

Defense Counsel Need New Strategies In Spinal Fusion Cases

By **Nicholas Hurzeler** (September 30, 2021,)

Fusion surgery is a procedure that prompts questions about whether financial incentives drive patient treatment. This is especially true because the evidence is mixed on whether fusion surgery is generally more effective than less invasive treatment options, such as injections or physical therapy.



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One study conducted by the Royal Australasian College of Physicians in 2018 found that "the available evidence does not support a benefit from spine fusion compared to non-operative alternatives for back pain associated with degeneration," although it also found that "better evidence is required to determine more accurately the effectiveness of spine fusion surgery for all indications." [1]

The abstract for a 2019 study supported by the South-Eastern Norway Regional Health 3 Authority summarized the issue as follows: "Studies from different Western countries have reported a rapid increase in spinal surgery rates, an increase that exceeds by far the growing incidence rates of spinal disorders in the general population." [2]

Consider as well a 2019 study by the University of Utah, which estimated the "volume of elective lumbar fusion increased 62.3% (or 32.1% per 100,000 US adults), from 122,679 cases (60.4 per 100,000) in 2004 to 199,140 (79.8 per 100,000) in 2015." [3] The same study found that aggregate hospital costs for fusion surgeries "increased 177% during these 12 years, exceeding \$10 billion in 2015, and averaging more than \$50,000 per admission."

An investigation conducted by CBS News in 2014 found that the number of spinal fusions in U.S. hospitals increased 70% from 2001 to 2011. [4] The Utah study found that more than 480,000 spinal fusions are performed in U.S. hospitals each year, at an annual cost of more than \$12 billion. [5]

In sum, it is undeniable that the past 15-20 years have witnessed a sharp increase in the number of fusion surgeries performed in the U.S.

And this trend has been accompanied by ever-increasing jury awards, settlements and verdict values. In most cases, although by no means all, plaintiffs allege spinal fusion surgery of the cervical or lumbar spines related to a motor vehicle accident, trip and fall, construction accident, or similar personal injury claim.

Although statistics regarding the prevalence of fusion surgery in litigation are not available, it is clear that such cases are increasingly common in jurisdictions across the country. And the increasingly lucrative nature of this litigation has certainly not been checked at the appellate level. Appellate courts consistently uphold large awards whenever a fusion is involved.

The challenge for the defense bar is to come up with some creative strategies to combat this trend, since the traditional approaches are often ineffective.

Consider the CBS investigation's findings regarding cost-effectiveness of fusion surgeries. Based on its review of a Medicare billing code database, CBS found that a small number of

surgeons perform a disproportionate number of spinal fusion operations.[6]

CBS found "there is ... a financial incentive to performing a spinal fusion. It can earn a surgeon thousands of dollars - and five times as much as less risky alternatives." [7] CBS interviewed Richard Deyo, a professor at Oregon Health and Science University, who gave his opinion that as many as half of fusion surgeries are medically unnecessary.[8]

Consider also the example of vaginal mesh surgery in mass tort litigation.

In 2018, the New York Times published an article documenting how hundreds of women were pressured into having unnecessary vaginal mesh surgery as part of a scheme to increase the value of claims against vaginal mesh implant companies.[9]

The newspaper found a confluence of financial interests between the doctors performing the surgeries, the lawyers collecting their fees, and the litigation funding companies invested in lucrative outcomes for vaginal mesh plaintiffs. The scandal eventually resulted in the arrest of a doctor and a medical consulting firm.[10]

The women were aggressively targeted for surgeries that in many cases turned out to be unnecessary, and some were left with serious medical problems and complications.

In many cases, settlements were consumed in large part by fees for lawyers and doctors, as well as high interest rates for litigation funding companies. The biggest victims were those plaintiffs who were left with complications from unnecessary surgery and little in the way of financial compensation. Schemes such as these also increase insurance premium costs.

It would be naïve to think this same process does not occur at all in the context of spinal fusion surgery. And while vaginal mesh litigation is relatively niche, fusion surgeries are extremely common. And defense counsel almost always are faced with a jury pool that is wholly ignorant of the topic.

Naturally, random members of the general public have no knowledge about the finer points of fusion surgery statistics. Jurors decide each case in a vacuum. They often believe the straightforward explanation that the fusion surgery was a necessary treatment that resulted in range of motion restrictions and the possibility of future complications.

The personal injury trial itself may well be the jurors' first and only exposure to the topic.

And while defense counsel can in some cases present expert testimony that the plaintiff's surgery was not medically necessary or causally related to the accident, juries may well be skeptical of these claims, since they know the defense has a financial incentive of its own, which is true as well.

It is in defendants' interests to downplay fusion surgeries and whether they are causally related to an accident. But potential financial incentives for plaintiffs, their attorneys, doctors and litigation funding companies is equally clear, as the vaginal mesh example plainly shows.

Given these realities and the increasing costs of fusion litigation on defendants and insurers, defense counsel has no choice but to consider all options to dispute the textbook plaintiff's narrative regarding fusion surgeries. There is no reason why juries cannot necessarily be educated about these matters. Defense counsel should consider retaining qualified experts to testify about them at trial.

Such a strategy will undoubtedly lead to an evidentiary objection. But the attempt can at least be made. In an appropriate case, information regarding financial incentives may be relevant and admissible if, for example, the plaintiff's surgeon is one of those who performs a disproportionate number of fusion surgeries, as noted in the CBS investigation.

Traditional methods of defending these claims often fail to convince jurors. For example, one standard defense is essentially to hire well-credentialed biomechanical engineers and orthopedic surgeons, and present their testimony to the jury on the issues of medical necessity and causation.

In the typical motor vehicle case, this expert testimony would ideally be supplemented with vehicle photographs and damage estimates. Testimony from an accident reconstruction expert may also be presented.

Such tactics are often ineffective because they are too abstract and complicated for jurors to easily grasp. Moreover, plaintiffs are adept at presenting testimony from their own biomechanical engineer, accident reconstruction expert and medical professionals — frequently the plaintiff's own treating surgeon, who will often be more persuasive regarding causation, because he or she will have the benefit of having personally seen the plaintiff's spine during surgery.

Their opinion of a traumatically induced injury is often more persuasive than a defense physician who never saw the inside of the plaintiff's spine up close, and is instead relying on a physical examination done long after the fact, although diagnostic studies, and, possibly, intraoperative photographs can also be helpful.

Faced with lengthy, confusing and competing expert narratives, and a very sympathetic plaintiff, juries will frequently side with the plaintiff on the question of medical causation.

Even if certain other evidence, such as minimal vehicle damage, is overwhelming, and even if the defense has the edge in a strictly scientific sense, many science-heavy presentations fail to make a favorable impression on a lay jury.

Some proposals to improve the standard formula are as follows.

First, ensure that the defense biomechanical engineer and orthopedic surgeon are working together, for example by reviewing each other's reports and, if possible, reaching a consensus on their findings well in advance of trial.

They may be more persuasive if they communicate regarding each other's methods, expertise, reasoning and evidence relied upon. Having the experts work together also minimizes the risk of one expert being tripped up by another's findings during cross-examination.

Notably, although many states are trending towards greater admissibility of biomechanical opinion,[11] the biomechanical engineer is still subject to challenge on the ground that he or she is not a doctor. However, this objection will be without merit if the biomechanical opinion is supported by a medical doctor. The biomechanical engineer can defer to the doctor regarding strictly medical issues.

Likewise, the orthopedic surgeon can defer to the engineer regarding the finer points of biomechanics. If an accident reconstruction expert is also retained, he or she can also join

in this collaborative process.

In contrast, presenting expert testimony in which the respective experts are uncoordinated, and unaware of the science behind each other's findings, can only undermine the jury's confidence in their determinations and generate material for the plaintiff's side during cross-examination.

Second, retain the experts at an earlier stage of the proceedings. They are typically retained after the plaintiff's deposition, but it may be better to retain them earlier. This will make it easier to prepare targeted questions for the plaintiff's deposition.

It is recommended that the experts be retained approximately when the bill of particulars is served, or once it is determined that a fusion surgery has happened, or will likely happen.

Given the proliferation of fusion cases as discussed above, defense counsel cannot assume that what appears to be a low value case will not transform into a high-value case simply by performing a fusion surgery, even if it happens long after the accident.

Biomechanical engineers, for example, can generate lists of specific questions that should be asked during the plaintiff's deposition, geared toward medical causation and the finer points of biomechanics.

Certain questions are specific to the models of vehicles involved, and can only be brought to the attention of defense counsel through timely expert input.

The orthopedic surgeon and accident reconstruction expert, likewise, can offer valuable input that can be used during the plaintiff's deposition to flesh out as much as possible the mechanics of medical causation, how the accident occurred, and the specifics of the forces at work on plaintiff's body. Targeted deposition questions such as these can only improve the odds of a successful defense at trial.

Third, make all efforts in the discovery and investigation phase to obtain all available evidence requested by the experts in support of their theories, and to support the admissibility of their testimony.

For example, the case law in New York imposes certain standards for the admissibility of a biomechanical engineer's opinion.[12]

The case law helpfully provides a shopping list of items to obtain in support of the engineer's testimony: vehicle specifications, vehicle inspection information, damage estimates and reports, photographs, repair records, scientific articles, specific deposition questions as noted above, and possibly also photographs recreating the position of the plaintiff's body within the same vehicle, or an exemplar, at the moment of impact.

Similar lists can be compiled for other types of accidents, for example construction accidents or slip and falls.

The more evidence that can be obtained during discovery and investigation, in response to the experts' specific requests, the better supported the expert's testimony will be. The more items on the shopping list that are obtained, the more difficult it will be for the trial judge to preclude the trial testimony of defendant's experts, particularly the biomechanical engineer.

Parenthetically, those same admissibility standards can be used, in the right case, to

preclude or limit the testimony of plaintiff's experts, if their scientific analysis falls short under the case law. In such a case, a trial motion should result in the preclusion or limiting of the expert's trial testimony. If the motion is denied, at least a good issue has been preserved for appellate review.

Another commonly used method is to maintain a database of trial testimony of any plaintiff's experts who testify frequently. As noted above with respect to the CBS study, a few doctors perform a disproportionate number of fusion surgeries.

Previous trial transcripts can be used to cross-examine the experts, with the goal of challenging the soundness and reliability of their methodologies and opinions.

Finally, what are some of the more unconventional approaches to defending fusion claims?

One novel method could be to commission a reconstruction of the actual accident. For example in a low-impact vehicle collision case, a crash test dummy and the same, or exemplar, vehicles could be filmed in a controlled environment, performed by qualified professionals.

If photographs of the damage to the actual vehicles are available, the reconstruction would attempt to reproduce the same amount of damage to the same, or exemplar, vehicles. The jury could then be shown the accident reconstruction video.

The problem with this option is cost. A preliminary estimate for such a reconstruction is in the range of \$100,000. A cheaper approach would be a computer simulation, although rigorous standards must be adhered to if the simulation is to survive an admissibility challenge by the plaintiff at the time of trial.

The benefit of using video and computer simulations is obvious — their simplicity. A significant problem in this area, noted above, is that many jurors become confused and bored by extensive, complicated and lengthy expert testimony. Many jurors will simply throw up their hands and rule in plaintiff's favor as the more sympathetic party. The two sides' experts essentially cancel each other out.

Moreover, accepting the defense's theory of the case may even require the jury to brand the plaintiff a liar or malingerer, and many juries are simply unwilling to go that far, on the basis of expert testimony that is dense and difficult to comprehend. The nuances and complexities of expert testimony may be lost on juries.

In contrast, everyone grasps the simplicity of videos, and, if they are accurate, they will clearly convey the defense's point. Defense counsel can tell the jurors to forget the experts and rely on their own common sense with regard to the force of the impact as seen in the video. Counsel might be able to cut through the clutter and noise of the expert testimony and present a much more straightforward narrative for the jury's consideration.

Whatever the effectiveness of these techniques, it is certain that these claims will continue to proliferate. The defense bar must improve its defense of these claims. Given the spread of these claims, it is well past time to think outside the box and come up with some new strategies.

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[1] <https://onlinelibrary.wiley.com/doi/full/10.1111/imj.1412>.

[2] <https://bmjopen.bmj.com/content/9/8/e028743>.

[3] <https://pubmed.ncbi.nlm.nih.gov/30074971/>.

[4] <https://www.cbsnews.com/news/tapping-into-controversial-back-surgeries/>.

[5] <https://pubmed.ncbi.nlm.nih.gov/30074971/>.

[6] <https://www.cbsnews.com/news/tapping-into-controversial-back-surgeries/>.

[7] <https://www.cbsnews.com/news/tapping-into-controversial-back-surgeries/>.

[8] <https://www.cbsnews.com/news/tapping-into-controversial-back-surgeries/>.

[9] Michael Goldstein and Jessica Silver-Greenberg, How Profiteers Lure Women Into Often-Unneeded Surgery; N.Y. Times (Apr. 14, 2018), <https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html>.

[10] Matthew Goldstein, Two Men Charged in Pelvic Mesh Removal Scheme, N.Y. Times (May 24, 2019), <https://www.nytimes.com/2019/05/24/business/vaginal-mesh-surgery-arrests.html> ["Pelvic Mesh Removal Scheme"]; Bexis, Litigation Funder Indictment in Pelvic Mesh Litigation, Drug and Device Law Blog (June 20, 2019), <https://www.druganddevicelawblog.com/2019/06/litigation-funder-indictment-in-pelvic-mesh-litigation.html>; see also Beisner, et al., U.S. Chamber Inst. for Legal Reform, Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding a Decade Later 14 (Jan. 2020) ["ILR 2020"].

[11] In general, New York law is trending in the direction of greater admissibility of biomechanical testimony at trial. *Aspromonte v. Judlau Contr., Inc.*, 2017 NY Slip Op 31091 (Sup. Co. New York Co. 2017); *Valentine v. Grossman*, 283 A.D.2d 571 (2d Dept. 2001); *Cocca v. Conway*, 283 A.D.2d 787 (3rd Dept. 2001); *lv. denied*, 96 N.Y.2d 721 (2001); *Martell v. Chrysler Corp.*, 186 A.D.2d 1059 (4th Dept. 1992).

[12] One of the best cases to discuss these requirements is *Singh v. Siddique*, 2016 N.Y. Slip Op 50987(U), 52 Misc 3d 1204(A)(Sup. Ct. Kings Co. 2016).