**DON'T HIDE FROM HISTORY**

by

Vadim Liberman

Very often someone's prior history of injuries and injury claims can come back to seriously impede one's ability to recover just compensation in a personal injury case. There is nothing insurance defense attorneys and adjusters love to bring up more often at trial or during settlement negotiations than the lengthy claims history of the plaintiff. Their goal, of course, is to try and persuade the finder of fact, whether it is a jury, a judge or an arbitrator, that either the plaintiff is a "professional claimant" who feigns most of his injuries and is out to collect a quick buck, or that the injury was pre-existing and the defendant did not cause it. If the defense succeeds, the final settlement amount or judgment in your case will be substantially less than what would be the norm.

So if you are a plaintiff's lawyer, you will bet the family farm that your client will be quizzed quite thoroughly about any prior accidents he may have been involved in, the injuries he sustained in those accidents, the treatment he received thereafter, and, of course, the compensation from the insurance companies, if any. The quiz occurs during the plaintiff's deposition, which is a question and answer session that usually takes place in either the plaintiff's or defendant's attorney's office in the presence of a court reporter or stenographer authorized to administer the same oath to tell the truth and nothing but, as is given in the court of law. The questions asked and the answers you provide are typed up and later mailed to the deponent in the form of a booklet that looks like a movie script.

If you are a plaintiff's attorney, you will not allow your client to start the deposition without first preparing him for what is to be expected. That includes preparation for the questions about any prior injuries or injury claims. Even though the party being deposed is allowed to make subsequent changes to the answers provided at the deposition, you want to give your best answers immediately. The reason for that is that good defense attorneys will try to turn your corrections into signs of deceit, making the plaintiff look much less sympathetic to the jury (e.g. "Mr. Deponent, do you remember swearing to tell the truth at your deposition? And do you remember stating at your deposition, page 49, line 18, that you were never involved in any prior accidents? Do you remember subsequently changing the answer on page 49, line 18 from "no" to "four prior accidents"? Now, Mr. Deponent would you please tell the jury on which occasion you were lying and on which occasion you were telling the truth?") If you are a plaintiff's lawyer you want your client not to hide relevant information and also not to forget anything that may come back to haunt the client if the other side finds out about it and brings it up at trial. And if you have been doing personal injury work for some time, you will also know that no matter how much you try to impress upon your clients how important it is to be truthful at least with their own attorney, some will still think that hiding certain facts from either you or the other side or both is the best way to go.

This brings us to the true story that was the inspiration for this article. Many years ago I represented an elderly Jewish-Russian gentleman, who was well into his 70s, in a trip-and-fall accident case. He was shopping at a corner shopping plazza in the early evening hours as it was getting dark when, being a wise man, he realized that he'd better call his wife to see if he forgot to purchase anything that might negatively affect his preferred state of domestic bliss. So, with a shopping bag in his hand, he headed towards the payphone (remember those?) located in the corner of the parking lot. Within a couple of feet of the payphone someone dug up a ditch approximately 2 to 2 ½ feet deep and about the same length in diameter, most likely for the purpose of repairing the telephone lines leading to the payphone itself. Needless to say our hero falls into the ditch, which was not barricaded, covered or surrounded by any warning signs. He sustained a somewhat serious contusion of the leg, which caused him to limp for several weeks and sprains and strains of his back, all of which required

approximately 10-12 weeks of physical therapy. I presented a claim to the owners of the strip mall and Pacific Bell, the owners of the payphone. Neither showed any interest in paying approximately $10,000.00, which my elderly client would have happily accepted to avoid going through a lengthy and time-consuming litigation. So we filed a lawsuit and my client's deposition was set.

Before the deposition I spent close to an hour giving the client a lecture about what the process involves and how to present his responses to the questions in the best possible light. We went over the facts of the case, the subsequent medical treatment and of course discussed whether my client had any prior accidents or injuries, to which he responded that he did not. I recall that at the deposition conducted in the offices of the Pacific Bell defense firm, there were three opposing attorneys present: one for the owners of the strip mall, one trial attorney and one associate for Pacific Bell. At first the deposition was pretty uneventful as my client was quizzed about the facts of the fall and the subsequent treatment of his injuries, all of which he was describing without any surprises. But towards the end, the defense attorney asked whether my client ever had a leg injury in the past. To my surprise, though I expected to hear a response containing an unqualified "no", my client stated "yes he had and a very serious leg injury at that". I tried to keep my face from revealing any anxiety about this new revelation as I immediately noticed the eyes of the three defense attorneys light up and their bodies move closer to the conference table. The next series of questions went as follows:

Attorney: "Was the leg injury a result of another trip and fall accident?"
Client: "No."
Attorney: "Was the leg injury a result of an automobile accident?"
Client: "No."
Attorney: "Was the leg injury a result of a work-related injury for which you made a worker's compensation claim?"
Client: "No."
Attorney: "Would you explain then how you sustained this leg injury?"
Client: "Well you see in 1941, during the start of World War Two, I was drafted into the Russian army. After serving in various army units during the initial stages of the war, I wound up being assigned to the Russian Army tank divisions. I think the year was 1944 and we were fighting one of the battles for the liberation of Bulgaria from the Nazis, when an anti-tank missile struck my tank. You see I was very lucky because the only injury I sustained as the result was a deep shrapnel wound to my left leg, which happens to be the same one injured in this accident. I still have the scar to prove it. Here it is, take a look."

(The three attorneys leaned back into their chairs, the look of disappointment impossible to conceal. But the trial lawyer asking the questions wasn't about to give up just yet.)

Attorney: "Thanks, that won't be necessary, we believe you. Now I see you are also claiming injuries to your back as a result of the accident we are here to discuss today. Have you ever had back injuries in the past?"

Client: "Well, yes I did have a very serious back injury come to think of it."

(Again my heart skipped at least one beat while my adversaries' faces showed renewed excitement.)

Attorney: "Was the back injury a result of another trip and fall accident?"

Client: "No."
Attorney: "Was the back injury a result of an automobile accident?"
Client: "No."
Attorney: "Was the back injury a result of a work-related injury for which you made a worker's compensation claim?"
Client: "No."
Attorney: "Would you explain then how you sustained this back injury?"
Client: " Well you see after I spent about 2 months with my shrapnel injury in a Russian military field hospital, they decided that I was still good for some sort of military duty and instead of sending me back home, my commanders, in their infinite wisdom, assigned me to paratrooper training, as I apparently wasn't qualified to sit in a tank but was qualified to jump out of airplanes."

(At this time I noticed polite smiles beginning to appear on the faces of the defense attorneys as they and I begin to realize where this is going.)

Client: "So it was late 1944 and we are fighting one of the battles for the liberation of Czechoslovakia and we are being dropped by the hundreds out of airplanes with our parachutes and rifles into a big valley near a small forest. Germans, meanwhile, had their snipers sitting in the trees of this forest shooting us out of the skies while we were slowly descending. One of those sniper bullets hit me in the stomach and came out of my back. But I was very lucky as this bullet missed my spinal chord by about an inch. I can show you the scars on my belly and back, would you like to see them?"

There were no more injury questions after that and the deposition ended within a few minutes thereafter. I could see that by the end of this session our opponents had a hard time hiding their admiration for my client. Without admitting this, they asked me what it would take to settle the case and received a demand of $20,000.00. Three days after the deposition one of the attorneys telephoned me and said that the two defendants agreed to pay the demand and each would pay $10,000.00 in exchange for a dismissal of the case.

When I asked my client why he did not tell his own attorney about his military injuries, he said he thought we were only interested in injuries sustained in other accidents, and Nazi bullets and missiles were no accident. The bottom line is attorneys for the defendants realized that letting a jury hear about these particular prior injuries might actually make them feel more sympathy towards this man than any lawyer would like a juror to feel towards any opposing party. The resulting advise to their clients was to avoid trial and settle. With this particular client, his prior injury history proved to be a complete opposite of an impediment to a good recovery.

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