Proving unique damages: A judicial perspective

Beware the fallacy of the "single cause" or expert testimony on "cutting edge" science

By Hon. Mark Mooney

There are probably a million and one ways a person can sustain an injury. To a certain extent, every injury is unique in its own way. For the litigator, however, unique-damage cases are of concern for one major reason: They can be exceedingly difficult to prove to a jury. This difficulty in proof can arise either from problems in establishing causation, or in establishing that the injury actually exists. Occasionally the litigator is faced with the challenge of proving both.

Every jury pool is going to have a number of potential jurors that are skeptical about any personal injury case. (A cup of scalding hot McDonald's coffee, anyone?) Significant inroads into this inherent skepticism can be made when an actual injury can be demonstrated. There is nothing like an X-ray of a compound fracture to refute an allegation that the plaintiff is a malingerer. Unfortunately for the litigator, not all injuries are so easily demonstrated.

Psychological injuries

Psychological injuries immediately come to mind when one thinks about injuries that are difficult to prove. Of course we are not talking about the pain and suffering that can accompany any injury. There is a common-sense understanding among all jurors that if you break an arm or a leg you are going to experience pain and suffering. Rather, we are talking about the case where unique psychological injuries make up the bulk of the damage claim. Think of Post Traumatic Stress Disorder, or the Intentional Infliction of Emotional Distress.

There is simply no definitive test that is going to establish the severity, or even the existence, of a psychological injury. The expert psychologist may run a series of psychological tests that provides information upon which the expert can offer a DSM-IV diagnosis. Psychological testing, however, is typically interpretive in nature. The test results (whether it is the MMPI, the Beck Depression Inventory or any of the other hundred or so psychological tests) are often expressed in a numeric scale. While the numeric result is a helpful tool for the health-care provider in the clinical setting, the litigator should not be lulled into placing too much emphasis on a test result in the courtroom setting. The severe psychological-injury case is going to rise and fall with the credibility of your lay and expert witnesses.

Soft tissue and other injuries

Some physical injuries are also difficult to provide the jury with demonstrative proof. Any litigator who has tried a "soft tissue" injury case has faced this particular hurdle. However there are also many other types of physical diagnosis that defy definitive testing. For example, a diagnosis of Lupus, Complex Regional Pain Syndrome, or Guillain-Barre syndrome cannot be made on the basis of a single test. Rather, it requires the health-care provider to consider symptoms, complaints, observations and differential testing to arrive at a diagnosis. A weakness in any one particular factor upon which a physician rests his or her opinion can lead to doubts in the mind of a juror.

Even where the injury is demonstrable, the litigator in the unique-damage case may find it difficult to prove that the injury actually was caused by the incident upon which the lawsuit is based. Just because client's hair all fell out the day after her auto accident, does not necessarily prove that the accident caused the injury.

Fallacy of the Single Cause

An important axiom of the scientific method is that: "Correlation does not equal causation." As appealing as it may be, the simplistic argument that your client did not have a condition before the accident and therefore it must have been caused by the accident, is an example of a classic logical fallacy. You may have learned it as the *post hoc ergo propter hoc* argument or, more plainly, the Fallacy of the Single Cause.

The more unique the particular damage claim may be, the greater likelihood the litigator will be faced with a serious causation challenge. One should never rely on a mere temporal correlation to establish causation. Where a condition can be brought on by more than one cause, the litigator should be prepared to have someone with an M.D. or Ph.D. after their name to explain the injury-producing mechanism.

If the diagnostic tool being used to identify your client's condition is based upon new or different technology, the litigator should expect a foundational challenge to the diagnosis. Moreover, if the diagnosis itself is a novel one, (i.e., a condition that is either newly recognized or not widely accepted) there will also likely be foundation challenges.

The trial judge's involvement with the issues raised in the unique-damage case will typically be in a challenge to an expert's opinion. This will normally be

seen as part of a summary-judgment motion (or opposition), or be brought as a pre-trial motion. One will see either motions in limine, request for a hearing pursuant to Evidence Code section 402, or section 802, or some other mechanism to restrict the admission of the damage evidence. The rulings on such motions may well make or break the case. Accordingly, the litigator should be fully prepared to argue such motions and to have the experts available for live testimony if the judge finds it necessary for the determination of any pre-trial motion.

"Junk science" and valid scientific opinions

Science and the law have always had a difficult relationship. The scientific method requires making observations, developing a hypothesis, and testing that hypothesis with an experiment that can be repeated. The researcher may need to perform double-blind studies that require months if not years to collect enough data to make any statistically significant findings. Thereafter, the researcher must publish those results to submit them to peer review. This can be a long process, but it leads to results upon which other scientists can trust and rely. This does not help the litigator if your trial is in two weeks.

Testimony given in the name of science has not always served justice well. The courts have a history of admitting "junk science" as well as excluding valid scientific opinions. The so-called science of "eugenics" was relied upon by the U.S. Supreme Court upholding the forced sterilization laws in *Buck v. Bell* (1927) 274 US.200. Scientists first started using DNA profiling for identification in 1985, but DNA evidence was not admitted at any trial to obtain a conviction at trial until 1987.

The judge's role as "gate keeper" to exclude speculative or irrelevant expert opinion testimony has taken on greater prominence since the California Supreme Court's decision in *Sargon Enterprises v. University of Southern California* (2012) 55 Cal.4th 747. Even if the opposing side does not raise the issue, the judge (pursuant to Evid. Code, § 802) may want to hold a hearing to determine the basis of the expert's opinion.

As California adheres to the *Kelly* standard (formerly *Kelly-Frye*) the litigator should be mindful of the heavy burden in establishing a novel scientific principle. The proponent of the evidence is required to make a preliminary showing of general acceptance of the new technique in the relevant scientific community. If the evidence is "cutting edge" it simply may be "too new" to have gained general acceptance. This can be true no matter how well-credentialed your expert may be.

The unique-damage case can pose a unique set of challenges to the litigator. One may find himself pushing the boundaries of existing law or fighting the pre-conceptions of jurors. Before accepting any case that has "an interesting wrinkle" in the damage claim, the litigator should fully consider the potential difficulties in proof and evaluate how that may ultimately affect the chances of success on the claim.


Mooney

Hon. Mark Mooney received his undergraduate degree from the University of Southern California in 1978. He attended law school at Southern Methodist University and received his Juris Doctor in 1981. Before being appointed to the bench he was an associate with firms of Hillsinger & Costanzo and Lafollette, Johnson, De Haas & Fesler. He also served as an Assistant United States Attorney for the Central District of California from 1991 to 1995. Judge Mooney was appointed to the Los Angeles Municipal Court by Governor Pete Wilson in 1995. In 1998, he was elevated to the Superior Court for the County of Los Angeles. He currently has an unlimited general civil assignment in the Mosk Courthouse.