



The eggshell plaintiff

The eggshell-plaintiff doctrine protects the rights of a plaintiff whose pre-existing fragility makes them particularly susceptible to injury.

BY VICTOR GEORGE

The tort-feasor takes the injured plaintiff as she is found. If, by reason of some pre-existing condition, the victim is more susceptible to injury, the tort-feasor is not thereby exonerated from liability. (*Rideau v. Los Angeles Transit Lines*, (1954) 124 Cal.App.2d 466.) This type of highly susceptible plaintiff is commonly known as an “eggshell plaintiff.” The eggshell-plaintiff doctrine applies to all areas of the law – intentional torts, negligence, strict liability, and criminal law. It protects the rights of a plaintiff whose pre-existing fragility makes them particularly susceptible to injury. As a matter of public policy, courts refused to allow defendant to rely on a plaintiff’s pre-existing conditions to escape liability. When representing an eggshell plaintiff, the goal is to persuade the jury that the defendant’s actions were the proximate cause of aggravating a prior condition to maximize any damages award.

Plaintiff’s burden

Plaintiff must demonstrate that the defendant’s conduct was the cause of, or at least a substantial contributing factor to, the harm. From the outset, an attorney should adequately plead that the plaintiff has a pre-existing condition that made him susceptible to the harm caused by defendant’s wrongful conduct.

Any pre-existing weakness or medical condition bearing on the injury should be fully disclosed and carefully explained. This is true whether at the early stages of litigation or at trial. Using the opening statement at trial is an essential opportunity for plaintiff’s counsel to give an effective, persuasive description of the plaintiff’s pre-existing condition before defendant is allowed to condition the jurors to believe that plaintiff is seeking

undeserved compensation. Also, when a plaintiff has a pre-existing mental condition, it is necessary to distinguish between aggravated emotional distress caused by defendant’s tortious conduct and emotional distress that would have arguably developed regardless of the defendant’s action due to plaintiff’s pre-existing mental illness.

Role of experts

Experts are an absolutely essential tool to explain the causation between the normal harm that may have occurred compared to the aggravation of a plaintiff’s pre-existing condition. Independent doctors, forensic psychiatrists, and psychologists should review all available documentary evidence concerning a plaintiff (i.e., treatment notes, medical and employment records, deposition transcripts, and thorough psychological test data) in order to assess any potential factors that may cause or contribute to aggravating plaintiff’s physical impairments and mental disorders. An expert retained in an eggshell-plaintiff case should be used to explain rather than advocate, and to provide to the trier of fact an adequate explanation to distinguish additional damages caused by pre-existing factors.

To determine all potential causation factors that may account for some or all of an eggshell plaintiff’s aggravated physical and psychological damage, comprehensive psychological and psychiatric investigation by the defense (including the defense medical examination) should be routinely permitted to allow and obtain all of the facts, not just those facts that the plaintiff wishes to voluntarily reveal.

Jury instructions

Jury instructions must be used to reiterate to the jury that defendant is liable

for the aggravation of a pre-existing condition, and that damages must be given according to plaintiff’s pre-existing condition and susceptibility. There are two jury instructions in CACI that are imperative to a counsel representing plaintiff with a pre-existing injury.

First, CACI 3927, Aggravation of Pre-existing Condition or Disability, mandates the jury that it “must” find the defendant liable if his or her conduct aggravated the plaintiff’s condition:

If [name of plaintiff] had a physical or emotional condition that was made worse by [name of defendant]’s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her] for the effect on that condition.

Second, CACI 3928, Unusually Susceptible Plaintiff, addresses the fact that although an eggshell plaintiff may have suffered more damage than a healthy person, she must still receive damages that would reasonably and fairly compensate them for damages caused by the defendant.

You must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for all damages caused by the wrongful conduct of [name of defendant], even if [name of plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

These jury instructions are vital and should always be given when counsel represents an eggshell plaintiff. Not only do these jury instructions empower the jury to find defendant liable and adequately award damages, they further compel the jury to consider the susceptibility of an eggshell plaintiff.



Hypotheticals

• Pre-existing physical conditions:

1. Plaintiff drove a small tow truck north on Main Street toward 23rd Street in Los Angeles. The weather was clear and the street dry. Before reaching 23rd Street, he had driven for four or five blocks in the lane of traffic next to the center of Main Street, in which lane there were tracks of defendant Los Angeles Transit Lines. When he reached 23rd Street he stopped in obedience to a traffic signal. About eight or ten seconds later and before the traffic signal changed from "Stop" to "Go," his truck was struck in the rear by one of the defendant Transit Lines' northbound streetcars operated by defendant Adams. Plaintiff was severely injured, including an aggravation of a pre-existing spondylolisthesis of the fifth lumbar vertebra.

2. Plaintiff Jordan was working as a switchman for Santa Fe on January 28, 2006. He was closing a gate at Leaseway when it fell and landed on top of him. He was diagnosed as suffering from a derangement of a disc, but his doctors also discovered that he had spondylolysis and spondylolisthesis, a pre-existing condition that made him more susceptible to back injury. Plaintiff sued Santa Fe and Leaseway for negligence under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. At trial, Jordan presented the medical testimony of his treating doctor. The doctor testified that Jordan's low back and left leg pain were caused by the accident having aggravated the pre-existing spondylolysis and spondylolisthesis.

• Pre-existing mental conditions:

1. Catherine, a seven-year-old girl, and her sister were playing near their home. A Doberman Pinscher named Satan owned by defendant entered Catherine's yard and attacked her. She suffered multiple severe bite wounds on her face and shoulders. Despite corrective surgery, she is permanently scarred and sustained damage to sensory nerves. In addition, the district court found that she "suffered great pain during and after the attack and faces the prospect of further psychological and psychiatric treatment." The court found that the \$85,000 award for "psychiatric treatment" alone was warranted even though Catherine's unstable family situation was a pre-existing condition that should have caused her a future need for a psychologist or a psychiatrist.

2. Patricia, a past victim of sexual abuse, worked as an elementary school teacher. The principal of the school where she taught began making sexual jokes in front of Patricia at the beginning of one school year. After Patricia told the principal that the jokes make her uncomfortable, he told her to "lighten-up" and continued his crude behavior. He later would make comments on Patricia's outfits and tell her that his wife and he were swingers. This behavior continued over several years until the principal attempted to sexually assault Patricia after a staff meeting. Patricia went on leave the next day. Patricia's re-victimization led to an aggravation of her depression, post-traumatic stress disorder, and anxiety. The jury found that Patricia's past sexual abuse was a pre-existing condition that

was exacerbated by the principal's conduct.

Conclusion

Jurors understand human fragility, and that some victims already have physical and/or mental issues. Not all plaintiffs are perfect before the incident that brings about litigation. These pre-existing issues do not give the defendant a license to further injure the plaintiff. It is clear that even though a plaintiff without a pre-existing condition would probably have suffered less injury, it does not exonerate the defendant from the added liability. An attorney representing an individual with a pre-existing condition must be certain to make the pre-existing conditions absolutely clear to the jury from the outset, and seek extensive damages available to adequately compensate an eggshell plaintiff.



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