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## Admiralty & Maritime - In a World of Mediated-Settlements, Some Cases Need to be Tried

At the end of a full-day's mediation in a maritime personal injury case filed against our client under the Jones Act and the General Maritime Law doctrine of seaworthiness, the Parties were \$1,500,000.00 apart. In the weeks following mediation, the plaintiff's settlement demand increased by another \$200,000.00. The plaintiff and his lawyers were particularly emboldened by what they perceived as a favorable Rio Grande Valley venue, along with the fact that the plaintiff had undergone surgery to his cervical spine.

Our client very much wanted to proceed to trial in this matter and, faced with the intransigence of the plaintiff and his lawyers and the inability to reach a commercially-reasonable compromise of the plaintiff's claims, our client's underwriter agreed to try this matter to judgment. The matter proceeded to trial before a Rio Grande Valley jury that, following approximately a full day of deliberations, returned a "message" verdict very much in favor of our client.

The plaintiff's claims arose out of two (2) alleged incidents occurring approximately one (1) month apart aboard our client's dredge. At the time of the first alleged accident, the plaintiff placed his left wrist within a pinch-point and allegedly sustained a crush injury with a questionable fracture. While working light duty as a result of this first incident, the plaintiff allegedly slipped down the starboard stairway leading from the deck of the dredge to the lever room in the second alleged incident. The plaintiff's primary focus in his liability case was the second alleged incident, which he claimed was the injury-producing event requiring his cervical surgery. The timelines of events, however, cast serious doubts on the plaintiff's claims with regard to causation.

The plaintiff's two (2) alleged incidents occurred in February and March, respectively. This was especially important because the plaintiff underwent an MRI in April, following his abandonment of his employment with our client, which was read as normal and showing no bulge at the C5-6 level, the level upon which he had been operated. Notably, the same radiologist who performed the April MRI performed a subsequent, follow-up MRI in June allegedly showing such a disc bulge at the C5-6 level.

With no objective evidence of a traumatic injury to the plaintiff's cervical spine, the plaintiff's treating surgeon (who was also the plaintiff's medical expert witness) was forced to testify that the necessity for surgery did not result from any objective nerve impingement caused by the alleged C5-6 disc bulge. Rather, he testified that surgery was performed to relieve the plaintiff's subjective complaints of pain believed by the treating physician to be "discogenic pain," a controversial diagnosis that presumes the leakage of chemicals and proteins from the inner portion of a spinal disc through

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annular tears that irritate adjacent nerves and produce pain and other symptoms.

In any personal injury case in which the plaintiff has undergone surgery, it is difficult to convince a jury that a plaintiff would be willing to undergo surgery to his spine simply for monetary gain or that a surgeon would perform unnecessary surgery for that same reason. That was especially so in this case, where the plaintiff's treating physician, along with his orthopedic surgeon father, were long-time residents and practitioners in the area and very well regarded by the public.

Instead of attacking the plaintiff's treating physician, we suggested through the testimony of our own highly-qualified neurosurgeon, and through the use of the plaintiff's objective radiographic studies, that the plaintiff had not been candid with his subjective complaints, given that the cervical surgery performed by the treating physician had resulted largely from the clinical picture the plaintiff presented through subjective complaints. In this fashion, we "protected" the reputation of the treating physician by suggesting that the plaintiff had simply lied to him for reasons of secondary gain by way of his lawsuit. While ordinarily difficult for a jury to believe, we were assisted in this regard by actions of the plaintiff, which cast substantial doubt on his character and credibility.

As part of our proactive handling of the defense of this matter, we retained a highly-qualified vocational rehabilitation specialist and disability consultant to serve as our client's vocational rehabilitation expert. The plaintiff did not retain or designate a corresponding expert in the area of vocational rehabilitation. We arranged for the plaintiff to undergo a vocational rehabilitation IME prior to his cervical surgery, at which examination the plaintiff moved about our expert's office in a very slow, deliberate, and stilted manner. The plaintiff also reported to our expert that he could not work because he could not carry anything, and reported further that he could not even carry his new baby. Rather, according to the plaintiff, he spent his days watching television, unable to do any housework, yard work, or other light household tasks. He reported further that his left arm was painful, numb, and tingled and that he could not drive as a result of the severe pain he experienced.

In connection with the vocational rehabilitation IME, we arranged for our private investigator to obtain surveillance footage of the plaintiff. The plaintiff, who resided in Brownsville, arrived at his appointment in Corpus Christi with both of his parents in a vehicle that was driven by his father. The group departed our expert's office, again with the father at the wheel, but shortly thereafter stopped at a convenience store. At the convenience store, the plaintiff could be seen pumping gas and walking briskly from the vehicle to the store several times. In addition, contrary to what he reported to our expert, the plaintiff could be seen climbing into the driver's seat of the vehicle. Our investigator followed the plaintiff after the group left the convenience store, and the plaintiff continued to drive for the remainder of the trip to Brownsville.

At trial, our expert noted the plaintiff's obvious deception, which gave her grave concern over the legitimacy of any of the responses and information provided by the plaintiff during her evaluation. Importantly, the plaintiff's lawyers objected so strenuously to the admission of the video surveillance footage that we made a tactical decision to not offer the footage into evidence or play it for the jury. After a lengthy conference at the Bench, during which the jury was dutifully escorted from the courtroom, we simply had our vocational rehabilitation expert refer to the surveillance footage that she had viewed, and as expected, the surveillance footage took on a life of its own in the minds of the jurors, who assumed the surveillance footage was much more devastating than it actually was.

The plaintiff's character and credibility were further damaged by the live testimony of his "grunt and groan" family member witnesses, and his own testimony. The plaintiff's mother testified that the plaintiff was a virtual invalid, could not lift his new baby, and could no

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longer take his young wife out to dance. The plaintiff contradicted some of this testimony on cross-examination. But the most glaring contradiction occurred during cross examination of the plaintiff's young wife, who confirmed her husband's inability to take her out to dance since the time of his alleged accidents aboard our client's dredge. On cross examination, we asked the plaintiff's wife the age of her and the plaintiff's new baby. When she answered, the collective calculations of the jurors were readily apparent as they each performed the simple arithmetic showing the child had been conceived during the pendency of the lawsuit, and well after the plaintiff's alleged accidents aboard the dredge.

Days before the trial setting in this matter, the plaintiff's lawyers made a settlement demand of \$1,350,000.00. Buoyed by what they believed to be lengthy deliberations by the jury to determine just how much money our client would have to remit to the plaintiff, the plaintiff's lawyers increased their settlement demand during jury deliberations to \$1,750,000.00.

The jury ultimately made a determination that both parties were equally negligent, but awarded only past medical expenses as damages. In this regard, and as we speculated while the jury deliberated, which speculation was confirmed subsequently in a call to the Presiding Juror, the jury essentially determined that it wished to ensure that local health care providers received payment for medical services rendered to the plaintiff. Accordingly, and in order to accomplish the jury's goal, the amount of \$130,000.00 was awarded as past medical expenses, which amount was reduced by the plaintiff's comparative fault in order to allow for a Judgment to be issued in the amount of \$65,000.00, which was just short of the aggregate amount of medical expenses for which the plaintiff had offered evidence. No other damage award was provided to the plaintiff.

During the pendency of this matter, the plaintiff's lawyers had "warned" us at every opportunity that they were certain to secure a Judgment well in excess of one million dollars in this allegedly plaintiff-friendly venue. The lesson of this matter is that, even in a plaintiff-friendly venue, with the logical and persuasive presentation of evidence gathered proactively during the entire course of the litigation, the jury will be disinclined to reward a plaintiff who is clearly dishonest—regardless of how that dishonesty manifests itself.

