IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

MARCH 2017

CHAIR'S COLUMN

Now that the IADC Midyear Meeting is behind us we look forward with excitement to the Annual Meeting this July in Québec City, Canada. In addition to the customary IADC blockbuster speakers, social networking and all-around fun, our committee will be sponsoring several CLE programs at the Annual Meeting. Stay tuned for additional information and please plan to join us.

This edition of your committee newsletter has an insightful article on *Defending Damages Claims involving Foreign Plaintiffs* by Kurt Gerstner of South Korea, along with a practical *Trial Tip* from Jim King on the importance of "first impressions" in court.

As always, please feel free to contact me with any questions or suggestions about the programming we do for you.

Chris
Chair, Trial Techniques and Tactics Committee

Chris Kenney is the Managing Partner of Kenney & Sams, P.C. in Boston, MA, where he focuses his practice in litigation, trials and appeals before state and federal courts throughout New England. Mr. Kenney also serves as the Vice President of the Massachusetts Bar Association. He can be reached at cakenney@KandSlegal.com.

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IN THIS ARTICLE

This article discusses special strategies available to defense counsel when attacking the damages claims of foreign plaintiffs.

Defending Damages Claims Involving Foreign Plaintiffs

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Given the enormous volume of international commerce and global tourism, foreign nationals are doing business and visiting other countries in ever-increasing numbers. Inevitably, a certain number of foreign companies and foreign nationals will become plaintiffs in litigation in the countries they visit or where they have business interests. It is highly likely that IADC members will find themselves defending damage claims brought by foreign plaintiffs.

Plaintiffs' economists and other experts must base their damages opinions on accurate facts, information and economic data that apply to the actual plaintiff making the damage claim. It is important for defense counsel to understand the facts and data underlying and forming the basis for the experts' opinions. If it can be shown that the information on which the plaintiffs' damages experts' opinions are based is flawed and inaccurate, then the credibility of those opinions can be seriously undermined in the eyes of the jury.

When defending damages claims involving foreign plaintiffs, it is critical for defense counsel to understand that there may be significant economic, social and cultural differences that could dramatically affect the amount of damages actually sustained by the plaintiff. This article will focus on an actual personal-injury case study that illustrates this point.

The Case Background and Plaintiffs' Damages Claims

A young Korean couple traveled to the United States as tourists. While in the United States, they were involved in a very serious automobile accident which rendered the wife a paraplegic. The couple filed a lawsuit in the United States seeking damages for the wife's paraplegia.

Plaintiff's counsel hired various experts to opine on the economic losses that would be suffered by the plaintiff wife as a result of her paraplegia. The experts included a medical expert to discuss the plaintiff's past and future medical treatment and medical expenses, a vocational rehabilitation expert to discuss her future employment and wage prospects, a life care planning expert to discuss her past and future life care expenses and an economist to opine on the total economic loss, based on the work of the other experts. All of the experts were located in the United States and experienced in handling plaintiffs' personal injury litigation matters in the United States.

The plaintiffs' experts prepared their customary reports outlining the likely anticipated future medical treatments, life care plan and work prospects of the plaintiff and her expenses, for the most part using the experts' customary data sources that they typically would use for plaintiffs in the United States. Utilizing the data supplied by the other experts, the plaintiffs' economist opined that the present value of the total loss and costs equaled $5.7 million. That included roughly $1.2 million for lost wages/compensation and $4.5 million for medical costs and life care expenses. The economist noted in his report that the medical costs were based on United States costs, but if the court determined that there was a significant enough difference between United States and Korean medical costs, then he would re-estimate the future medical costs portion of his opinion.

The plaintiffs' attorneys apparently did some research and then decided that they should have their economist re-estimate the future medical costs without waiting to hear from the court. The economist obtained the official medical fee schedule of the Korean National Health Insurance program (mandatory government-administered healthcare). The plaintiffs' attorneys also obtained a two sentence report from a Korean medical expert saying that the cost information on that schedule accurately reflected what is in the Korean National Health Insurance medical fee schedule. Using that data, the plaintiffs' economist issued a supplemental report with revised cost amounts for all of the line items contained in the plaintiffs' medical expert's report on future medical expenses.

Medical expenses in Korea are considerably less than medical expenses in the United States. Simply changing the cost amounts for each line item of future medical expense listed by the plaintiffs' medical expert reduced the medical costs and life care expense total from approximately $4.5 million in the original report to a range of between $2.3 million and $2.65 million in the supplemental report. This made his revised opinion of the total economic damages to be between $3.5 million and $3.85 million – a reduction of about $2 million from his original report.

Attacking the Damages Claims

Although the plaintiffs' economist had voluntarily adjusted his damages opinion downward to reflect lower medical costs in Korea (and presumably in an attempt to appear fair and reasonable), United States defense counsel was still skeptical of the very high economic damages opinion. They asked my firm to assist in evaluating the Korean plaintiffs' damages claims and whether they were realistic. We evaluated all of the damages claims in light of Korean social, cultural and economic conditions and found that there were many other inaccuracies and overstatements of the past and likely future damages that would be incurred by the Korean wife plaintiff.

A. Future Medical Expenses

Although the plaintiffs' economist (or the plaintiffs' attorneys) came to realize that Korean medical expenses are significantly less than medical expenses in the United States, they failed to realize that medical treatment plans in Korea also are significantly different than in the United States. It was not enough to simply reduce the line items of proposed future treatment to Korean cost numbers because the line items reflected a treatment plan that the plaintiff would not experience or utilize in Korea. The question was not what a paraplegic in the United States would likely receive for future treatment, but what the plaintiff, living in Korea, would likely receive.

We were able to find a very prestigious Korean medical doctor, with significant experience treating spinal cord patients, who opined that many of the treatment line items that the plaintiffs had presented in their expert report on future medical expenses were unnecessary and unlikely to be provided to the plaintiff in Korea. Significantly, this medical doctor had been retained by the Korean courts on numerous occasions to provide his independent medical opinion as to future treatment and medical expenses for paraplegics in other legal matters. (In Korea, although parties may present expert opinions

through their hired experts, courts also retain independent experts to advise the court and independently evaluate the information and opinions provided by experts retained by the parties.) He provided an opinion, consistent with his prior opinions given to the Korean courts in other unrelated matters, that the future medical expenses of the plaintiff were likely to be roughly USD $200,000, rather than the millions suggested by plaintiffs' experts.

We also formulated another line of attack on the future medical expense claim. In Korea, virtually all Korean citizens, including the plaintiffs, are covered by the Korean National Health Insurance program. Under that mandatory program, most of the plaintiff's medical expenses would be covered by the program. The plaintiffs' actual out-of-pocket expenses for deductibles and items that are not covered would be quite limited. We were able to find another medical expert, who was the head of a prestigious hospital and had significant experience with the Korean National Health Insurance program, who was able to provide an expert report reflecting the information above. (This was a precursor to the defense arguments in the United States relating to Obamacare coverage, and whether plaintiffs can recover for medical costs that are fully paid by mandatory health insurance.) We also used this argument on the past medical expense analysis, analyzing the wife's medical records and bills to determine what her actual out-of-pocket expenses were versus medical expenses paid by the Korean National Health Insurance program. One comment of note: the medical records and bills were almost all written in Korean and had to be translated. United States defense counsel relied on the translations to determine what was in the records and in the bills. In reviewing the translations, my Korean colleagues found that a number of the translations were poorly done and contained inaccurate information. Some of the inaccuracies were significant as they related to the medical expenses. My colleagues utilized the actual Korean language documents in determining what had and had not been paid, rather than using the poor translations.

B. Life Care Plan

The plaintiff's life care plan and future costs identified in that plan were not revised to reflect Korean cultural norms and costs. The life care plan included many items that we believed would not be used in Korea and inflated costs that were not accurately reflective of likely costs in Korea.

We were not able to find a life care planner in Korea. But we were able to evaluate different elements of the life care plan including the costs that had been suggested by the plaintiffs' expert, and we were able to find economic and other information showing that those costs would be significantly lower in Korea.

Usually it is impossible for defense counsel to attack and criticize all elements of a damages expert opinion. But if you can clearly and cleanly attack certain elements of the opinion, in a simple way that the jury easily can understand, the overall opinion of that expert can be undermined. We focused on certain elements of the life care plan that would make this point to the jury.

For example, the life care plan included a significant amount for home renovations to

make the plaintiffs' home handicapped accessible. These were based on United States wage rates for construction workers. We found Korean economic data showing that Korean wage rates for construction workers were significantly less and the cost of such renovations, if they were even needed, would be much less than the plaintiffs' experts opined.

As another example, the life care plan included a wheelchair-lift van that the plaintiff would need to purchase for transportation. The plaintiffs' life care planner included a United States cost for that van. We were able to obtain a report and data from a Korean car dealership demonstrating that in Korea a similar handicap van could be purchased for significantly less (approximately USD $30,000 vs USD $72,000) than the plaintiffs' expert opined.

C. Future Lost Earnings

The plaintiffs' vocational rehabilitation expert looked at the plaintiff's education, prior work history and her physical limitations. Using that information, he evaluated her transferable skills and looked for different types of jobs that he believed she could perform. He did this using American job titles because he could not find Korean job titles when he conducted his research. He also did some limited research on current job openings on an English-language Korean job website, and he did some research on general salary history in Korea using other English-language websites. Based on his limited research, he opined that the wife could do only clerical work, which work she could do only for very limited hours per day. Additionally, he opined that she would have difficulty finding reliable transportation and her handicap would make it difficult for her to be hired in Korea. Therefore, in his opinion, she would be relegated to low paying self-employment or home-based employment.

Among other things, my Korean colleagues were able to search websites and other data sources written in Korean that contained significantly different information than what the plaintiffs' expert was able to find. We were able to find Korean job titles, with wages that were comparable to what the plaintiff had earned previously. We also collected data on the public transportation system in Seoul, which is one of the most modern in the world and fully handicapped accessible. Likewise, we researched Korean laws that prohibit discrimination against handicapped people and provided for accommodation of their handicaps in the workplace. We also found actual Korean data on the employment of handicapped people in the workforce in Korea, jobs available specifically for handicapped people and vocational rehabilitation resources available in Korea to help people like the plaintiff return to the workplace.

Using the Korean Data and Information

In the course of our work, as mentioned above, we found a lot of useful information and Korea-specific data to challenge the plaintiffs' expert opinions. There are different ways that the information can be used. If this type of information is going to be used at trial, defense counsel needs to consider how he/she potentially might want to use it, evaluate the different pieces of information for admissibility, and obtain the information in a form that would be admissible. Also bear

in mind that there are many practical and other difficulties in bringing damages expert witnesses and/or foundational witnesses to court from other countries to testify. That should be taken into consideration when determining if and how you might use the information at trial and whether you will need live witnesses to introduce the information. Other alternatives might be to use it in deposing the plaintiffs' experts, and/or to allow your expert to consider it but not try to admit the information independently.

In our case, all of the information that we provided to United States defense counsel was submitted in the form of expert reports from medical experts and from a Korean-licensed attorney. Usually the underlying data from our research was attached to the reports. The attached data was often from governmental and other published sources that an expert in the field of economics could reasonably rely upon in forming opinions. We provided those reports to be utilized by the economist hired by United States defense counsel.

We also provided English language translations of documents as well so that United States defense counsel could read them and potentially use them in a deposition of the plaintiffs' economist, or possibly save them for trial. Utilizing the reports and information we supplied, along with other research that he had done, the defense economist was able to provide an opinion that the present value of the plaintiffs' economic loss was millions of dollars less than the amount presented by the plaintiffs' economist. That defense economist report created considerable risk that the plaintiffs' damages would be found to be very low compared to what the plaintiffs' attorneys originally believed. It contributed to allowing the case to be settled on reasonable terms that were favorable to the defense.

Conclusion

While the example above focuses on a personal injury case, there may be cultural, social, economic, regulatory or other issues that could also affect damage claims related to commercial transactions, contract disputes, etc. involving foreign plaintiffs. Any time you are presented with a claim made by a foreign company or individual, whether in court or international arbitration, it bears considering and analyzing whether there might be some special conditions or factors in the plaintiff's country that could affect the plaintiffs' damage claims. As in the example above, those local factors may prove to be a significant tool that you can use in the defense of your client.

TRIAL TIP:
"APPEARANCES COUNT"
BY: JAMES A. KING

When I was a young lawyer practicing in Columbus, Ohio, one of our senior federal judges had a rule for any male attorney who appeared in his courtroom: only white dress shirts. If an attorney showed up with a blue or striped dress shirt, he would be ordered to leave and find a white one. I am not kidding. While the federal judge who had this rule has long since passed, his legacy continues. If you try a case with or against an attorney from Columbus – whether it be in Ohio or in some other jurisdiction – odds are he will be wearing a white shirt. For me, I have never appeared in any court anywhere wearing anything other than a plain white dress shirt.

Now this may seem a bit extreme, it highlights an important subject for any trial lawyer. Appearances count. Because judges and jurors will take notice of your appearance. When you prepare for your trial, you do not want anything other than your case to stand out. And, by all means, you do not what to look like you are only in it for the money. The judge and jury should be interested solely in what you and your evidence have to say.

So what does this mean? While there are no hard and fast rules (and, of course, with every rule, there can be exceptions), most lawyers follow a basic guideline. A courtroom calls for respect, decorum, and solemnity. This means men should wear a suit and tie, with a plain colored (for me, white) shirt. The courthouse is no place for casual Friday. Do not wear a sport coat and slacks. Keep the jeans and the polo shirt at home. Wear a plain, neutral-colored suit (blue, grey, or black). Unless you are Johnny Cochran, avoid the powder blue suit. Remember the red suit that Joe Pesci wore to court in My Cousin Vinny? Do not wear something like that. Again, your suit should not be noticed.

The same is true for your tie. You may own a beautiful neon-colored tie that sparkles in the sun. It's a wonderful tie. This is the tie that we leave at home. You want to wear something that blends in, so the court and the jurors focus on you, not your tie. Finally, your shoes should be dressy, conservative, and shined. Jurors will notice when your shoes are faded and scuffed. If they squeak when you walk, find a different pair. Remember, you are a professional. You need to look, act, and sound like one.

As for women, I am no expert on women's fashion, but the same principles would apply. The general rule should be a skirt or pant suit, proper shoes (typically heels), and neutral makeup (if

any). Avoid clothing that calls attention to anything other than your case. If you wear heels that clickety-clack when you walk, for example, the court or the jury may find it distracting.

Pay attention to other aspects of your appearance. For example, your clothes should fit. If you have been successful in losing weight but have not found the time to purchase a new suit, you need to visit the mall or your tailor. Wearing baggy clothes may make you look like you are donning a clown suit. All you are missing is the red nose. And, if you are constantly adjusting, pulling, or tucking in your clothes, you may appear uncomfortable and not confident. Accessories can present the same challenge. Avoid loud or clangy bracelets. If you enjoy wearing large hoop earrings, consider something a little less noticeable for trial. Or, if you wear diamond-studded eyeglasses that would make Elton John proud, look for a new pair. The Clark Kent look may be more appealing in the courtroom.

Be cognizant of how your accessories may reflect on your case or your client. If you are representing the big corporation against an individual plaintiff, do you really want to wear a $10,000 Rolex watch? Or carry that $3000 purse? The jurors will notice. By the same token, how you appear outside the courthouse also can make a difference. Think about your car. Let's say you have a trial in a rural county. Should you show up in your new Porsche? You never know when a juror may be observing you. I own two cars, a BMW and a Ford. If I have to appear in a small county court where the judge or the jurors may see me park, I will be arriving in my Ford. The BMW stays in the garage.

Like it or not, how we appear in court matters. In any trial, we must make the trier of fact believe what we are telling them. They must believe not only in our case – they must believe us. The focus must be on what we say, present, and argue. Don't let your appearance get in the way.

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