QUESTIONING WITNESSES (Hear what they say, but heed what they don't say)

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INTRODUCTION

The unfortunate reality for defense attorneys is that they get into the fray late. By the time they receive the assignment and claims file from the insurance carrier, the memories of witnesses are just as faded as the physical evidence at the Incident site.

Whether a case is won or lost at trial, two, three or years down the line, is often determined by the quality of the investigation done immediately after the dust settles from the accident or the last nail is hammered on the job. Admittedly, by far, most cases never get to trial and insurance companies are understandably reluctant to investigate "full bore" on every case. But, as a law professor of mine once said, if you're going to spend the time, money and effort to investigate at all, do it well and do it thoroughly the first time . . . it may be the only time you'll get to see the witness, the scene of the accident or to inspect and photograph the evidence before it or they show up on the witness stand against you.

Too often witness statements are taken without "focus" and, despite lengthy pages of questions, they miss the salient legal point(s) entirely. Likewise, physical evidence which could be pivotal to a case at trial is disposed of or overlooked and inadequately documented or missed altogether.

I recall a quite catastrophic construction site fall injury case, in which the claimant was allegedly knocked from a ladder by an automatically activated receiving dock gate. One key issue at trial was whether or not the property owner had adequately posted warning signs, which would have provided the claimant notice of the potential hazard in his placing his ladder near the electric gate. A 20-page(!) statement was obtained by the investigator from the claimant early on in the case. We knew from the statement where this man had worked for the past three decades and what he had for breakfast that morning... but, the investigator never asked the claimant if he read English. The evidence did show that there were warning signs posted; unfortunately, Mr. Garcia couldn't read them.

This article is offered to provide guidelines and suggestions to the claims professional, the field investigator and defense counsel as to what will be helpful to the defense trial lawyer, how to spot it and how to preserve it.

AXIOMS OF INVESTIGATION

1. Understand the claimed "mechanism of injury."

2. Understand the "insured's role" in the incident.

3. Focus the investigation on the likely issues.

4. Ascertain who the witness\party is, what his qualifications are and what he knows. But also ask what he doesn't know.

5. Preserve the evidence.

6. Remember that the claimant's task at trial is three-fold:

   First - He must prove negligence and/or other legal responsibility.

   Second - He must establish legal or "proximate cause" and

   Third - He must prove his damages.

MECHANISM OF INJURY

Ask yourself first, what is the claimant's version of the Incident and the mechanism or dynamic of his claimed injury?

Suppose for example a workman who falls from a temporary scaffold and impales himself on a wooden stake embedded in the earth below. We will need to ask focused and directed questions about 1) the scaffold, 2) the wooden stake, 3) the claimant's activities before, during and after the fall and 4) of course others who may have contributed to the scenario as it was at the time or caused the incident.

E.g., with regard to the scaffold, we must know who erected it. Why was it placed where it was? When was it installed? Why was a temporary scaffold being used instead of a scaffold built for the purpose or a man-lift? Who supplied it? Who directed the claimant to use it? What safety instructions was he given? What warnings? Did he see any evidence that it was unstable/unsafe? Exactly how was it constructed and of what materials? Were there any marking labels, etc.?

Many similar questions should be asked about the wooden stake. Exactly where was it located, relative to other known and determinable geographical reference points? What trades were working in the area? Did the claimant notice it prior to the accident? What was its purpose? Were there any safety caps or covers on it? What about warning flags or signs? Who installed it and when? What exactly did it look like? Etc., etc.

What was the claimant attempting to do? Why? How exactly did he go about it? What, in his opinion, precipitated or set in motion the fall? How exactly did the claimant/s body move in the fall and how did he land and where exactly did he come to rest?

In one such case based upon just these facts, we were brought in late as a cross-defendant three years after the fact. Plaintiff's deposition had been taken (albeit poorly) prior to our entry into the case

and the facts established to that time gave every appearance that our concrete subcontractor would be a target for allegedly having placed the wooden stake and for having failed to remove it at the conclusion of his work.

But after we re-questioned the claimant more precisely in deposition about the mechanism of his injury, we were able to clearly establish that the accident actually occurred at a building which was adjacent to the building worked on by our client and that the concrete form staking was done by someone else entirely. Moreover, the wooden stake did not in any way match the ones used by our client and, in fact, the precipitating factor that set the accident in motion was the fact that the wooden plank the claimant himself provided and was using for a work platform was not certified or approved scaffold planking and had a large knot, which allowed the plank to break under his weight. Focused questioning thus provided a foundation for a successful Motion for Summary Judgment.

INSURED'S ALLEGED ROLE

What was the insured's role at the time of this accident?

In most cases the role of an alleged wrongdoer is pretty clear, but make the claimant define it anyway. The insured's role in many instances defines the legal capacity and responsibilities and, therefore, the potential legal exposure.

In a construction case, for example, is the claimant suing the property owner for his alleged active negligence, passive negligence for failing to prevent the dangerous condition or for "non-delegable duty" to keep the property safe under a "special risk"?

PROBABLE THEORIES OF LIABILITY

The answers to the first two questions then assist you in understanding the probable theories of liability against your insured.

Once the likely theories are outlined, you can then address your questions to witnesses and other investigation efforts to those theories and obtain a much more focused and relevant work product.

A seemingly clear-cut example might be the routine rear end collision. The theory undoubtedly will be inattention and/or speed. Knowing that, we should question everyone concerned about where their attention was focused at the time and what the approach speeds were at various physical reference points up to the point of impact. We should ask ourselves too about other possible explanations for the accident, such as the vehicles' characteristics, weights, angles of approach, roadway conditions, weather and traffic conditions, as may be applicable. All will be helpful to defense counsel and, if it comes to that, to our defense reconstructionist.

Later, when we compile the evidence together, perhaps we can show that the physical damage seen is not consistent in severity, location, angle of deformation, etc., with the impact described by the claimant... or that there are, at least, mitigating circumstances to explain the incident.

In one such case, investigation prior to our getting the case established important "non-evidence" of no substantial impact to the insured's vehicle (so, take a photo of the insured's car even if it has no evidence of significant damage. That's an important fact, don't you agree?), which meshed beautifully with information we were able to later develop in deposition. We were able to establish via quite straightforward accident reconstruction that plaintiff's larger, heavier automobile with $6,000 in damage 1) could not have been damaged in this accident by our client's much smaller and lighter car... and, therefore, could not have caused the extensive injuries being claimed and 2) as our expert testified, the "impact " here would equate with someone "precipitously dropping their buttocks onto a down sofa from a height of 2 feet".

In other cases, rear end impact claims may be deflated by evidence to show a sudden and unreasonable stop or unexpected backing by the claimant. Or perhaps that the claimant slowed to turn without signaling or that his brake lights were not functioning.

There is no clear liability case, until full investigation is done and other explanations are ruled out.

WHO IS THE WITNESS? WHO IS HE NOT?

Find out what the witness knows but also what he doesn't know. Qualifications of a witness are important but equally important are lack or limitation of qualifications.

With a lay witness, this usually means ascertaining in some detail the witness' ability to see, hear, smell or perceive the events or fact for which he claims knowledge. Where was he? Where were the events occurring relative to his own position? Were there any obstructions or distractions to his perceptions? Did he really have a chance to see the event long enough to develop a sense of actions, times, speeds and distances? What are his biases (Relation or prior acquaintances, etc.)?

Witnesses almost always want you to know what they saw and what they believe they know; but, often it is more important to establish those facts that they don't know. For example, if they don't know how much or what the claimant and the defendant had to drink prior to the altercation, or if they didn't hear the conversation that preceded it, or don't know if the claimant had waved a knife beforehand, etc., all of that is important in neutralizing him as an adverse witness.

Experts are often more sophisticated and experienced as witnesses and sometimes take on an adversarial role. So it is all the more important to find out who they are and who they aren't.

If the expert is, for example, a neuro-radiologist, have him acknowledge that he is not a neurologist, a neurosurgeon, a vascular surgeon, etc. He is not a treating "clinician" but only a "picture taker", etc. and have him explain the scope of his knowledge, training, duties and experience and those things which are not within his area of expertise..

Again by way of example, if the expert is a geologist, make certain to ask him to acknowledge that he is not a soils engineer and have him define their different roles and limitations. You may even get him to admit that some other field is better qualified to address the issues in the case.

PRESERVING EVIDENCE

Lastly, **preserve evidence**. It's easy to say but not always easy to do, for both practical and economic reasons. I can understand from the insurance industry's viewpoint not wanting to undertake a "trial ready" field investigation on every case, no matter how trivial. But, during my certification course in accident reconstruction many years ago, it was repeatedly emphasized how vital timely site inspection is and just how rapidly the evidence fades from view.

In construction cases, for example, preserving the warning sign or a piece of the dry wall claimed to be defective for later analysis and testing can make the difference in winning or losing.

Often photos showing no damage or showing a correct jobsite installation, with proper foundation laid, will go far towards persuading a jury that no injury or damage could have resulted as claimed.

Whether it's an auto case, a products case, a construction site injury, a slip and fall or anything else, try insofar as possible to preserve and protect any evidence of the mechanism of claimed injury.

It is equally important to "preserve" potential witnesses, as their testimony is evidence as well. It is a perhaps obvious point but, unfortunately too often missed, that one should always ask for information about how, where and through whom the witness may be re-contacted in the future. In addition to the usual name and address information, a witness should be asked for the name of a relative or friend through whom he could be reached in the future, in the event the witness moves.

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