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From the Emergency Room to the Court Room

By Joseph Napoli, J.D., LLM

The anatomy of a personal injury accident and the ensuing lawsuit is a thing of beauty. In an age where the personal injury lawyer glorifies mass tort litigation, MDLs, and class actions I prefer the challenge and fascination of the car crash, slip and fall on debris or ice, construction worker accident, the defective product or the negligent doctor or hospital. The interesting prospective client ranges from a hodgepodge of very wealthy individuals to illegal alien. They are of all races and creeds: a mix of the 120 plus nationalities that populate the five boroughs: doctors, lawyers, judges, construction workers, Jews, Muslims, and the list goes on and on.

The office of a New York personal injury attorney must have Spanish speaking personnel as well as assistants that can translate Chinese and Korean to round out their staff.

After taking the initial facts and starting the investigation, which requires the ever-crucial witness statements and photos of the accident scene or of a defective product and liability expert witnesses have to be retained. The photos can be from a scar to an amputated leg, the scene of an accident, the defective product - a car, a broken chair, exploding pasta cooker, table saw, and many of the everyday products.

Who to sue and where to sue is a creative process: what court (state or federal) what county (Brooklyn Bronx New York or Westchester). It is no mystery that some courts are more favorable to plaintiffs than other courts. After gathering all investigative materials and medical records, you must decide who to sue and what causes of action to include in your complaint.

If a truck or employee is involved, we can include a negligent entrustment and punitive damages claim which is always helpful in the ultimate resolution of the case. In construction worker cases you must be very specific in alleging the rules the owner or general contractor have violated. If you are suing a municipality you have to file a notice of claim. The defendant will ask you for time to answer your summons and complaint and it is given only if their attorney waves defenses or of jurisdiction and service of process. Here is your first chance to win your case. If the defendant fails to timely appear, you can move for a default judgement.

The next stage: discovery and depositions are where the fun begins. Each type of case has its own set of plaintiff's discovery demands: automotive, premises, construction accident, transit authority, product case, medical malpractice, and municipalities. You must be determined to get the right documents and witnesses with knowledge. (The best example of thoroughness is Caldecott v. Lilco, 417 F.2d, 994 (1969), where a very small entry (only seen with a magnifying glass) on a defendant's computer "leak on meter" made out the case against the defendant.)

Your second chance to win the case without a trial is the spoliation motion. After multiple attempts and orders to obtain depositions or discovery, the court can strike the defendants answer or allow the jury to draw favorable inferences in favor of plaintiff.

Your third chance to avoid a trial is a motion for summary judgment – which you should be thinking about when you take the case. Here is where you are expert witnesses, investigation and discovery comes in.

All of this should be done expeditiously. I have had cases come up for trial within one year of the accident (federal court), with an average of three to five years and as long as eight years.

At this stage with a case on the calendar the defendants might be willing to discuss settlement or private mediation. I prefer talking settlement when we have a firm trial date (to pick a jury), subpoenas have been served and all medicals are in court and the case is on the defendants' radar. I have settled cases during trial (settled at the high point) and while the jury is deliberating. Taking the verdict is the hard part. You must ask yourself if you are reading the jury correctly; how well has your case gone in, is there something in the judge's charge to the jury that creates a

problem and has the judge created reversible error, either way so that you are now trying the case for the appellate court. There is nothing more exciting than getting a favorable verdict.

You should always be trying the case for the jury, the judge, the defense attorney, and his/her adjuster, and for the appellate court.

These cases always involve challenging legal issues that are unique. In 1969, I argued in the Court of Appeals, *Flannigan v. Mt. Eden Hospital*, 24 NY2d 427 (1969), that established the discovery rule in medical malpractice actions in foreign object cases. In *Watson v. Colonial Sand and Stone*, 38 A.D. 2d 762 (2nd Dep't. 1970), aff. 31 NY 2d 685 (1972), a wrongful death automobile case, the court ruled in favor of the plaintiff based upon the definition of "a marginal street." In *Newman v.RCPI Landmark Props, LLC*., 28 NY3d 1032, 1033 [2016]), in an action to recover for injuries incurred by plaintiff when he descended from a loading dock, using milk crates, a motion for summary judgment dismissing the complaint was denied by the Court of Appeals where defendants' own submissions did not establish as a matter of law that their alleged negligence was not a proximate cause of the accident, but left open the possibility that some negligence on their part contributed to the injuries incurred, and that there was a causal link between that alleged negligence and plaintiff's fall.

Perfecting and arguing an appeal is the most gratifying part of being a lawyer. With your trial memorandum of law given to the court at the start of the trial and memos during trial you should be prepared for your appellant brief.

As Clarence Darrow said, "The only real lawyers are trial lawyers, and trial lawyers try cases to juries."