

1966

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### Recommended Citation

Gibson B. Witherspoon, Presentation of Evidence in a Whiplash or Cervical Sprain Case, 15 Clev.-Marshall L. Rev. 424 (1966)

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## *Presentation of Evidence in a "Whiplash" or Cervical Sprain Case*

*Gibson B. Witherspoon\**

**I**N 1928, DURING AN ADDRESS before the Western Orthopedic Association, Dr. Harold E. Crowe, an orthopedic surgeon from Los Angeles, first used the unfortunate term "whiplash" to describe a strain or sprain of the neck. He intended this term to be descriptive of movement, but soon physicians, patients, claimsmen, attorneys, judges, and the general public were using it as an all-inclusive term describing a neck injury which required years to heal.

By 1963 claims paid by insurance companies for "whiplash" injuries amounted to more than thirty per cent of the total claims paid.<sup>1</sup> It was natural that the insurance companies began a campaign to discredit "whiplash" claims. The industry has been most successful in convincing many judges and jurors that these injuries often are faked by those claiming them. Since the publication of several articles concerning these neck injuries,<sup>2</sup> the insurance industry has adopted a very cynical approach to all "whiplash" injuries. No other injury in the history of American jurisprudence has been the subject of such unfavorable publicity.

In 1958 Dr. Nicholas Gotten surveyed one hundred cases of "whiplash" injuries, both prior to and after settlement or litigation. He gave the insurance companies actual case histories and provided them with ammunition in his famous article "Whiplash Injuries."<sup>3</sup> This famed neurologist revealed:

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<sup>1</sup> 1963 figures of Jury Verdicts Research, Inc., Caxton Bldg., Cleveland, Ohio 44115.

<sup>2</sup> Knepper, *The Revolt Against Whiplash* (Defense Research Institute, Inc., 1961). (This monograph was distributed to 11,000 judges, lawyers, insurance claim superintendents, and law school professors who taught torts. It is credited with exploding the myth of "Whiplash." It was republished in larger quantities and introduced in courts for the records.); Knepper, *The Continuing Revolt Against Whiplash* (Defense Research Institute, Inc. 1964). (This monograph was widely circulated. It included articles covering the medical, economic, and legal aspects, and also articles giving suggestions on practice and procedure); Shannon, *Post Traumatic Neurosis*, 28 *Ins. Counsel J.* 472 (July 1961); Crowe, *A New Diagnostic Sign In Neck Injuries*, 29 *Ins. Counsel J.* 463 (July 1962); McNeal, *Whiplash—An Unrealistic Psychological Word*, 30 *Ins. Counsel J.* 275 (April 1963).

<sup>3</sup> "Whiplash Injuries" by Nicholas Gotten, M.D.; widely circulated by Jefferson Ins. Co. of Pine Bluff, Arkansas.

. . . that after litigation some patients have divorced and remarried, others bought new homes, redecorated their old homes, bought new cars; such financial changes clearly indicate the strong possibility that the illness has been used as a means of implementing psychological or other adjustments which had previously been postponed or which because of financial difficulties, the patient had not been able to fulfill . . . This included 92 patients who had claims ranging from simple settlement by insurance companies to lawsuits filed, tried and appealed to the State Supreme Court. Only eight patients appeared to be continuing to have enough trouble to be wearing a Thomas Collar, sleeping in traction, taking physical therapy or heat treatment, as well as periodically visiting a physician.

In 1959 Dr. David M. Bosworth wrote an article entitled "Whiplash—An Unaccepted Medical Term" for the *Journal of Bone and Joint Surgery*, in which he said:

There is no room or reason for such a loose diagnosis as "whiplash" injury to the neck. This diagnosis is vague and thoroughly unscientific. Furthermore, its use may lead to extreme injustice to those responsible for causing these injuries due to the rather dramatic implications of this phrase . . . The term to the honest is merely a bulwark behind which ignorance skulks; to the dishonest a mirage with which to confuse and delude. There is a tendency for this terminology to be employed for the purpose of exaggerating the severity of the original injury and the possible residual disability, in order to expand the benefits to be secured in legal action.

Exaggerated claims are not the only use to which "whiplash" injuries are put. In Massachusetts, the Association of Casualty and Surety Company had many reports of conspiracy with rearend collisions. One ring was broken with 40 men who participated, and over \$100,000.00 was realized annually.

It is no secret that many an otherwise upright citizen occasionally makes abrupt stops in heavy traffic, hoping that he will receive a slight bump from a following car. Many more are bumped legitimately but use the opportunity to build an exaggerated claim and replenish his bank account . . . Settlements that encourage more and more of the same are certainly not the answer. It has long been this author's opinion that assiduous investigation of a plaintiff's activities, the use of every scrap of mitigating evidence and a readiness to try all such cases to a conclusion if they cannot be settled

on a common sense basis, represent the only approaches that will stem the tide.<sup>4</sup>

During the past thirty-seven years many articles have appeared in insurance law journals and medical journals<sup>5</sup> concerning "whiplash" injuries. Primarily because of these articles and the attending publicity, many jurymen consider "whiplash" synonymous with faking and malingering. The systematic propaganda appearing in many editorials, the agent blaming the increase in rate on this type of injury, the sly comments of executives, and damnations by claimsmen have all combined to develop a crusading zeal in many jurors to unmask this phony plaintiff with the imaginary "whiplash." The number of "whiplash" cases has diminished, and the amounts of the judgments have also diminished and are now more realistic.

"Accent is the soul of language. It gives to it feeling, sincerity, and truth."<sup>6</sup> Therefore, when a client signed a contract in our office and we learned that he had sustained a "whiplash" injury, we made a resolution never to use the term "whiplash" in presenting his case to the jury. The client, the doctors, and all the witnesses were instructed not to use it at any time. We also resolved that if the defense lawyer used the term, we would vigorously object, move to exclude his argument because it was not based on the testimony, and introduce the monograph "The Continuing Revolt Against Whiplash"<sup>7</sup> for the record.

### *The Facts*

At 10:50 p.m., April 29, 1965, our client was traveling westbound on 14th Street in a 1964 Chevrolet. As he came down a hill, he approached the intersection of 24th Avenue. He was positive that he had the green light governing the east and west traffic. After entering the intersection, he was struck on the right rear fender by a 1963 Volkswagen driven by the defendant who was traveling southbound on 24th Avenue. The defendant claimed that he had the green light governing the north and south

<sup>4</sup> Cowie, *The Economics of Whiplash* (Defense Research Institute, Inc.); see also Graham, *Whiplashes That Never Occurred*, 39A *J. of Bone and Joint Surgery* 455 (----).

<sup>5</sup> See, Note, 97 *J. of Surgery*, 522-529 (April 1959); Cammack, *Whiplash Injuries to the Neck*, 93 *Am. J. of Surgery*, 663-666 (1957); Lipon, *Whiplash Injuries*, 48 *Southern Med. J.*, 1304 (1955); and see, Oleck, *Damages to Persons & Property*, Secs. 442A-H (1961 rev. ed.).

<sup>6</sup> Rousseau.

<sup>7</sup> *Supra* note 2.

traffic. Both drivers were driving at the stipulated speed of 30 miles per hour. The next day the defendant's adjuster told our client to have his Chevrolet repaired and that he would see him in two weeks when his route carried him back through our city. In two weeks the adjuster was out of town but left word that he would see him on May 27 on his next trip. When this meeting was arranged, the adjuster stated that he was not going to pay the repairs because the defendant claimed that he had the green light.

The plaintiff came to our office four weeks after the accident. He had not consulted a doctor. We asked him if he was having trouble with his neck. He stated that he had difficulty turning his neck and rotating it from right to left. He stated that he was using a liniment and a lotion and that his wife was giving him a massage with an electric vibrator which they had purchased for this specific use. We immediately made an appointment with a doctor who, after examining the patient, sent him to a physical therapist. The therapist could feel the muscles contracting in his neck.

#### *The Medical Testimony Developed*

Since both drivers were going to testify that they had the green light, we knew that the doctor's testimony would have to be positive and persuasive and presented in a most conclusive manner if our client was to be protected.

In previous trials we had used two methods of asking the ultimate question in order to satisfy the doctor, the court, and the jury. When the doctor was positive, we would ask: "Did this accident cause these injuries to the plaintiff?" The second method required the doctor to answer the same question predicated on whether or not with a reasonable degree of medical certainty there "might" or "could" be a causal relationship between the trauma and the injury from which the plaintiff now was suffering.

Fortunately, our studious doctor objected to the first method because it was too certain, definite, and rigid in a legal battle. Also, he objected to the second method because it was too loose, since even the remotest consequence of anything is either "possible" or "probable." After several conferences with the doctor, who was very scholarly, a series of questions were promulgated which would most dramatically present our client's case to the court and jury.

The plaintiff testified that before the accident he was healthy and normal, and that at the trial, seven months after the accident, he could not rotate his head to the right without pain. He testified that often in rainy or cold weather up and down movement of his head caused sharp pain which radiated down his back and shoulders, that he had headaches which he never had before, dizzy spells, whirling sensations, and that he occasionally saw black spots in the sunshine. He said that one month before the trial he could not remember a customer's name. He testified that he thought he was clearing the intersection and that the defendant's car would pass behind him; his car was violently struck on the right rear wheel, and he was thrown against the steering wheel and the hardware on the door; moments later the car hit a telephone pole and because of such rapid deceleration his neck became stiff, which was accompanied by varying degrees of pain.

Before consulting the doctor we read an excellent article by Joseph Kelner, "Preparing a Plaintiff's Doctor for Trial," which was most helpful. After consultation, the doctor testified at the trial and made a very favorable impression. We first elicited his experience. When the defense offered to waive the qualifications, we stated that we wanted them for the record. The doctor can make a very fine impression to the jury and others in the courtroom, so we have concluded that it is always best to let the doctor prove his qualifications, experience, honors and general background.

The doctor first read his notes, saying that the plaintiff told him of being hit while crossing an intersection. He stated that the impact from the accident caused a stretching of the muscles and ligaments and damage to the soft tissue. The exact testimony, as taken from the court records, follows:

Q. Dr. Nice, when did you first examine the plaintiff? A. May 5, 1965.

Q. What symptoms, if any, did you find? A. Sprain in his neck, back and shoulders of the lumbar spine, which caused headaches every morning, dizzy spells and occasionally black-outs. We sent him to a physical therapist for treatment as he was in pain, especially in the morning and after he drove some distance at night or during any change of weather.

Q. What pain, if any, accompanied the plaintiff's symptoms? A. The moving of his neck caused severe pain to his nerves and ligaments and his entire nervous system. The sprain and strain

of the traumatic injury pulled the muscles and nerves and ligaments in the plaintiff's neck.

Q. What is asphyxia? A. Suspended animation in living organisms due to interference with the oxygen supply of the blood. In this plaintiff's case, the muscles contract in the neck and press the arteries against the vertebra so that the blood flow is diminished. We noted a swelling in the plaintiff's neck when we first saw him and a hardening of some of the muscles and ligaments.

Q. What effect would swelling in plaintiff's neck have on the "vertebra and corotic artery" which carries the blood and oxygen to the brain? A. Both the vertebra and the corotic artery originate in the heart and go directly to the head to supply the brain cells with blood and oxygen. When the flow is cut down, then the functions of the brain cells are diminished.

Q. What caused the plaintiff's headaches? A. Nervous tension and muscle spasms. The arteries are forced against the vertebra, reducing the blood supply to the brain, and when these muscle spasms develop it not only causes pain and suffering to the nerves, but it also reduces the blood flow to the brain from the heart.

Q. What caused his dizzy spells? A. The same.

Q. What caused his blackouts? A. Blackouts are caused when the blood supply is diminished past the dizzy spell. Constant vibration in an automobile is bad and aggravates the condition.

Q. What is amnesia? A. Loss of memory. This can be caused when the brain is not fed the proper amount of blood.

Q. What is chronic vertigo? A. Sensation of dizziness, a whirling motion of oneself or of exact objects. Usually caused by the vertebral artery carrying blood and oxygen to the brain becoming occluded by swelling in the sprain or of the neck. The cranial cervical syndrome often results in brain damage.

Q. Which of these symptoms, if any, appear in plaintiff? A. Plaintiff has all of those I have been asked about.

Q. If plaintiff has had these symptoms from April 29, 1965, to the present time, would you say these injuries are chronic and permanent or are they temporary? A. Usually in a young man like plaintiff, the injuries pass away in about four weeks. The fact that they have lasted six months would show that in all probability they are permanent.

Q. How is plaintiff's nervous condition related to this accident? A. Plaintiff's history was negative on nervousness before the accident and because of the nerve damage sustained, he is nervous, loses sleep. His injuries are related to the accident according to his history, my examination, and lack of response to treatment.

Q. How is plaintiff's psychoneurosis related to the injuries received April 29, 1965? A. All of the pain and suffering and all of the other symptoms plaintiff had and will continue to have resulted from this traumatic injury.

Q. What, if any, signs of being depressed does plaintiff show? A. Anxiety and worry.

Q. What is malingering? A. Faking an illness.

Q. What evidence do you find, if any, of plaintiff malingering? A. None during the past six months.

Q. What is fright neurosis? A. A fright or apprehension usually caused by a functional disorder of the nervous system without demonstrable physical liaison. This psychoneurosis is usually traceable to fright, emotional shock, resulting from an accident, which produced an overwhelming or benumbing emotional effect.

Q. What evidence, if any, of fright or terror neurosis did you find in Plaintiff? A. His nervous condition keeps him in apprehension, or when any danger arises he is frightened and becomes nervous. He suffered nausea as a result of the accident. When I first saw him, I noticed his hands were sweaty and cold, and all these result from traumatic injury.

Q. What is the meaning of traumatic injuries? A. An injury or wound usually referred to by contact with force and violence.

Q. What type of traumatic injury did plaintiff receive? A. Sprains and strains.

Q. What classes of nerve injuries are there? A. In general peripheral nerve injuries may be classified as complete, which means a severance, or incomplete by compression. The latter may be either transient or permanent.

Q. Dr. Nice, are you able to explain adequately to this court and jury the injuries suffered by plaintiff without medical illustration? A. My explanation is inadequate without a chart.

Q. What is this I hand you? A. Bender's Anatomy Chart of the Neck and Head.

Q. Is this medical chart correct and standard or substandard?

A. Yes, it is a standard chart and is used in teaching in medical schools and is universally accepted authority.

Q. Doctor, would this chart aid you in giving your testimony and explaining the injuries of the plaintiff to the jury? A. It would help me very much and I think I can explain it so the jury will understand how these injuries develop from the chart.

(We offered the chart in evidence. This is a synthetic chart that starts with the vertebra, has the nerves on the next page in yellow that fits over the vertebra, then the arteries on another page, the veins, the ligaments, etc. The doctor would pinch these pages and tell the jury that because of the muscle spasms in the plaintiff's neck, the nerves and ligaments were pinched and the blood supply was diminished in its flow in the artery.)

Q. What is a prognosis? A. Opinion which is known in advance.

Q. What is your prognosis of plaintiff's physical condition at this time? A. Undetermined. He is not responding to treatment as well as I would like. It may take years for him to get back to normal.

Q. How much is your medical bill to date? A. It is \$395.50.

Q. Is plaintiff still under your treatment? A. Plaintiff is still under my treatment.

Q. What is your estimate of your charges for plaintiff's future treatment? A. Impossible to know. Gradually decreasing, but it will probably take three to four years.

Q. What treatment do you prescribe for plaintiff? A. Muscle relaxant, aspirin or bufferin for pain, heat lamps, massages and other medicine.

Q. What permanent effect, if any, will this injury have on plaintiff's nervous system? A. Head and neck hurts more in moving. Hot baths help some. I hope he will fully recover, but it will take years for him to be back to normal again.

Q. Is there anything else, doctor, that I haven't covered which you could tell the jury about plaintiff's injuries? A. My notes show that plaintiff suffered more when it was raining and cold than he did in warmer weather. This is typical in this type of case. The plaintiff has been very cooperative in getting his treatments and has followed my directions in taking the medicine prescribed.

When the defendant's counsel in his argument to the jury mentioned "whiplash," we objected. The court excluded the word and told the jury not to consider it as it was not supported by the testimony in the record.

The jury was out only a short time and brought in a verdict for \$3,900.00. We believe that the medical testimony and the fact that we refrained from making any reference to the term "whiplash" were the deciding factors.