

# Proving Neck & Back Claims

## How to build a solid case of liability and damages

**S**oft tissue injury cases are plagued with challenges. The injury cannot be proven objectively with an X-ray, malingerers have tarnished the credibility of the entire claim category, and initial settlement offers can be pitifully low.

As a result, these common claims will test your resourcefulness. Special techniques are required, and you can find them in John Tarantino's *Litigating Neck & Back Injuries*. His practical book is filled with creative strategies for making the injury more tangible, and model forms for improving your advocacy.

## Proving what seems unprovable

### Injury diagnosis and proof

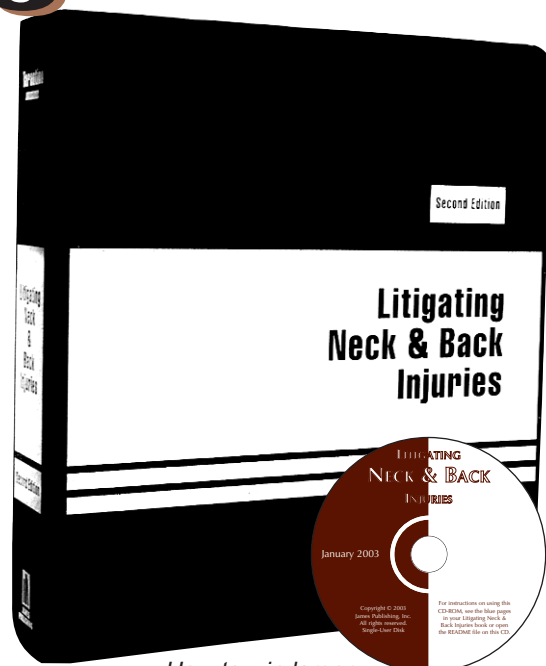
- 16 objective tests of the severity of soft tissue injuries. **§1:300**
- Checklists for determining sources of neck and back pain. **§3:60**
- The biomechanics of whiplash injuries, with extensive citations to medical journals. **§3:220**
- A checklist of symptoms associated with neck and back pain. **§3:240**
- Common defense tactics to claims of closed head injuries. **§3:370**
- Measuring and documenting pain and suffering. **§8:70**

### Settlement

- A checklist of damage claims to consider in all neck and back injury cases. **§1:230**
- Tips for dealing with adjusters. **§8:120**
- Questions to help elicit all aspects of the injury from the treating physician. **§8:160**
- Overcoming the special problems of the soft tissue injury case. **§8:240**
- Dealing with lowball settlement offers. **§8:290**
- Avoiding taxation problems in non-physical tort cases. **§8:541**

### Pretrial

- A table of causes of action correlated to likely defendants. **§1:350**
- Sample complaints. **§1:360**
- Neutralizing the 'independent' defense medical expert. **§8:610**
- Model questions for deposing the IME. **§9:310**
- Outline for deposing the defendant. **§9:330**
- Request for Production, Memorandum in Opposition to Physical Examination, Plaintiff's Motion to Bar Evidence of Pre-existing Injury. **§§9:430-520**
- Three different opening statements that can be used to introduce pre-existing injuries. **§1:190**
- Sample foundations for admitting x-rays, CT scans, MRIs, and thermographic and spinoscope evidence. **§§3:470-540**



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**See sample pages and table of contents inside...**

# Table of Contents (partial listing)

## Interviewing the Client and Filing the Case

Initial Interview: Preparation and Obtaining Information; Special Problems; Establishing Damages; Types of Damages; Documenting Damages; Client Diary; Drafting Complaints

## Anatomy of the Neck and Back

Spinal Column: Anatomy and Injury; Nervous System: Spinal Cord, Nerve Roots and Relationship of Spinal Nerves and Intervertebral Discs

*"It does not require a medical degree to follow this discussion."*

– Lawyers Weekly USA Review

## Diagnosing Neck and Back Injuries

Examination; Testing Individual Nerve Roots; Objective and Subjective Findings; Common Injuries and Diseases; Whiplash Injuries; Fractures; Temporomandibular Joint Pain Syndrome; Head Injuries; Spinal Shock; Discs; Thoracic Outlet Syndrome; Diagnostic Studies; X-Rays; EMG; Tomography, CAT and CT Scans; Myelograms; Cervical Disk Distention Test; MRI; Thermography; Diagnosing Spinal Lesions

## Treating Neck and Back Injuries

Traction; Drugs; Physical Therapy and Manipulation; Other Forms of Treatment; Justifying Surgery; Conditions Requiring Surgery; Psychological Treatment; Elements of Chronic Pain Syndrome; Results of Chronic Pain; Chiropractic Medicine

## Evaluating Permanent Impairment

Disability Ratings; Back; Peripheral Spinal Nerves; Physical Aspects and Vocational Effects of Evaluation

## Investigation of the Case

Role of Investigator; Gathering and Preserving Evidence; Testimonial Evidence; Witness Statements and Depositions; Non-Testimonial Evidence

## The Physician

Communicating With Treatment Physicians: Plaintiff and Defense Contact; Medical Reports and Records; Physician Office Records; Hospital Records

## Dealing With Defense Team: Insurers, Defense Counsel and Impartial Medical Experts

Valuing the Case; Economic and Non-Economic Loss; The Adjuster; Role of Case Reserves; Preparing Medical Support; Presenting the Claim; Settlement; Negotiation; Structured Settlements; Settlement Fund Management Trust; Tax Strategies; Joint Tortfeasors; Impartial Medical Experts; Plaintiff's Insurance Carrier

## Pretrial Procedures

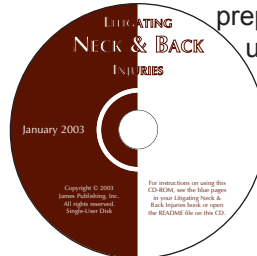
Developing a Discovery Plan; Types of Information to Discover; Experts; Indemnity and Insurance; Surveillance Evidence; Electronic Media Discovery; Interrogatories; Depositions; Videotape Depositions; Production Requests; Requests for Admission; Requests for Physical and Mental Examinations; Pretrial Motions

## Preparing for Trial and Appeal

Voir Dire; Jury Selection; Opening Statement; Presenting Evidence; Testimonial Evidence; Expert Witnesses; Non-Testimonial Evidence; Videographics; Showing Damages; Closing Argument; Jury Instructions; Preserving Record for Appeal; Appellate Advocacy

## Companion Forms CD

Our Forms CD will expedite your neck and back injury case preparation by putting more than 60 easy-to-use forms from the book at your fingertips. The disk is free with your order.



## The Author

John A. Tarantino is a trial attorney, partner and Chairman of the Litigation Department with the firm of Adler Pollock & Sheehan in Providence, Rhode Island. He lectures frequently on trial techniques and has authored numerous books, including *Personal Injury Forms* (James Publishing).

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# Lawyers Weekly USA says...

"To counter concerns of malingering, Tarantino surveys methods to corroborate the plaintiff's complaints, including daily self-reporting, personality tests, and the DSM-IV criteria for chronic pain syndrome."

"The busy lawyer will also benefit from Tarantino's chapters on trial preparation, which include a wealth of model documents, including requests for medical records and reports, demand letters, interrogatories, expert deposition checklists, voir dire questions, opening statements, and closing arguments."

Page B14, Issue 174

Medical explanations, charts and diagrams will help you prove damages, explain injuries, analyze diagnostic test results and win larger awards for your client.

## PRETRIAL PROCEDURES

§ 9:520 Sample: Motion in Limine

§ 9:520

SUPERIOR COURT

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

MARY JOHNSON

DAVID SMITH

C.A. No. \_\_\_\_\_

### PLAINTIFF'S MOTION IN LIMINE TO BAR DEFENSE INTRODUCTION OF EVIDENCE CONCERNING PRIOR INJURY

On (insert date of incident) Plaintiff was injured in a rear-end collision when her vehicle was struck by a vehicle owned and operated by the Defendant. Plaintiff sustained serious injury to her neck and spine, and was diagnosed as having a herniated disc at L4-L5. Plaintiff has incurred months of medical treatment and continues to be disabled from that injury.

In the course of discovery, Defendant asked an interrogatory concerning Plaintiff's prior health history and in response to that interrogatory, Plaintiff disclosed that nine years earlier she had suffered a job-related injury and received Workers' Compensation for a back strain. Plaintiff was not hospitalized for the injury and was out of work for 11 days. Over nine years ago, Plaintiff's then treating physicians discharged her, noted in their records that the injury had fully and properly healed, and Plaintiff resumed work without incident for over nine years.

In his Pretrial Memorandum, Defendant has disclosed that he intends on offering evidence of the Plaintiff's prior work-related injury over nine years ago in an effort to "impeach the treating physician's diagnosis that the Plaintiff has suffered a herniated disc as a result of this accident." Plaintiff requests that this Court rule in limine that the Plaintiff's prior health history, and any testimony concerning the Plaintiff's prior health records, and any testimony concerning the Plaintiff's prior work-related activities, are not relevant. Alternatively, even if relevant, any testimony is substantially outweighed by the risk of unfair prejudice, confusion and misleading the jury.

First, the evidence of the prior injury is not relevant. The applicable Rules of Evidence provide that relevant evidence is evidence that has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Here, evidence of a prior injury that had fully healed over nine years ago; that had not re-manifested itself; and for which Plaintiff experienced no discomfort, disability or pain, is not relevant in determining whether the Plaintiff suffered a herniated disc in the subject incident with Defendant.

9-73

## § 1:190

### § 1:190.30 Aggravation of Pre-Existing Injury

The third alternative for presenting prior injuries or other pre-existing conditions in the case on the basis of an aggravation of the witness testimony must establish the existence of the prior condition, the nature, extent and limitation of the plaintiff's activities. When properly handled, from a weakness into a strength and can result in a substantial settlement or jury award.

In some cases it can be advantageous to demonstrate that, even with the pre-existing condition, the plaintiff was able to work effectively, enjoy recreational activities and a relatively normal life before the aggravation caused by the defendant. Medical and lay witness testimony can focus on how the aggravation disrupted the plaintiff's medical condition, social and work life and family relations.

In other cases, plaintiff's counsel may prefer to argue that the pre-existing condition was still causing the plaintiff severe pain, discomfort and harm, and that the new aggravation and the plaintiff's total incapacity. Medical testimony should focus on the fact that the injury would have been chronic and disabling had not any pre-existing defect or injury.

Counsel should request an instruction on the admissibility of damages if the injury is aggravated or worsened as the result of the defendant's negligence.

### § 1:190.40 Use During Opening Statement

Counsel elects to present the pre-trial motion as either regarding the plaintiff's condition (see § 1:190.20) or as regarding the aggravation of the condition from the defendant's negligence. In either case, the plaintiff's condition from the defendant's negligence should be the focus of the case. Plaintiff's counsel should understand that there is nothing at both the common law and court

## DIAGNOSING NECK AND BACK INJURIES II

most sense support a right to recovery regardless of pre-existing injury.

Consider the following examples of how a pre-existing injury can be shown in opening statement to make the plaintiff more susceptible to new injury or how a pre-existing injury was aggravated by the defendant's conduct.

### EXAMPLE ONE: Susceptibility to new injury.

Ladies and gentlemen of the jury, the accident that brings us here today occurred on October 15, 1993. You will learn from the testimony that the accident occurred at the intersection of First Avenue and Walker Street. By all accounts, it would appear that the accident was not of a particularly serious nature. However, in order fully to understand what happened to this plaintiff, Mary Edwards, we have to go back in time to June 3, 1990. What does that date have to do with an accident that occurred in October, 1993? The answer is simple: In June of 1990, Mary Edwards was involved in a serious motor vehicle accident and she suffered severe injuries. It took Mary Edwards over 18 months to recover from those injuries, and you will hear testimony from various physicians, nurses and other health care providers about the nature, extent and duration of those injuries. You will also hear that as a result of that prior accident, Mary Edwards became more susceptible to re-injury as her body was weakened and stressed. Mary Edwards was a different person after June 3, 1990, but she is the person who was in the vehicle and who was struck by the defendant, in this case, on October 15, 1993. We will present medical testimony to show that these prior injuries made her more susceptible to injury in the future and that her injuries in this case led her to go into further detail about what the evidence will show in this regard...

### EXAMPLE TWO: Aggravation of Prior Injury

Ladies and gentlemen of the jury, you are going to hear about an injury in this case and perhaps it is not the one you would expect: yes, the plaintiff, Tom Smith, was injured when he slipped and fell at work, on or about January 4, 1992, and the injury that was diagnosed by his treating physicians. What may surprise you, however, is that the medical experts will testify that what happened on January 4, 1992 was an aggravation of an injury

## DIAGNOSING NECK AND BACK INJURIES

### Chart of Cervical and Lumbar Injury Deficits

§ 3:520

Spinal Levels	Pain	Numbness	Muscle Strength	Reflexes
C5	3 inch band below collarbones, base of neck and top of shoulders; anterior arm from top shoulder to elbow	Lateral arm top of shoulder to elbow	Deltoid (pure C5) and biceps (innervated by both C5 and C6)	Biceps
	Outer arm from top of shoulder to thumb	Forearm thumb, index finger and one-half of middle finger	Wrist extensor group (both C6 and C7) and biceps (from C5 and C6)	Brachioradialis and biceps (C6 overlaps C5 in biceps innervation; C5 is predominant innervator)
	Across shoulder blades and down posterior arm to first two fingers	Middle finger (also innervated by C6 and C8; thus, no conclusive tests for C7)	Triceps, wrist flexors, and finger extensors (predominantly C7; some C8 innervation)	Triceps
	Across top of back at C5 level and down inner arm to ring and little fingers	Ring and little fingers in distal half of forearm	Finger flexors	None
	Follows T1 dermatome pattern	Upper half of medial forearm and medial portion of arm	Finger abduction; finger adduction	None
	Upper anterior thigh into low back	Anterior thigh between inguinal ligament and knee	Iliopsoas, hip flexor, quadriceps, and adductor group	None (knee reflex predominantly L4 though some L2 and L3 innervation)
	Lower back hip, postero-lateral thigh, anterior leg	Medial side of leg extending to medial side of foot	Tibialis anterior muscle (also some L5 innervation)	Knee reflex

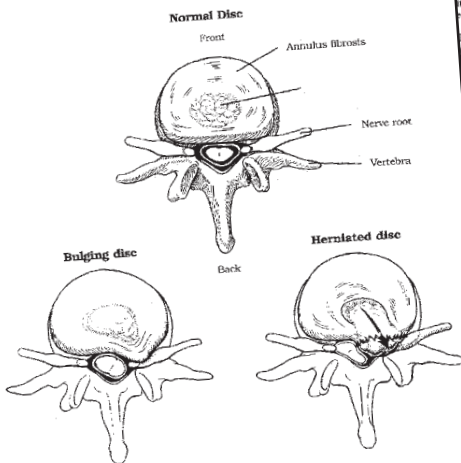
3-43

(Rev. 1.5.95)

## § 3:400

### DIAGNOSING NECK AND BACK INJURIES II

Plate 3:3 Normal, Bulging and Herniated Discs

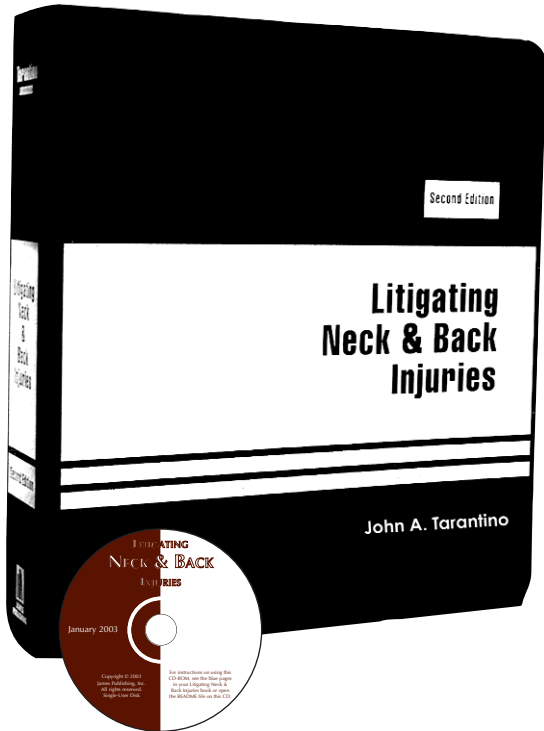


1-46

3-302

Practice tips, checklists, and forms help you move efficiently through discovery to a fair settlement.

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