Ben Brodhead on proving causation and damages in spinal fusion cases.

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**Ben Brodhead** is an honors graduate of Harvard Law School and has handled significant personal injury litigation for nearly fifteen years. After graduating from Harvard, Ben was employed in the corporate litigation department of Paul, Hastings, Janofsky & Walker and worked on complex business litigation matters for several Fortune 500 companies. In 1998, Ben decided to open his own firm dedicated to representing victims of severe personal injury and wrongful death. Brodhead Law, LLC, is now a successful personal injury firm that is known for aggressively litigating tractor-

# Proving Causation and Damages in Spinal Fusion Cases

By: Ben C. Brodhead

Back and neck injuries are commonly caused by motor vehicle collisions, and, quite often, spinal fusion surgeries are required to relieve the pain and neurologic symptoms associated with these injuries. However, unless the attorney for the plaintiff is extremely well versed in the medical and legal issues involved in spinal fusion cases, the plaintiff will likely recover only a small fraction of the true value of the case. In order to obtain the full value of the case, the attorney must first understand the true value of spinal fusion cases. Next, the attorney must invest the time and effort in proving liability, understanding defense strategies, proving causation, and proving damages.

Injuries requiring spinal fusion surgery can and should result in very large recoveries because they represent a very large harm to the injured plaintiff. Medical bills alone usually range from $60,000.00 to $130,000.00, and, in complex cases, can exceed $200,000.00. Permanent impairment from an average spinal fusion case will usually range from 13% to 28% of the whole person. Moreover, there will be debilitating pain leading up to the surgery, a recovery

trailer collisions, auto collisions, and products liability cases. Ben has been recognized as a Georgia Super Lawyer in 2008, 2009, 2010, 2011, and 2012. Ben is a native of Georgia and resides in Atlanta. Since 1998, Ben has successfully litigated hundreds of serious personal injury cases across the country and has recovered millions of dollars in settlements and verdicts for his clients. Even though many of the largest recoveries obtained by Brodhead Law, LLC are confidential, the CaseMetrix database still contains several recoveries obtained by Brodhead Law, LLC that show the type of recoveries that can be obtained in spinal fusion cases:

**$7.2 million** - 5/24/11 Neck herniation w/surgery
**$2 million** - 9/13/12 Back/neck herniation w/surgery
**$1.699 million** - 7/12/12 Neck herniation w/surgery
**$1 million** - 9/5/11 Back herniation w/surgery
**$1 million** - 10/28/04 Back/neck herniation w/surgery

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period that can last as much as a year, and the injured plaintiff will almost certainly continue to experience some level of pain and dysfunction for the rest of his or her life. Additionally, in order to even undergo surgery, the injured plaintiff must first certify that he or she has been informed that there is a real possibility that paralysis or death could result from the surgery.

Despite the significant harm suffered by injured plaintiffs, many verdicts and settlements only reach $200,000.00 to $300,000.00, which is far lower than what could be achieved. The failure to properly prove liability and causation is the primary reason that recoveries fail to represent the true value of these cases. In our experience, as long as liability and causation are properly locked down, an average spinal fusion case without revisions or complications should result in a recovery from $500,000.00 to $800,000.00. If there are complications requiring a revision of the surgery or the possibility of an additional surgery at another level in the future, the value of the case will likely range from $1,000,000.00 to $1,500,000.00. In cases that require the plaintiff to undergo both a cervical fusion and a lumbar fusion, the true value of the case should be $1,000,000.00 to $2,500,000.00. Where there are significant and permanent disabilities such as foot drop or other permanent nerve injuries that compromise the function of one of the plaintiff's arms or legs, the value of the case could be $3,000,000.00 to $7,000,000.00 or even more.

Due to the value of spinal fusion cases, there should be no shortcuts taken in proving the case. Accordingly, even in rear-end cases where liability is admitted, there must be thorough depositions of the defendant and all witnesses that prove the defendant is unquestionably at fault and that the defendant cannot dispute the injuries of the plaintiff. Even in cases where liability is admitted in the Answer, some defendants will try to sneak in liability defenses by claiming that the plaintiff stopped too quickly, swerved in front of the defendant, or committed some other act or omission that the defendant claims contributed to the cause of the collision. By eliminating these issues in the depositions, surprises at trial will be avoided, and the possibility of settlement increases. Similarly, defendants commonly attempt to testify that the plaintiff could not have been hurt in the subject impact. Invariably, defendants have no medical or scientific basis for such a claim and will eventually crumble when subjected to a thorough and sifting cross-examination. Nevertheless, if such tactics are not shut down in the defendant's deposition, the plaintiff's attorney will be left trying to

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defuse live testimony in front of the jury. In addition to the obvious perils of live theater, the plaintiff's attorney runs the risk of appearing as a bully, which can offend the jury and lose the case. If handled properly during depositions, however, the defendant should be limited to an unequivocal admission of liability and a concession that he or she cannot opine regarding the extent of the plaintiff's injuries. If the defendant deviates from the admissions and concessions at trial, the plaintiff's attorney can politely and respectfully remind the defendant of his or her prior sworn testimony.

Once liability is locked down and unsupported testimony claiming the plaintiff could not have been hurt in the collision is properly eliminated, the defense attorney will likely seek a defense medical examination or a record review in order to claim that the need for surgery was caused by pre-existing degeneration rather than injuries from the collision. This is where most plaintiffs' attorneys get trapped and lose significant case value. In general, the defense medical expert will provide the following opinions (which are usually accurate):

1. The plaintiff had degeneration in the spine (degenerative disc disease, spondylosis, bone spurs, etc.);
2. Degeneration develops over time;
3. The degeneration pre-existed the collision;
4. The collision did not cause the pre-existing degeneration;
5. The surgery removed the degenerative disc; and
6. The surgery removed the degenerative bone spurs;

The defense medical expert then provides the following opinions (which are almost always false):

1. The degeneration that pre-existed the collision is what made surgery necessary; and
2. The surgery was not related to the collision.

Based on the testimony of the defense medical expert, the defense attorney makes the following arguments:

1. The surgery was performed to fix conditions that the defendant did not cause; and
2. The defendant should not have to pay for a surgery to fix conditions that the defendant did not cause.

Additionally, if the treating surgeon does not understand the tactics of the defense attorney, the treating surgeon may concede all of the above points without ever realizing that the ultimate conclusions are entirely inaccurate. Even worse, if the treating physician does not fully consider the analysis that leads to the surgical decision, the treating physician may agree that the only reason he or she would say the plaintiff was injured in the collision is because the plaintiff said so. Since most spinal fusion surgeries occur as a result of relatively minor impacts, the defense attorney gets to add that the plaintiff had no broken bones, no cuts, no scrapes, no bruises, and that not even a single drop of blood fell from the plaintiff's body as a result of the impact. In many instances, there is also no complaint of injury at the scene of the collision, and the plaintiff does not seek medical treatment for several days or even weeks after the collision. If the plaintiff's attorney fails to show why these defense issues and contentions are false, misleading, and/or irrelevant, the plaintiff would be lucky to get $200,000.00.

In order to obtain the true value of a spinal fusion case, the plaintiff's attorney must recapture the framing of each issue, show why the defense framing is false and misleading, and force the defense medical expert to admit that the collision caused the plaintiff's need for surgery. The starting point is understanding that ***degeneration alone does not provide the indication for surgery***. Even the defense expert will have to admit the following:

1. Everyone over 30 (or 40 with some doctors) has degeneration in his or her spine;
2. Many people with significant degeneration can go through their entire lives without significant pain or neurologic symptoms;
3. 99% or more of the people who have degenerative changes to their spines will never need spinal surgery;
4. The purpose of spinal fusion surgery is to relieve the pain and neurologic symptoms, and not to treat the degeneration;
5. There is no peer-reviewed, authoritative material that the doctor knows of that says spinal fusion surgery should be used as a treatment for degenerative disc disease when there are no other symptoms such as pain or neurologic deficit;
6. If someone had the same amount of degeneration as the plaintiff, but no pain or other neurologic signs, the doctor would not even consider doing surgery; and
7. In the subject case, the doctor did the surgery to treat the pain and/or neurologic symptoms.

Once the above points are established, the plaintiff's attorney should show the following:

1. Even if the plaintiff had spinal degeneration before the collision, the plaintiff did not have significant pain before the collision;
2. Even if the plaintiff had spinal degeneration before the collision, the plaintiff did not have any significant neurologic deficit before the collision;
3. Accordingly, even if the plaintiff had spinal degeneration before the collision, there was no indication for surgery before the collision;
4. The pain started at the time of the collision or shortly after the collision;
5. The neurologic deficit started at the time of the collision or shortly after the collision;
6. Accordingly, surgery became necessary after the collision due to the pain and neurologic deficit.

The plaintiff's attorney must also must show that no surgical recommendations, significant pain, or neurologic deficit existed immediately before the collision and that there were no other collisions, falls, etc. that could explain the onset of pain and neurologic deficit. If prior surgical recommendations, pain, neurologic deficit, and/or other recent traumatic events are involved in the case, different methods which are beyond the scope of this paper would be employed to prove whether those conditions were exacerbated by the subject collision. Additionally, it cannot be stressed enough that thorough depositions must be conducted of defense experts. Although the above points are clearly presented, the defense medical expert will try to avoid direct answers to direct questions. The questions must be asked until they are actually answered. Defense medical experts are professional witnesses; they cannot be effectively cross-examined at trial without sworn testimony locking them into clear opinions. Accordingly, it is necessary to get each question and answer for trial on the record in a discovery deposition as a definitive sound bite. The plaintiff's attorney should anticipate a 4-7 hour discovery deposition of each expert in order to obtain 10-15 minutes of sound bites.

In addition to cross-examining the defense medical expert, the plaintiff's attorney must be prepared to ask questions that will help the treating surgeon explain his or her opinions to the jury. Just like the defense medical expert, the treating surgeon also should agree with the points outlined above. Since the treating surgeon usually does not have an agenda like the defense medical expert, obtaining

agreement with the truthful and accurate points outlined above should be much less challenging. Furthermore, the treating surgeon can be used to debunk defense arguments about the severity of the impact as well as irrelevant matters that the defense may try to argue (for instance, a defense claim that a pulled muscle requiring a couple of chiropractic visits 30 years earlier caused the need for surgery). Simple questions of the treating surgeon should be able to clarify that there is no significant correlation between the severity of the impact and the need for a spinal fusion surgery. The treating surgeon also should be able to testify that a pulled muscle or other injury that healed years earlier is not what caused the need for surgery.

A more difficult area to defuse is the defense contention that the treating surgeon based his or her opinion of causation solely on the self-report of the plaintiff. Although the defense contention is not true, a skillful defense attorney may cause the surgeon to under-analyze the treatment and diagnosis process. Therefore, the plaintiff's attorney must demonstrate the surgeon's full analysis for concluding that the collision caused the need for surgery. In addition to the patient history, the surgeon should agree that he or she considered all of the medical circumstances, including physical examinations, the current MRI, all previous treatment, all previous MRIs, all relevant previous conditions, the patient's statements about the onset of pain, and any prior history of trauma as well as his or her own training and experience of being a surgeon day in and day out. The surgeon should be able to state that the degree of muscle atrophy is consistent with the date of injury and inconsistent with a neurologic deficit that began years earlier. The surgeon also needs to eliminate causes other than trauma, such as MS, ALS, and CIDP, etc. If the surgeon fails to eliminate neurologic disorders, the surgeon runs the risk of performing an unnecessary surgery; accordingly, the surgeon should have taken reasonable steps to eliminate neurologic disorders and confirm that the symptoms and need for surgery stem from the subject collision.

Ultimately, in order to obtain the full value of a spinal fusion case for an injured plaintiff, the attorney must have full knowledge of the medical and legal issues relating to this complex area of law and medicine. The attorney representing the injured plaintiff must be able to simplify and explain these complex concepts and must be able to debunk the claims of the defense expert as well as facilitate the testimony of the treating physician. Although this article merely scratches the surface of the issues involved, I hope that it provides

a starting point for those wishing to increase recoveries in spinal fusion cases.