



A Tietjen Cross: Tim Tietjen on Cross-Examining Defense Experts

B Y S T E P H E N M U R P H Y

Litigators spend much of their time questioning witnesses, whether in deposition, trial, or informal interviews. Few would dispute that the ability to ask questions enhances any litigator's chance of success. One of the most adept cross-examiners I have encountered is former SFTLA President Tim Tietjen. At my request, Tim provided me the deposition transcripts of two defense experts he recently deposed. One is a defense orthopedist who performed an examination of the plaintiff and the other of a defense safety engineer in a case involving a construction site accident.

Below are slightly edited excerpts from these depositions along with my comments on the testimony. Tim's techniques can be adapted for most types of personal injury cases. Although we may not all be as successful in turning defense experts to our point of view, with these questions we are sure to score some points.

Case #1: Plaintiff v. Defendant Concrete Plumbing

CASE SUMMARY:

On November 8, 1997, 46 year old plaintiff suffered multiple severe injuries in a construction site accident. He was tending a concrete hose, pouring concrete into panels for tilt up building construction. Suddenly, the concrete hose emitted an explosion of compressed air and whipped about violently, striking the plaintiff and throwing him to the

ground. He was struck at least two times by the 300-pound concrete-filled hose, and was knocked unconscious as he was thrown backward onto a previously poured cement panel.

The plaintiff suffered injuries to his cervical and lumbar spine as well as both shoulders and minor brain injuries. He had worked in the construction field for approximately twenty years and had a pre-existing history of low back pain, neck pain and shoulder pain; however, he had not received any significant treatment for many years before this accident, and was able to work 2,000 hours per year for the four years before the accident.

Plaintiff contended that this accident significantly aggravated plaintiff's preexisting asymptomatic condition in his spine resulting in permanent disability from returning to work as well as requiring surgery. Plaintiff underwent surgery of his lumbar spine two and one half years after the accident.

The defendant disclosed an orthopedic surgeon to rebut contentions that the accident caused any significant injury to plaintiff's low back, let alone required surgery. The questions below contain some excellent techniques for dealing with preexisting conditions. The defense was so persuaded by Tim's cross-examination that the case settled for \$1.5 million after the deposition.

Cross-examination Of Defense Orthopedic Surgeon

PRE-EXISTING INJURIES:

Q. What was your understanding of Mr. Plaintiff' pre-accident condition, medical condition?

A. Well, I think, like a lot of working people, laboring people, he had aches and pains. He had back stuff. He had shoulder stuff. He had previous studies done if you look through the records.

Q. So the medical conditions he had prior to this accident were nothing unusual for someone involved in that type of work?

A. If you do this kind of work for 20 some years, you know, you're going to get wear and tear on your shoulders and your back and your neck and just about everything, yeah.

Q. Was it your understanding that Mr. Plaintiff had no preexisting medical conditions that caused him any disabilities?

A. He had some preexisting medical conditions. I don't know whether or not they caused him any disabilities. He was treated for them. Whether it was a true disability or not, I don't know.

Q. Well, I take it, you're not aware of any medical disabilities that he had before the accident?

A. That prevented him from working, no.

Q. And that is your understanding, that he had no physical limitations. He could perform his work without limit, correct?

A. I have no information that he was limited, that's correct.

COMMENT:

These questions illustrate how to negate the potentially harmful fact of preexisting injuries. The key is to

establish that the plaintiff's preexisting injuries were not unusual for a person in his occupation, i.e. they were not caused by any extraordinary traumatic events. Note how Tim changed the focus from the fact of preexisting injuries to the absence of medical disabilities, which of course is the significant issue when the plaintiff is no longer able to work. By getting the defense expert to admit that the plaintiff had no work limitations before the accident, Tim has forced the defense to essentially admit that any limitations after the accident were either caused by the accident or are not legitimate. With a credible plaintiff, the latter argument will fall flat.

CAUSATION ISSUES re POST-ACCIDENT SURGERY:

Q. Did you have an understanding what the purpose of the surgery was?

A. Yes. It was stated in the record. Sure.

Q. The purpose of this surgery was to try and reduce or minimize his chronic sciatica, correct, Doctor?

A. I think, someplace in there, he talked about the possibilities of it. I think it was his leg pain he was talking about, right.

Q. Sciatica, that is the radiation of pain from his low back down his left leg, correct?

A. That is sciatica, yes.

Q. And, from reviewing the records, do you recall that Mr. Plaintiff had persistent sciatica pain in his leg after this accident?

A. He had sciatica, yes.

Q. Would you agree that before this accident Mr. Plaintiff did not suffer from chronic sciatica as has

been described after his accident?

A. Yes, that's correct.

Q. Okay. And a person with degenerative conditions of their spine may or may not have symptoms associated with that, correct, Doctor?

A. That's correct.

Q. Would a person with a "normal spine" without any degenerative conditions be as susceptible to injury as a person with degenerative conditions of their spine?

A. Well, theoretically, I suppose. If a person had asymptomatic preexisting arthritis of any joint and it was traumatized, was it more likely to cause an injury than if it wasn't? Sure. That probably true.

Q. And that would be true in this case as well, correct, Doctor?

A. That's true.

COMMENT:

Here, Tim has brought the witness from the general principle - that a person with a preexisting condition may be more susceptible to arthritis - to a specific admission that the plaintiff was more susceptible. In view of the witness's previous admission that the plaintiff had no prior disabling conditions, the defense would be hard-pressed to argue that the subject accident was not the triggering cause of this (asymptomatic but-more-susceptible-to-injury plaintiff) disability. Tim continues to hammer the point in further.

Q. And Mr. Plaintiff was largely asymptomatic prior to this accident, correct?

A. Well, he had been for a while.

Q. Would you agree, Doctor, that this accident made Mr. Plaintiff symptomatic with regard to his low-back pain?

A. It appears to have done that, yes.

Q. Are you questioning Dr. Treater's deci

sion to perform surgery on Mr. Plaintiff?

A. I think there are some people with the findings that they had on the MRI, might not have suggested surgery. That's true. I think it's a gray zone.

Q. Are you saying reasonable physicians could differ as to whether to conduct surgery under these circumstances?

A. And particularly when he had nothing but subjective symptoms.

Q. Well, if you could answer my question.

A. I think people can differ, yes.

Q. And you would have no criticism of Mr. Plaintiff for agreeing with a doctor who recommends surgery, correct?

A. No. I mean that's what he wanted to do, you know.

Q. So you're saying that you disagree with Dr. Treater's decision to perform surgery?

A.. Yeah.

Q. But you're not saying Dr. Treater fell below the standard of care in deciding to perform surgery on this patient?

A. No. I didn't say that.

Q. And you recognize that reasonable physicians can differ under these circumstances whether to perform surgery?

A. That's correct.

Q. So it was reasonable for Dr. Treater to attempt to perform surgery under these circumstances even though you differ with that?

A. That's his opinion. Right. I might differ whether it was reasonable or not.

Q. And you would agree that based on your review of the records the reason for the surgery was to reduce the pain that stemmed from the accident?

A. Certainly the pain that he had,

right.

COMMENT:

Defense doctors frequently disagree with the treating physician's decision to perform surgery. The key, as Tim illustrates, is to get the witness to agree that the decision was not below the standard of care. If it was a reasonable decision, albeit one the witness disagrees with, the defense would be hard-pressed to argue it was unnecessary. This testimony also eliminates any argument of apportionment of liability with a treating physician.

FUTURE CONDITION IF NO ACCIDENT:

Q. But, Doctor, have you formed an opinion in this case to a reasonable degree of medical probability that if this accident had not occurred Mr. Plaintiff would have gone on to experience the type of pain that he has documented?

A. I don't have an opinion about that. It could have gone either way.

Q. It would be pure speculation?

A. That's right.

COMMENT:

This testimony eliminates the potential claim that the plaintiff would have become disabled eventually even without the accident. The witness's admission that such testimony constitutes speculation means the plaintiff has a strong grounds for a motion in limine to exclude any such claim in the argument or testimony.

Case #2: Plaintiff v. Defendant Construction Company

CASE SUMMARY:

On August 18, 1997, plaintiff 32 year

old plumber suffered multiple severe injuries when he fell fifteen feet through an unguarded floor opening at a construction site in Fremont. Plaintiff contended that the general contractor was negligent in creating the floor opening and not properly covering it. The defense claimed that plaintiff removed the floor opening and then fell through it, or alternatively, that someone else removed the floor covering. The defense hired a consulting safety engineer to defend its safety practices.

The deposition of the defense safety engineer demonstrates several useful techniques. Tim utilized ten general safety principles he learned from San Francisco lawyer Bob Arns, who provided an article on these principles at an SFTLA seminar last year. Tim referenced these principles in his questioning and had the expert agree with them. He then applied the principles to the facts of his case and got the defense expert to admit that the defendant violated them. As you will read, this proved quite entertaining. It also proved lucrative for the plaintiff, who later received a settlement of \$1.8 million.

Cross-examination Of Defense Safety Engineer

THE SET-UP: THE DEFENDANT DID NOTHING WRONG

Q. In your opinion, based on everything you've seen, you would place this fault entirely upon [plaintiff's employer] and Mr. Plaintiff?
A. Yes.

Q. You don't have any criticisms of defendant, that they did anything wrong that caused or contributed to this accident; is that correct?
A. Yes, that is -- yes, that's my opinion.

Q. I believe you said, based upon everything you reviewed, you believe defendant General Contractor Construction properly implemented its safety prevention program with regards to its employees?
A. In regards to its employees, I believe they did, yes.

COMMENT:

These questions show that the witness has committed himself to the party that hired him. By getting him to say he has no criticisms, Tim has set him up for some serious impeachment. As you read the testimony below, count how many times the witness has contradicted his initial statement that he had NO criticisms of defendant.

OOPS! DID I SAY "NO" CRITICISMS?

Q. Let's talk about that for a little bit here. You understand Greg Superintendent was the superintendent for General Contractor Construction?
A. Yes.

Q. You read his deposition testimony; correct?
A. Yes.

Q. Did you read in his deposition testimony that he had not seen his company's illness and injury prevention plan prior to his deposition?
A. I don't recall seeing that.

Q. Assuming that is true, you would be critical of that; correct?
A. Yes.

Q. You would expect General Contractor to put together this plan and communicate it to its general superintendents, including Mr. Superintendent; correct?
A. That's expected to happen.

Q. And you would expect General Contractor to make sure that Mr. Superintendent understood the contents of the injury and illness prevention program; correct?

A. Yes.

Q. And you would expect General Contractor to make sure that Mr. Superintendent, in turn, communicated that to his employees so that there could be a safe job site; correct?
A. Through communications, yes.

Q. And do you recall in Mr. Superintendent's testimony, specifically, that he had never seen the company policy about covering holes, how to cover them, before this accident?
A. I do believe he said that, yes.

Q. And I take it you're critical of General Contractor and Mr. Superintendent for his not being aware of his company policy about how to cover holes?
A. I would have to be critical of that.

COMMENT:

How many did you count? Well, you're not finished yet. Below Tim shifts to the general principles and gets the witness to admit that a competent general contractor would have been aware of basic information on how to handle floor covers.

COMPETENT GENERAL CONTRACTORS:

Q. Okay. Assuming Mr. Superintendent did not know that floor covers were supposed to be secured, you would be critical of him for lacking that fundamental safety knowledge; correct?
A. I would have to be, yes.

Q. You would expect any competent general superintendent to be aware that floor openings had to be covered, secured, and marked accordingly?
A. I would say that.

Q. Do you recall reviewing the deposition testimony wherein General Contractor people acknowl-

edged that this was their company policy and this is how floor covers were supposed to be handled?
A. Yes.

Q. And, again, this is fundamental information you would expect a competent general contractor to be aware of?
A. Yes.

OSHA SAFETY ORDERS:

Q. Let me mark as next in order Cal OSHA Safety Order Section 1632. (Exhibit No. 5 was marked for identification.) Subsection (b), "Floor openings shall be guarded by a standard railing and toeboards or cover. Covering shall be secured in place to prevent accidental removal or displacement; and it shall bear a pressure sensitized, painted or stenciled sign with letters not less than one inch high, stating: 'Opening - Do Not Remove.'" The manner in which Phil Plaintiff covered the dumbwaiter hole violated that specific Cal OSHA safety order, did it not?
A. Yes, it did.

Q. Likewise, the manner in which Phil Defendant covered the dumbwaiter hole violated his company's safety policy; correct?
A. Yes, it did.

COMMENT:

These are beautiful leading questions going right to the heart of the case. Since violations of OSHA orders are now admissible, these questions are fair game. The impact is increased by Tim's reading of the order verbatim. If the testimony is read back at trial, it will have an immediate strong impact on the jury. The witness has now been twisted so badly he has admitted he has no criticism of a defendant who has violated both an OSHA safety order and its own safety policy. But the onslaught is not yet over.

BACKTRACK:

Q. As a safety professional, you are critical of General Contractor and Phil Defendant for violating that Cal OSHA safety order, are you not?

A. I'd have to say yes, although I don't really feel that was a contributing factor to the accident.

COMMENT:

The witness has realized the fallacy of his "no-criticisms" testimony and decides to try a different strategy: sure, the defendant violated a few orders or rules, but that's not what caused the plaintiff's injuries. Sure, that'll work.

Q. What's the purpose of securing a cover over a hole?

A. So it can't be kicked out of the way.

Q. Accidental displacement; correct?

A. Yes.

Q. The ultimate purpose is to prevent someone from falling through a hole; is that correct?

A. Absolutely.

Q. As the general contractor, it was their responsibility to inspect the job site to see if it was safe. That would include the mezzanine and the dumbwaiter area; correct?

A. They do that, yes.

Q. Nobody else on this job site had the responsibility to do a job-site-wide inspection for unsafe conditions; correct?

A. No, not job site.

Q. That was solely the job of General Contractor; correct?

A. That's my understanding.

Q. You would agree, if the hole over the dumbwaiter was uncovered, and an inspection was performed by General Contractor, a competent

inspection would have revealed that the hole was uncovered; correct?

A. Yes.

COMMENT:

Bingo! There goes the witness's causation strategy. Notice how carefully worded the final leading question is. It contains all the elements needed to prove causation: if the hole was uncovered and if a "competent" inspection was done, the hole would have been revealed.

GENERAL CONTRACTOR'S PREVENTATIVE DUTIES:

Q. Okay. As a safety-conscious general contractor, it was their intention, and it would be the intention of any safety-conscious general contractor, to explore potentially serious hazards that may exist on job sites?

A. Yes.

Q. So if a General Contractor Construction employee observed the dumbwaiter cover off and that hole existing in the floor, proper safety procedures should have been for that person to bring it to the attention of General Contractor, or take some action himself to cover that hole?

A. Yes.

Q. All right. You would be critical of a General Contractor Construction employee who observed this dumbwaiter floor opening and took no action to bring it to the attention of someone or take some step to cover it himself because of the potential for serious injury or death?

A. Yes, yes.

Q. Do you approve of an employee having actual knowledge of an unsafe condition that could potentially cause someone's death not bringing it to the attention of the superintendent?

A. I can't approve of it.

COMMENT:

This last question shows the benefits of careful phrasing. By starting the question with "Do you approve" rather than the customary "Would you agree" or "Isn't it correct", Tim has put the witness in a position where he has to agree. He would look silly if he said he approved of such a practice, whereas he may have been more likely to quibble with a question beginning with more customary phrasing.

WHY DID I SAY THAT?

Q. Coming back to where I was before, your opinion that Mr. Plaintiff himself uncovered the hole, that opinion, sir, you would acknowledge, is in potential conflict with the statement of Mr. Defendant's Employee?

A. Yes.

Q. All right. Given the statement of Mr. Defendant's Employee, who was an employee of General Contractor Construction at the time, it would appear that that hole was uncovered before Mr. Plaintiff went up there; correct?

A. According to what he has to say here, it appears that way. It would be handy if we knew when he saw that.

Q. Assuming it was in the morning, which most people would acknowledge is before noontime, that was before the accident; correct, sir?

A. Given the fact Mr. Plaintiff fell around one o'clock, that would be correct.

Q. If Mr. Defendant's Employee went and brought this condition to the attention of his superintendent, you would expect his superintendent to have promptly investigated this condition; correct?

A. I would have to say yes.

Q. And assuming the general superintendent, Mr. Superintendent, was

safety conscious and competent, he or someone else would have gone up to the mezzanine level and inspected this potentially dangerous condition discovered by Mr. Defendant's Employee; correct?

A. I can see him probably giving instructions to somebody to go check it out.

Q. And, again, assuming a competent person was assigned to the task and they went up there and they discovered this hole was uncovered, they would have taken steps to cover that hole; correct?

A. Yes.

Q. And if they were familiar with the General Contractor Construction policy and Cal OSHA safety standards, they would have secured this floor cover over the hole; correct?

A. I think that's kind of speculation, but probably, yes.

Q. That's what you would hope, as a safety professional?

A. It's what I would hope they would do.

COMMENT:

So here we have causation locked in. We also have any claim of comparative negligence seriously undermined.

ADVOCATE ON BEHALF OF THE DEFENSE:

Q. Do you see your role in this litigation to act as an advocate on behalf of the defense?

A. Absolutely not.

Q. Do you see it as your role to present honest, objective opinions?

A. I do.

Q. If you get information that's in conflict with opinions previously formed, you will take that into account and change your opinion if you believe

that is more appropriately the opinion to be formed in the case; correct?

A. Yes. I've given you both opinions.

Q. I want to go back, sir, to the question I asked you which was never answered: If Mr. Defendant's Employee, according to his company policy, had brought this to the attention of his superintendent, the superintendent, in turn, being safety conscious, would have sent somebody up there to investigate the condition; correct?

A. Hopefully, yes.

Q. If that person who was sent up there knew about the company safety policy and the Cal OSHA standards, they would have taken an appropriate cover, marked it, put it over the hole, and nailed it or secured it; correct?

A. Yes.

Q. If that had occurred, and Mr. Plaintiff went up there later that afternoon, paid out his tape measure and walked backwards, he would have stepped on the floor cover?

A. Yes.

Q. He would not have fallen through the opening?

A. Yes.

COMMENT:

The first two questions in this section are effective ways to disarm an expert witness, who despite an obvious bias for the party that hired him, still wants to believe in his objectivity. After disarming him, Tim gets him to admit essentially that if defendant had acted reasonably plaintiff would not have fallen through the hole.

FUNDAMENTAL SAFETY RULE NO. 1:

Q. Let me talk with you for a minute about some fundamental safety rules.

As a safety professional, would you

agree that safety begins during the set-up, not after the work is started?

A. Yes.

Q. On this particular construction site, did you see any evidence or testimony about a pre-job safety meeting where there was a conscious discussion of safety and precautions to take on this job site?

A. No, I did not.

Q. You would expect, sir, a competent general contractor with the sophistication of General Contractor to have a pre-job safety meeting that addressed specific safety issues to that job?

A. Yes.

Q. On a job of this size, with a contractor as sophisticated as General Contractor, at some point before the floor openings were cut, you would expect there would be some discussion about safety with regard to that process; correct?

A. I would have expected that to happen.

Q. You didn't see any evidence in the testimony that any such discussion took place?

A. No.

Q. As a safety professional, you would be critical of General Contractor for that oversight; is that correct?

A. Yes.

COMMENT:

By getting the witness to agree to the desirability of pre-job safety meetings, Tim has set him up for yet another area of criticism.

FUNDAMENTAL SAFETY RULE NO. 2:

Q. Another safety philosophy: Safety begins at the top. Do you agree with that?

A. Yes.

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