations suffered by the plaintiff.

Effective presentation of this information to a jury consists of more than simply putting a witness on the stand and asking questions. Medical illustrations, blowups of excerpts from depositions or medical records, or a videotape of a day in the life of the plaintiff can each be used effectively to impress upon the jury the extent of the impediment.

Counsel should determine, after interviewing the physician, whether or not the physician's testimony will be such that it would be of assistance in establishing impairment. As a practical matter, however, the physician is probably not in as good a position to provide evidence on impairment as the plaintiff, plaintiff's friends, family, and coworkers.

I have found it to be helpful to ask the plaintiff for the names and addresses of persons with whom he or she spent leisure time. This is especially helpful in cases involving persons who are active in sports and spend a great deal of time outdoors. Friends and family members are frequently articulate in describing the extent of plaintiff's impairment and its impact on his or her ability to participate in the activities which were enjoyed before the injury. This area can also be somewhat difficult in that many persons are not particularly active before or after their injury.

As noted above, it is essential to determine from the plaintiff the leisure-time activities the plaintiff enjoyed before the injury. It is necessary to identify witnesses who can corroborate the plaintiff's leisure-time activities before the injury.

VI. SETTLEMENT NEGOTIATIONS

The ability of a lawyer to adequately present a soft tissue injury in the context of settlement is critical. All cases are tried, but just not very many to a jury. The most effective way to settle

a case is to prepare it for trial, keeping in mind that you will ultimately try it to an insurance adjuster, defense lawyer, or mediator in the context of settlement negotiations. The art of effectively presenting and packaging a soft tissue case for settlement deserves serious consideration.

A. Adjuster

Understanding the mind set of the insurance adjuster is important in the context of settling a soft tissue injury case. Lower level adjusters who typically deal with soft tissue injury cases usually have limited authority. Above that, they have to justify any and all decisions to a supervisor. It is essential in dealing with an adjuster to help the adjuster build his or her file adequately in order to receive a fair and adequate settlement, particularly in a soft tissue case.

Most adjusters fear the clear or "gut" liability case, especially if there were some aggravating circumstances or actions on the part of the defendant. Adjusters realize that if the only question is damages, the right kind of case will result in an unfavorable verdict. Too many attorneys settle their strong liability cases and try their weak liability cases. The opposite approach is more effective. Strong liability cases with verifiable soft tissue injuries and low insurance limits should generally not be settled short of picking a jury or a tender of near policy limits. Cases of clear liability with low to medium limits are a possible two lawsuit case. These are the cases where you have an ability to put significant pressure on the insurance adjuster because the insurance adjuster knows that the liability is strong and therefore they have an obligation to attempt to settle the case within policy limits if possible. Adjusters are much more likely to pay full value on strong liability cases where they have a fear of gut liability.

My approach in attempting to get full value on soft tissue injury cases is to attempt to distinguish my soft tissue case from the hundreds of similar

soft tissue injury cases that the adjuster may have on his/her desk. This is done in one of two ways. First, I attempt to document the adjuster's file adequately. I also try to include some form of demonstrative evidence demonstrating the damages in the form of settlement brochures and settlement videos. This distinguishes my soft tissue case from the other cases. The other way I try to distinguish my case is by emphasizing the credibility of my plaintiff and any extenuating circumstances, such as clear liability or extreme impact. I try and convince the adjuster that this is the type of soft tissue injury case that they don't want to risk trying. Insurance companies and adjusters are very proud of the trial report verdicts, particularly in Dallas County, regarding low jury verdicts in soft tissue injury cases. This statistic is derived by not risking jury verdicts on clear liability cases with very appealing plaintiffs. I try to convince the insurance adjuster that they don't want to skew their favorable trial statistics with my case.

Insurance companies operate with paper. In order to maximize the value of the soft tissue injury case you must "paper" the insurance company with specials. The more paper, the thicker the file, the easier to effect maximum value on the case. Constantly updating the adjuster with revised specials eliminates the necessity of having the adjuster search through his or her file each time. When the insurance adjuster asks for more information, I typically try to comply if the request is not unreasonable. I don't want the case to not settle simply because the insurance adjuster doesn't have enough documentation in his or her file to justify paying my demand to his or her supervisor. As previously indicated, settlement brochures, settlement videos and other demonstrative evidence is generally quite effective in presenting to the insurance adjuster in a settlement context.

B. Defense Lawyer

This same approach should be used with the defense lawyer. If you have a good case of liability and good soft tissue damages, the facts will help you tremendously. No insurance defense lawyer wants to read his or her name in the jury verdict sheet getting hit with a big verdict in a soft tissue injury case.

VII. TRIAL APPROACHES

A. Model Juror

The ideal soft tissue injury juror is one who is:

1. emphatic and sympathetic;
2. warm and personable;
3. outgoing and communicates;
4. relates directly and indirectly to pain; and/or
5. is susceptible to reframing his or her thinking regarding this inoperable injury.

I have found that older jurors are typically better for soft tissue injury cases because they know what it is like to not bounce back from painful injuries and are more empathetic with the residual impairment aspects of soft tissue injuries.

B. Voir Dire

Since I have been practicing law, voir dire approach has changed dramatically. When I initially began, lawyers argued their cases in voir dire. Now, it is critical that the lawyer weed out the hidden agendas of jurors who are liable to have a preconceived notion about soft tissue injuries and are unable to be reframed. The lawyer, much like the client, must establish credibility in the soft tissue injury case. This credibility must be used early on to reframe the juror's belief system as previously indicated. This reframing approach must begin in voir dire

and continue through opening statement and the rest of the case. You must link your client to the change of belief system.

C. Opening Statement

The opening statement should primarily focus on reframing and should deal with the “inoperable” nature of the injury and the credibility of the plaintiff. During opening statement, you should establish the credibility of your case by focusing on the anticipated witness testimony and medical evidence that will be presented as to the inoperable nature of this injury and the permanent residual impact. In opening statement, you should point out that the defendant is basically attacking the credibility of the plaintiff because the defendant is generally denying that the injury exists or saying that the plaintiff has gotten well. Since the most important aspect of the case is the credibility of the plaintiff, you will be successful if the jury believes that the plaintiff is being truthful.

D. Case in Chief

The most important part of the case in chief is to demonstrate effectively the mechanism of injury, or how the accident resulted in injury, and the residual effect of the injury. The dynamics of the accident and its impact on the body which resulted in the ripping, tearing, stretching and straining of the soft tissues is of primary importance. Animations and other demonstrative evidence provided by reconstruction specialists is very helpful in this regard. Demonstrative evidence is very effective in demonstrating the type of forces that the body is subjected to in certain traumatic events.

E. Rebuttal to Defense

The defense’s basic approach in soft tissue injury cases is to attack the credibility of the plaintiff and the plaintiff’s experts. The typical approach is to establish that soft tissue injuries are based upon the subjective complaints of the plaintiffs. Therefore, if the plaintiff is not believable or truthful, then the case has no merit. The examination of the defense witnesses should very clearly establish that they are in essence attacking

the credibility of the plaintiff on his or her injuries, disability and impairment. By establishing that the defendant is really just attacking the credibility of the plaintiff, you set up your case for success if in fact you have convinced the jury as to your client's and case's credibility.

A good rebuttal witness for the defense case is a clinical psychologist who has examined and treated the plaintiff and will opine that the plaintiff has suffered significantly, is not malingering, and has been truthful about his or her condition. The use of very believable and credible fact witnesses as to the plaintiff's condition is also an effective way to rebut the attack on the plaintiff's credibility.

F. Closing Argument

Closing argument in a soft tissue case should again focus primarily on credibility and about the inoperable and permanent nature of the injury. The most effective argument focuses on the value of freedom from permanent residual impairment. In essence, everyone should have the opportunity to be pain free and free of residual permanent impairment for the rest of their life. The focus should be on the fact that the defendant's conduct has taken a very valuable opportunity or right away from the plaintiff.

VIII. CONCLUSION

As with most activities in our field, preparation is the key to demonstrating and proving soft tissue injuries. There is simply no substitute for preparation. This paper has attempted to articulate a rational reasoned approach to the acquisition of the information necessary to have a complete picture of the effect of the injury upon the plaintiff. Once counsel has the information, translation of this information is a question of effective presentation during settlement negotiations or ultimately in trial. Counsel is well advised to sit quietly after having compiled the appropriate information, and articulate in

written form counsel's observations and conclusions relating to the affect of the injury upon the plaintiff. Once this is done, counsel will find that preparation of witnesses and exhibits for trial is infinitely easier.