

ORAL ARGUMENT – 10/16/02
01-0007
GOLDEN EAGLE V. JACKSON

STROH: We are here today to address the numerous legal errors that the 9th CA committed in reviewing Arnold Jackson's great weight point. Specifically his great weight point went to the jury's failure to award damages for the element of physical impairment other than loss of vision.

Among the legal errors that the 9th CA committed, it sanctioned the improper submission of dual physical impairment elements, and thereby reversed absent a showing of harm. The 9th court reversed the zero damages award despite the fact that there was no evidence of physical impairment other than loss of vision in the record.

HANKINSON: What is the legal standard for recovering physical impairment damages?

STROH: The definition of physical impairment, in order to make that showing, the plaintiff must prove a distinct, separate and substantial injury that goes beyond pain and suffering and beyond loss of earnings. And we do not have that in this record here for physical impairment other than loss of vision.

O'NEILL: Is temporary impairment enough?

STROH: I think temporary impairment would be enough. I don't know anything in the case law that says that the impairment has to be permanent. But it has to be a physical impairment that results from the injury.

O'NEILL: If the jury had awarded some amount for physical impairment, would there have been some evidence to support it just by the fact that the plaintiff was in the hospital for a period of time? There's a case that support that proposition.

STROH: First of all, the jury did award money for physical impairment. It awarded money for physical impairment for loss of vision. It simply did not award money for physical impairment other than loss of vision.

O'NEILL: And that's what I'm speaking of.

STROH: And concerning the claim about hospitalization alone supporting physical impairment damages, there is in fact no case law that hospitalization alone would support a recovery for physical impairment damages. Every case that talks about hospitalization in the discussion of physical impairment has evidence of, for example, the plaintiff was able to do X before the injury, and is no longer able to do that. For example, in this court's Estrada case, which was decided just

last year, the court talked about hospitalization. It referred to the CA's discussion that the plaintiff was not able to play basketball, go snow skiing, take long trips in a car, etc. That's the type of evidence needed in order to recover for physical impairment damages.

HANKINSON: If temporary impairment is enough, and if I'm hospitalized for 30 days so that my physical activity is restricted and obviously be at a point where I'm unable to function as normal, why isn't that a period of physical impairment that lasted 30 days that is a distinct and separate substantial injury under your definition?

STROH: Because it's not physical impairment. What it equates to is lost time. Why isn't the plaintiff entitled to...

HANKINSON: But I am unable to undertake during that period of time the activities that I ordinarily would because of the fact that I am incapacitated in some way.

STROH: First of all he recovered physical impairment damages for loss of vision and the hospitalization relates to that.

HANKINSON: I understand that. I'm just talking generally in terms of understanding the legal definition. If I have a period of time where I am unable to participate in the activities that I normally participate in, then why isn't that a distinct and separate substantial injury within your definition?

STROH: Because I think that the focus on hospitalization alone is erroneous. If you're focusing on a disability that's occurring while you are hospitalized, that would be one thing.

HANKINSON: So that would be enough if there was a disability while you were hospitalized?

STROH: And that there was evidence in the record that said that you were able to do X before the accident, but because of this impairment, not just injury, you are not able to do X after the accident.

HANKINSON: I'm afraid I'm not understanding the distinction between the two.

STROH: Anybody can be injured. For example you can receive a blow to the face. But just because you are injured that doesn't mean that you were impaired or prevented from doing anything...

HANKINSON: But where am I recovering? I may be recovering pain and suffering. I may be recovering mental anguish. But where am I actually recovering for the physical incapacity, the injury that I have actually sustained if I'm not getting it through physical impairment damages?

STROH:

STROH: I am not aware of any case that says there is a damages element just labeled injury. For example, this court's Huber v. Ryan case dealt with an alleged conflict between jury answers. One of the answers was, Was the plaintiff injured? And jury said yes. And then another question asked, What damages is the plaintiff entitled to recover? And physical impairment was an element. And this court said there's no conflict between the jury's failure to award damages for physical impairment and a finding of injury.

HANKINSON: I'm just trying to understand your legal definition. And so as I understand it, just being incapacitated or actually being injured is not anything that you recover for?

STROH: Not that I'm aware of. That the case would support such a recovery.

There has to be evidence of a loss. There has to be evidence that there is an impairment, a physical impairment that prevents you from doing something after the accident that you were able to do before the accident. And we don't have that in this case for other than loss of vision.

And I would also point out to the court this is our second argument. Our first argument concerns the fact that the TC improperly split the physical impairment element into dual elements, which goes against this court's preference for broad form submission. And in fact, rule 277's mandate for broad form submission, and therefore, Ronald Jackson cannot show harm...

PHILLIPS: But isn't that what a TC ought to do if it's clear that there's physical impairment for loss of vision, and you're not contesting that?

STROH: We haven't challenged the jury's award of damages for that.

PHILLIPS: If the trial judge is not clear, if there's any other physical impairment isn't this precisely what a good trial judge should do in order to prevent a retrial?

STROH: How does that compensate the plaintiff for something where a broad physical impairment element would not.

PHILLIPS: If only vision is required, the trial judge isn't sure, but sure that there's vision and not sure if there's any other, then submitting it in one blank could be the error if he allows there to be argument over something that you later convince the TC was improper.

STROH: I am certain that this court does not want to go down that road. If you were going to split damage elements into physical impairment for loss of vision, physical impairment for other loss of vision, what's to stop a plaintiff or any party from splitting other subjective damages elements into subelements.

HECHT: The trial judge. That's what's to stop.

STROH: The problem is that you cannot justify it in this circumstance and not justify it in others. For example, beyond damages, what if you look at the liability question. Why can't a defendant come forward now and say that we want separate submissions of subacts of negligence: failure to keep a proper lookout; failure to timely stop, etc. How is that any different from splitting distinct damages elements into further subelement, the plaintiff is not recovering for any additional injury that he would not be able to recover from a simple physical impairment broad form element?

ENOCH: It seems to me that when you come out of a bodily injury, and you're out of the hospital, but for 6 months the doctor restricts your activities for the recovery period. You're not supposed to use your arm. You're not supposed to lift objects more than 20 lbs. It seems to me that under any description that would be a physical impairment. If that were the case, how would we distinguish that from the recuperation period of being in the hospital? I guess I'm supposed to recover in the hospital for a week, and then I'm up, and then I'm just fine. You say, well just hospitalization shouldn't count for physical impairment, but there might be something else. How do you distinguish between 6-months when I'm out of the hospital, I'm just not permitted to use my arm until it fully heals, and one week in the hospital to allow recuperation before my physical body improves?

STROH: This is the distinction I would make on that point. If a plaintiff is restricted for 6 months, or however long after he's discharged from the hospital, or even if there's no hospitalization, if after he sustains an injury from an accident and he is prevented by virtue of those injuries that he sustained in the accident from doing something that he was able to do before the accident. For example, he injures his foot in a way that he's not able to walk. I mean that would be something that would be compensated by virtue of the physical impairment element. Were it simply hospitalization and you're recovering from the injury itself or from a surgery or something like that, I mean the problem there is you were simply recuperating from for example the effects of the surgery. There's nothing in the injury itself that is producing a physical disability that's preventing you from doing something after the accident that you were able to do before.

HANKINSON: But you're drawing a line between you get injured and because whatever your medical treatment is, and whatever restricted activities you have flow from that injury, and yet you act like it's something different. It's just the hospitalization. But I wouldn't be hospitalized or undergoing surgery or having my doctor say I want you to just have bed rest, no activity, if I hadn't been injured. How can you draw the line?

STROH: If you want to characterize it in that way, then what's to preclude for example finding physical impairment by virtue of being involved in the accident itself. Say there's a car accident, and you are injured, and you are in the car. I mean during that time you're not able to engage in any activities. I mean I think it has to be something that injures you, that causes a physical impairment, a disability that prevents you from doing something after that you were able to do before. It's not just lost time.

HANKINSON: We're not talking about lost time. We're talking about the fact that your

activities are restricted, that you are unable to do them for a period of time. And that may be the result of the kind of medical treatment that you're receiving. That may be some evidence of your physical condition that you were required to have that kind of care where your activity is restricted.

STROH: But where is the evidence here that there is something that he was able to do before the accident that he's not able to do now except as it relates to loss of vision. For example, he says he liked to go hunting, he liked to play pool, etc., prior to the accident. There is evidence in the record, his testimony, that after the accident because of the loss of vision, he was no longer as proficient at pool, proficient at hunting, and therefore, his activities that he was able to do before the accident are restricted. That is evidence of physical impairment.

And now we're not disputing that. We haven't challenged the jury's award of damages for that element. There's no similar testimony like that for physical impairment other than loss of vision. And I really don't want this court to get off on a tangent because the jury did award damages for physical impairment. It simply did not award them for this improperly submitted additional physical impairment element for other than loss of vision.

O'NEILL: So you'd say we don't even need to address the question of whether it has to be temporary or hospitalization is sufficient? We can just go straight to the evidence and say under any standard that might apply, there's evidence to support what the jury did or on the other hand there's no evidence to support an award of damages?

STROH: That's true. And it also relates to our initial point, which is, that there is no authority for splitting the damages elements into subelements, and because Ronald Jackson was not entitled to that submission in the first place, he cannot show harm by virtue of the jury's failure to award him damages for the second physical impairment element.

We also have a point relating to the 9th courts use of the zero damages rule rather than the standard enunciated in Pool. The court in its opinion referenced the zero damages rule and by virtue of the language in the opinion itself failed to use the standard in Pool, which would require them to view all the evidence, and to detail all the relevant evidence related to these damages elements.

HANKINSON: What evidence did they fail to detail that should have been mentioned in the opinion and it wasn't?

STROH: They failed to detail evidence of Ronald Jackson's good recovery. They failed to recognize the fact that he had already received damages for physical impairment for loss of vision.

HANKINSON: In the Pool review they are required to detail all the evidence. And you say that they failed to detail it all. What specific evidence should have been recited in the opinion that was not?

STROH: The fact that he made a good recovery. The fact that he was released to work less than 2 months after the injury at his own request. The fact that he continued to engage in activities after the accident that he did before. In fact he had been squirrel and deer hunting after the accident, and did continue to play softball, do work around the house, etc.. Both he and his wife testified to that fact.

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RESPONDENT

HOLMANN: Is there objective, undisputed evidence of physical impairment other than loss of vision? On this record, it's pretty obvious that there is.

HECHT: Well that's what the brief says, but then it doesn't say what it is.

HOLMANN: Well J. Stover said what it was.

HECHT: He said this is so obvious, we don't need to tell you what it is.

HOLMANN: There was a broken nose that required nasal reconstruction. It required a bone graft. There was a ruptured sinus. There were four bones around the orbit of the eye that were fractured that required resection. It had nothing to do with loss of vision. The eye was not operated on at all. There were two operations, two surgeries that were performed just to fix the bones that were messed up around the eye.

PHILLIPS: When I was practicing law that was medical, and lost wages, and pain and suffering covers that. And these damages came up 20 years ago across the nation in a number of different names like _____ damages. And this captures something else. This is what these injuries keep you from being able to do, but it's not related to a job. It doesn't take into account any additional medical. That's already all been covered. But it's the loss being able to do something. And I think everybody has agreed, at least at the SC level, that the loss of vision caused those kind of damages to your client. Right?

HOLMANN: I'll agree to that.

PHILLIPS: This other stuff sounds terrible, and I don't want it myself, but what loss has it caused that's not loss of time at work, medical bills, or pain and suffering?

HOLMANN: This court faced this very question last year in the Estrada case. Some of you said, well all you've got to show is this injury. Where is the impairment? And the court said, impairment is when your activities are restricted. And we've got more than just the injury. Here we have hospitalization, and here we have fractures, and here we have surgeries. This court detailed that evidence and said that the court properly conducted a factual sufficiency review, because it wasn't relying just upon the injury. If there had been only evidence of an injury, no hospitalization, no

surgeries, no fractures...

HECHT: So your position though is that if you're hurt in a car wreck and you go into the hospital and a bone is broken or something and then it's surgery, immediately operated on, and there's a full recovery, there would still be impairment?

HOLMANN: Correct. And the reason is, because you're restricted at least during the time that you're in the hospital.

O'NEILL: But you would say almost as a matter of law you wouldn't leave it up to the jury to decide. Because it sounds like you're saying because hospitalization and time that he was recuperating is impairment per se, the jury has to award something regardless of whether there's testimony of any specific activity that was curtailed?

HOLMANN: I don't think so. And the reason is - you're referring to the zero damages rule. The zero damages rule would have worked. Anytime there's an objective injury at all, the zero damages rule would require reversal. That's not what J. Stover did. J. Stover looked at the undisputed evidence and if, for example, you're in the hospital but it's because of subjective injuries, I don't think that that would qualify in this situation and the courts don't feel that this would qualify in that situation. It's only when you have undisputed, objective evidence of injury that results in hospitalization, surgeries, and fractures.

O'NEILL: You're saying as long as there's any physical injury a jury has to award something.

HOLMANN: No.

O'NEILL: What evidence is there in this case of some specific activity that this plaintiff was precluded from engaging in as a result of physical injury?

HOLMANN: Because the nose was pushed over and the sinus was ruptured he had trouble breathing. He talks about that in the record.

O'NEILL: Is there any evidence of what that precluded him from doing?

HOLMANN: Breathing. When he was discharged on Nov. 14 from the hospital, he was in the hospital for some 9 days, there was a limitation, a restriction put on his activities in the nursing discharge summary in ex. 27. He was restricted from doing any lifting, any straining, any bending. When he was discharged from the hospital on Nov. 14 in the nursing discharge summary it says that he was restricted from doing any lifting of heavy objects, from any straining, from lifting or bending. These are physical restrictions.

O'NEILL: I guess where I'm having trouble is, you would take it away from the jury to

decide well this really is deminimis other than loss of vision, and the other pain and suffering that we've awarded, and we're going to put it into pain and suffering rather than impairment. You would have them have to put a dollar figure there just from the fact of the injury.

HOLMANN: And I think there's a lot of levels you have to get to before you're requiring the jury to put a dollar figure there. It has to be objective. It has to be more than deminimis. It has to be significant I would believe. And there has to be objective, undisputed evidence of the injury. It can't be anything that you would challenge the person's credibility on. For example, if the person said, well ghee I haven't been able to get up. And they attacked him on his credibility on that issue, that wouldn't be enough. It would have to be something that would be undisputed, independently proved and not subject to a contest to his credibility.

OWEN: That would mean anytime you're in a cast, or on crutches, the jury must find some physical impairment?

HOLMANN: The jury has discretion to award damages. The jury does not have the discretion to ignore the undisputed evidence and award no damages.

OWEN: That's my question. Let's say in every case where you've got a cast or you've been on crutches for a period of time, must the jury put a dollar figure in that blank?

HOLMANN: Well if that's what the evidence is, I believe they must. Otherwise it would be against the greater weight of the evidence and manifestly unjust for them not to award some damages for physical impairment. If, as in this case, there is uncontested liability. We have liability. The question is what are the damages? The jury has no discretion to say there are no damages when in fact there is undisputed evidence of some damages. And that's the problem in this case.

OWEN: What if the jury puts it in pain and suffering or mental anguish, or lost earning capacity. You're saying that they have to put a dollar amount in yet another blank or he gets another trial?

HOLMANN: I think so. Because the jury has to follow the instructions that they are given by the judge. The jury cannot make up what the law is.

PHILLIPS: The jury was told in this charge not to give a double award.

HOLMANN: That's right.

PHILLIPS: And when they got to this blank couldn't they say we're not smart enough to separate mental anguish out from this, so we've already given it there?

HOLMANN: Well they could say that, but they'd be wrong. Because the court looks at what the damage elements are. And the damage elements it says physical impairment for loss of

vision, physical impairment for other than loss of vision. If there weren't some for physical impairment for loss of vision, which they did in this case and it's unchallenged, the question becomes is there evidence of impairment other than loss of vision?

ENOCH: You're arguing that the impairment is the result of a mere restriction in the hospital. You're arguing that the mere fact that I am here in the hospital is the impairment that I'm entitled to be compensated for. And you're trying to say but I'm going to parse that stay in the hospital between discrete types of injuries I'm complaining about.

HOLMANN: I think if you look at the evidence as J. Stover did, you will see that the reason he was in the hospital that length of time was not because of loss of vision. He could see. His eye wasn't operated on. The reason he had surgeries was not because of loss of vision. It was because of the facial fractures that had to be repaired.

ENOCH: Why did you ask the jury for impairment for loss of vision?

HOLMANN: He had impairment for loss of vision. That's what I say. They are discrete injuries. They are different. Loss of vision, he had blurred vision, he had problems with depth perception, he had problems with playing pool as Ms. Stroh said, he had problems with hunting, he doesn't have depth perception. One of the things that his wife testified to was that he has to buy new shoes all the time because he can't look down, and so he's always bumping his shoe and scuffing his shoe. Those are discrete injuries limited to loss of vision. On the other hand, the reason for the surgeries, the reason for the impairment just as in Estrada, hospitalization, fractures and surgery was caused because of the facial fractures.

HECHT: And all that's over. Is there any evidence of permanent...

HOLMANN: No. There is not.

HECHT: So we're just talking about that period in time?

HOLMANN: Correct. And there is good case law to the effect about whether temporary injuries can be enough for physical impairment, or temporary situations.

HECHT: But the impairment due to vision is permanent?

HOLMANN: Correct.

HECHT: And the jury found \$2,500 for that. And the disfigurement is permanent and the jury found \$1,500 for that. And now we're talking about temporary impairment. How much do you think we're talking about? A few hundred dollars?

HOLMANN: I don't think it's a few hundred dollars.

HECHT: It surely wouldn't be more than the permanent impairment.

HOLMANN: The damages for permanent impairment have been challenged. I think it's kind of ridiculous for the jury to award only \$2,500 for permanent loss of vision. Certainly the impairment here we're not talking about a scar on the forehead. We're talking about fractures of four of the bones around your face, a break in the nose, that a ruptured sinus, a bone graft. These are significant damages.

Let me get to one issue. Ms. Stroh said that J. Stover's opinion is wrong because he didn't detail all the evidence. J. Hankinson said what evidence? She said, well evidence that he healed up. Now surprisingly enough this very issue was addressed by the CA in Estrada. In that case, they said well he could snow ski after the accident, he could play basketball games after the accident. And the court said, wait a minute. What we're talking about is hospitalization, fractures and surgery. Whether he could snow ski at some later time, whether he could play basketball at some later time is not relevant to his past physical impairment. And why is that important? Why is that important that the court said is not relevant? Because if you look at Poole, look way back to Poole in 1986, the court says that the proper factual sufficiency review is, that the court must detail the evidence relevant to the issue. And that's why it's so important that the physical impairment doesn't have to be permanent.

In Rosenboom, the woman was in a wheelchair when they dropped her. And she was in the hospital for a week. There was evidence and they said that it should have been considered that she was okay after that. She was still impaired for that week that she was in the hospital, and the court upheld physical impairment damages for that.

Intuitively we know that this is correct. For example, if somebody had a fractured spine, and they were laid up for 5 years, and then they had a miraculous recovery after 5 years, would we say then that they weren't impaired during those 5 years because they had recovered. The fact that he recovered is not relevant to the past physical impairment he suffered, and therefore, didn't need to be included in the detail of the relevant evidence.

Now was there any conflicting evidence. And I concur. If there was any conflicting evidence then we wouldn't be here. J. Stover would have been incorrect in his factual sufficiency ruling if there was any conflicting evidence. I read the record. There is no conflicting evidence.

HECHT: But there can't be, because you say it's enough that he went to the hospital. And he had surgery. There's no question about that. So how could there be any conflicting evidence?

HOLMANN: There was no cross-examination. There were no medical witnesses put on by the defendant. There was nothing to challenge the fact that this occurred.

HECHT: But you can't say you really didn't have a surgery did you when the medical records are sitting there saying that he did have surgery.

HOLMANN: Right. I guess somebody could have challenged whether he couldn't breathe as he said he couldn't breathe.

HECHT: But that wouldn't matter would it? As long as it was an objective problem, he went to the hospital and he had surgery that's enough.

HOLMANN: I think it would matter. I think just the fact that he had an objective injury and went to the hospital may not be enough. But what we're talking about is the CA weighing the evidence. This court doesn't have the jurisdiction to reweigh the evidence. But we're talking about the CA weighing the evidence and determining that the jury finding of zero damages is so against the great weight and preponderance of the evidence as to be manifestly unjust. At some point if it's deminimis as J. Gonzales said, it's not manifestly unjust at some point.

HECHT: Well that's what worries me because the jury found \$2,500 for a lingering vision impairment; \$1600 for a lingering physical deformity; and zero for a temporary physical impairment. It looks like in their thinking it was close to deminimis.

HOLMANN: The jury must have been wrong.

HECHT: You think it was wrong on the other two issues too?

HOLMANN: That's been challenged in the CA. The CA didn't address that, the inadequacy of damages because the court resolved it based on issue 4.

HANKINSON: How would you state the standard to be applied in determining whether physical impairment damages should be awarded - a legal standard?

HOLMANN: The legal standard just as it was stated here. If there is independently proven evidence, it's objective and doesn't rely on the credibility that shows a restriction of the activities through hospitalization and surgeries, I think that that establishes that a jury's finding of zero damages in that situation is so against the great weight and preponderance of the evidence as to be manifestly unjust.

O'NEILL: Why was this issue split up? Theoretically, I suppose, they could have broken it down into many different finds: impairment for loss vision, impairment for problems with smell perhaps because of the nose injury. Why not 5 blanks and why did this come up?

HOLMANN: The only thing that I can guess, because I wasn't there at trial, and I have talked to trial lawyers and the reason that they said was because they had evidence of what the impairment was for loss of vision. But that was discreet and separate from the evidence for

impairment for other than loss of vision. And so they wanted to separate it because there were discrete elements of damages.

O'NEILL: That's true though in any case I would imagine that there are discrete elements of damages.

HOLMANN: I don't think so, because I think that loss of a sense is as different from physical loss as mental anguish is. I think that there are discrete elements of damages, and that's why it was submitted. Another reason it was submitted of course was because if you don't have separate damage lines, then you're unable to conduct a meaningful appellate review of those damages. You have a situation, and the petitioner admits this, that broad form submission is not always preferable particularly in light of Castile. And I know that the court has this issue before it now about whether Crown Life v. Castile per se error rule applies to multiple damage issues submitted. But I think it's the prudent thing to do for the court to submit, if there's evidence to support it, separate damage lines if they are discrete elements of damages. It's not to say that they should submit mental anguish here, and mental anguish there, and mental anguish there, because mental anguish is all the same quality of evidence.

O'NEILL: Why wouldn't you have mental anguish attributable to loss of vision, and mental anguish attributable to...

HOLMANN: Because I think qualitatively mental anguish is the same. Qualitatively, however, the loss of a sense and a physical loss is quite different.

OWEN: How have other jurisdictions resolved this question?

HOLMANN: Other jurisdictions have the same sort of resolution that we have. They have the against the greater weight challenge. And for physical impairment, which has required hospitalization and surgeries the courts have held that it's against the great weight of the evidence and manifestly unjust and needs to be reversed.

OWEN: So you have to award something for impairment in every case where there's been a hospitalization. That's what other jurisdictions have said?

HOLMANN: I think there's a threshold but that threshold has to be determined by the CA. It has the jurisdiction to determine.

I can't give you any specific cites to other jurisdictions.

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REBUTTAL

HANKINSON: Will you respond to Mr. Holmann's point that the evidence that you say

should be detailed is not relevant to the damage element, because it occurs after his recovery?

STROH: I think the evidence is relevant, because it shows the nature of the injury and whether it was likely an injury likely to produce physical impairment for other than loss of vision. Whether it comes before or after it's still relevant to that point.

HANKINSON: I think his point is is that there was a finite period of impairment that this element went to. And that the CA detailed the elements relevant to that time period. And that what you're talking about is outside that time period. Is there any evidence within the period of physical impairment that he's claiming that was not detailed by the CA?

STROH: Well the evidence that I gave you during my argument is the evidence that I feel is relevant in support of the jury's award. But I would also point out that the evidence that's recited by the 9th CA, and that was detailed by Mr. Holmann here today, is also not relevant to the element of physical impairment other than loss of vision.

For example, he talks about a broken nose. If you look at the record, in fact I think it demonstrates that Mr. Jackson did not receive a broken nose from this incident. But in fact during his surgery in Houston the doctors rebroke his nose from earlier incident predating this accident to graph bone to repair the eye. It was not that he sustained a broken nose as a result of this accident.

HECHT: Is being in the hospital for surgery on broken bones around the eye socket and the face enough to prove physical impairment?

STROH: First of all, I would answer that question in the unique circumstances of this case where there is already an element for physical impairment for loss of vision. And I would disagree with what Mr. Holmann said that the surgery was not related to his vision. In fact after his surgery in Houston, he recovered 100% from double vision that he had sustained and suffered during the interim from the time of his accident until his surgery...

HECHT: So the answer is it's enough, but it's already covered in the vision part?

STROH: I'm not conceding that it's enough. But if it's enough it's already covered in the other physical impairment element.

HECHT: Well I'm asking you if it's enough.

STROH: To the extent that Mr. Holmann is talking about hospitalization alone, and to the lost time reference that I made earlier - I mean I don't see that that's any evidence of physical impairment like just the objective injury. It's no different than if someone held me down in a chair. I mean I'm not physically impaired from doing anything. I'm restricted from doing something, but I'm not impaired.

PHILLIPS: Where do you draw the line. Because you've already said it doesn't have to be permanent. So if it's only temporary, then why is it a day of not being able to do what you would like to do sufficient to get some damages?

STROH: I'm not disputing a time period. Temporary verses permanent, a day verses a year.

PHILLIPS: So it could be a day?

STROH: It could be a day. My problem is, relying on objective evidence of injury alone, hospitalization alone without showing how that results in any sort of physical impairment that prevents you from doing something, physical disability that prevents you from doing something after the accident that they were able to do before. I think J. Hankinson's question gets closest to the mark about for example surgery and you're recuperating. But I think in this case it's already covered by the other element. And I would still argue that there is a line to be drawn...

HANKINSON: Does that mean that the plaintiff should testify, while I was in the hospital I was unable to play golf, or take care of myself, and the hospital staff had to take care of me? Would they have to actually then just explain your hospitalization and what it was like when you were in the hospital, and then would that get there? How do we deal with this hospitalization issue?

STROH: I guess I would use the example of say you have a plaintiff who before the accident does nothing. He sits around and watches TV all day, and then he's injured and he's in the hospital. And what does he do in the hospital but sit around and watches TV all day.

HANKINSON: So if the plaintiff comes in and talks about what the hospitalization was like, and the fact that they were in intensive care hooked up to tubes for three weeks, and were unconscious, and didn't really know - I mean is that what they have to do talk about what their hospitalization was like so that we know whether they were truly restricted or not?

STROH: My point here is that it has to go beyond a simple restriction of your activity by virtue of being in the hospital itself.

HANKINSON: But that's why I'm asking you. Would it be enough for the plaintiff to come in and testify about the specifics of their hospitalization, and how they were restricted during that time period? Would then that be enough evidence?

STROH: Things that an injury physically prohibited them from doing, yes, I think that would be enough.

ENOCH: Let's say you were in an accident and you broke your back. And you say you have to be in bed, immobile for 6 months. It would seem to me that is a compensable injury. Would we ordinarily cover that through pain and suffering? Would that be a pain and suffering

compensability or would that be a physical impairment injury?

STROH: I actually think that that could be both. I mean you could recover pain and suffering for the physical pain that you experienced as a result of your injury. For example, if you have back pain. But then you could also recover physical impairment because you were prohibited from doing X, Y and Z after the accident that you were able to do before.

ENOCH: But if it was temporary, simply a part of the recuperating process, you would think it would be appropriate in an argument and evidence to the jury that this would be one of the factors they would consider in the pain and the suffering element, although you might be able to submit it under a physical impairment?

STROH: Except, I think your example is different from simply the recuperative process. I mean if you have severe back injury, you may very well be unable to engage in activities due to the injury itself, not just because you are recuperating from surgery or whatever. But the injury to your back itself may prohibit you from engaging in an activity after the accident that you were able to do before. There's no evidence of any kind of physical impairment other than loss of vision.

ENOCH: But it would be hard to distinguish between whether the fact that I'm not to leave the bed for six months is a direct result of the injury, or a direct result of the recuperation necessary to recover from?

STROH: I would agree with that.