

Handling the Auto Injury Claim

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This paper addresses a broad topic and wide scope of trial practice. The materials have been organized to discuss general principles and provide examples of how to apply those principles to prepare cases successfully. More specific documents and forms are contained in appendices.

II. CONDUCTING INITIAL INVESTIGATIONS, GATHER EVIDENCE AND PREPARE EXPERTS

10:30 - 11:35

A. INITIAL CLIENT CONTACT:

Interview. A great deal of the background information necessary for the file will be required in each case. A Standardized form should be completed by a client to save you the time of obtaining the information for each new case. The initial interview is the only first impression you will make. Time well spent with the client in the first meeting will establish client confidence and elicit details which can increase the likelihood of success.

Contract. The contract should detail what the representation will cover and what will not be a part of the case. Representation concerning property damage, no-fault, medical payments, health insurance and other ancillary claims should be addressed when the representation is established.

Insurance Disclosure. Disclosure of liability insurance coverage is provided for under O.C.G.A. § 33-3-28. Obtain a form request from the client at the initial interview to satisfy the statutory requirements. A copy of the Declaration Page of any insurance policy which may cover the client should be obtained to confirm uninsured motorist coverages.

Medical/Records Release. Releases should be obtained from the client which are compliant with HIPAA and for employment, income, personnel and similar records requests.

Client Education. The initial meeting is a one time opportunity to educate the client to the part that they play in the process. The accuracy and completeness of their reports of medical history and complaints to their doctors and therapists are the most important ongoing involvement they have in the case.

Photographs/Video. Documentation of cuts, bruises, seatbelt marks, swelling may not be available a week after the collision. Photograph or video any evidence available at the initial client meeting.

Property Damage. The most important issue on most clients minds is their automobile damages. The client is entitled to the reasonable and necessary cost of repairs, plus loss of use and diminution in the value of the vehicle. *State Farm Mutual Automobile Insurance Co. V. Mabry*, 274 Ga. 498(2001); or, the fair market value of the vehicle immediately before and after the collision.

B. Pre-Suit Factual Investigation: Identify and preserve facts and evidence

Existing information sources: Investigative Agency records (Police, Fire, EMT, 911 records, Government Regulatory Agencies, Criminal Investigations); Regulatory filings (Licensor, regulatory filings: SEC, PSC and the rest of the alphabet);

Police Report. The police report is the obvious place to begin the investigation of the collision. The uniform traffic accident report form is used throughout Georgia by all police agencies. The report uses numerical codes which can be deciphered with the aid of a legend. Remember that if there is a homicide there may be a TSU (Traffic Safety Unit) investigation performed at the scene by an officer qualified as an accident reconstruction expert. This will result in a supplemental report. If the report indicates that photographs were taken request copies as soon as possible.

View of Scene. The scene of any event should be viewed as early as possible. It is often important to conduct the view under similar circumstances of light, weather, seasonal changes, time of day and traffic or use. Documenting conditions though photographs and/or videotape should be conducted in a manner consistent with the significance of the case. (Aerial views and professional forensic photographs are not Justified in every case.) It is a good idea to take more rather than fewer photographs. Document the area of interest, all approaches, views and positions of known witnesses and any visible markings or debris. It is a good idea to carry a ruler to place along any subject where size may be significant. **Considerations.**

- Site Investigation
- Marks, gouges and debris
- Traffic Control
- Road Engineering
- Photographs/Video
- Canvassing for Witnesses

Physical Evidence. Documenting, Securing and Chain of Custody. Vehicle Examination for obvious and hidden damage (i.e. bent steering wheel, cracked dash, broken frame, broken seat or deployed airbag).

Witnesses/Statements. The importance of positive and negative statements will only be appreciated when a witness appears at deposition or trial with a different story. The Signed statement serves to both restrict and refresh the witness recollection. Have the witness date and sign each page of the statement and initial any corrections or changes. Cast a Wide Net. Witness canvassing. The value of Shoe Leather. The only true way to evaluate a witness and obtain their full value or appreciate the danger they pose to your case is to interview them personally.

Media. New footage, helicopter video, and reporters notes can be the sources of photographic documentation and witnesses who may not be identified anywhere else.

Electronic Data. Computers are everywhere. The “Black Box” and Event Data Recorders; Surveillance cameras; email, cell phone records etc.

Internet Searches.

Medical Evidence. Records and Bills; Medical Narratives, Radiographic films (x-rays, MRI, CT, CAT); Surgical video, Medical Diagrams, Surgical hardware; casts, braces, crutches, wheelchairs. Day in the life presentations and photographs of injuries. A great source of medical illustrations are the patient brochures in doctors offices that explain common conditions and procedures.

C. DISCOVERY. Basic Auto collision discovery will minimally include interrogatories and requests to produce documents and the deposition of the immediate parties. Requests to Admit are one of the most overlooked and effective tools for pinning down facts that may be difficult to prove..

D. EXPERTS

Police. A police officer may testify as an accident reconstruction expert, an expert in investigating collisions, or as a law witness based upon observations at the scene. Felton v. White, 197 Ga. App. 367 (1990). The officer’s competency will be based upon his/her training and experience. Criminal charges made are not admissible. Strickland v. Stubbs, 218 Ga. App. 279 (1995). An investigating police officer should not be permitted to testify as to the ultimate issue. Smith v. Fee, 197 Ga. App. 483 (1990); Bennett v. Mullally, 2003 Ga. App. A03A1393; Deloach v. Deloach, 258 Ga. App. 187 (2002).

Accident Reconstruction. Hiring and Effectively Using a Collision Expert

Speed, time and distance

Crash Analysis and Trajectory analysis

Delta V

The “Black Box” and Event Data Recorders

Biomechanical Engineers

Kinetics

Human Factors

Design Engineers

Medical Providers: How much are they worth? Medical Narratives, doctor depositions by video or transcript, independent medical experts, or no medical expert.

The Adjuster’s Role in Gathering All the Facts. The claims adjuster is generally going

to obtain a police report, view damage to the vehicle, take a telephone statement from witnesses and the claimants and want medical records and bills. Their goal is to settle cases for an amount that is justified by the documentation in their file. Your job is to put documentation into their file.

Methods of Accident Reconstruction. Time, speed and distance, crush analysis, computer modeling. Electronic Data Recorders. An excellent website run by a community of accident reconstruction experts is www.tarorigin.com.

Key Issues in Discovery - Pay Attention!!

How to More Easily Determine Who's Liable

Driver. The vehicle operator has the obligation to exercise ordinary care and to comply with the rules of the road. Ordinary negligence may consist of failure to keep a proper lookout, etc. CITE: a violation of a statutory rule of the road will support charge on the doctrine of negligence per se. CITE

Dual Agency / Joint Venturer / Common Enterprise. Joint ownership or enterprise may impose liability on another. Kilpatrick v. Foster, 185 Ga. App. 453 (1985), drivers engaged in "common enterprise" to drive their cars in tandem in reckless manner.

Owner. Generally the owner of a vehicle has no liability based on mere ownership. Frankel v. Cone, 214 Ga. 733 (1959)

The owner may have independent liability for failure to properly maintain and equip the vehicle Spell v. Port City Adhesives, 183 Ga. App. 816 (1987); or, for negligent entrustment of the vehicle to an incompetent operator. Gill Plumbing Co. V. Macon, 187 Ga. App. 481 (1988)

Agency / Respondent Superior. Where one is operating a vehicle within the course and scope of their employment or agency for a principal, the usual rules of vicarious liability apply. Davis v. Peachtree City, 251 Ga. 219 (1983)

Family Purpose Doctrine. In Georgia, when an automobile is maintained by the owner for the use and convenience of his family, such owner is liable for the negligence of a member of the family having authority to drive the car while it is being used for a family purpose. Although a parent generally is not liable for the torts of a child, the family car doctrine, which arises from the principles of agency, constitutes an exception to this rule. Phillips v. Dixon, 236 Ga. 271 (1976).

DOT/County/City. O.C.G.A. §50-21-20. The Georgia Tort Claims Act. Hubbard v. DOT, 256 Ga. App. 352

Dram Shop Act (O.C.G.A. §51-1-40(b)); Northside Equities, Inc. v. Hulsey, 275 Ga. 364 (2002). There is a conclusive presumption in O.C.G.A. § 40-6-391(a)(5) that a person with a blood alcohol level more than .08 grams is impaired.

Car Manufacturer (Crash worthiness). Polston v. Boomershine Pontiac - GMC Truck, 262

Ga. 616 (1992). In an enhanced injury or crash worthiness case, a substantial factor in producing damages over and above those which were probably caused as a result of the original impact or collision.

Factors to Consider When Computing Damages. The value of a case is directly proportional to the conduct of the defendant.

Nominal damages are given as compensation for an injury done, and generally this is the measure when the damages are of a character to be estimated in money. If the injury is small, or mitigating circumstances are strong, only nominal damages are given. What would be a proper amount of nominal damages is a question for you to decide under all the facts and circumstances of the case. O.C.G.A. §51-12-4; High Shoals Mfg. Co. v. Price, 136 Ga. 22 (1911).

General Damages.

Pain and Suffering. Past, present and future; physical, mental and emotional. Pain and Suffering is a legal item of damages. The measure is the enlightened conscience of fair and impartial jurors. Questions of whether, how much, and how long a Plaintiff has suffered or will suffer are for you to decide. Western, etc. Railroad Co. v. Young, 83 Ga. 512, 515. The elements of pain and suffering include: physical pain and suffering; anxiety, shock, worry, diminution in the capacity to labor, disfigurement and the loss of any capacity of the body or mind that may result in mental or emotional anguish.

Loss of Consortium. This is a derivative but separate cause of action with a 4 year statute of limitations. The injury is to the marital relationship and includes the value of services lost to the spouse as well as the loss of society, comfort and companionship. Do not make the mistake of believing that this is a claim for damage to sexual relations.

Emotional Distress. Georgia law now permits recovery of damages for emotional distress arising from viewing injury to another person under limited circumstances.

Wrongful death: “full value of the life of the deceased”; economic value and intangible loss. The full value of the life of the deceased, as shown by the evidence, is the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased if that person had lived. You should consider the gross sum deceased would have earned to the end of life, had deceased not been killed, reduced to its present cash value in determining the amount of the full value of the life of the deceased. The full value of the life of the deceased is not limited to the amount of money that could have or would have been earned had deceased not been killed. O.C.G.A. §51-4-1; Pollard v. Boatright, 57 Ga. App. 565 (1938)

Special Damages

Reasonable and Necessary Expenses: medical, therapeutic, life care. As to medical expenses, such as hospital, doctor, and medicine bills, the amount of the damage would be the reasonable value of such expense as was reasonably necessary O.C.G.A. §51-12-7; Georgia Power Co. v. Clark, 69 Ga. App. 273 (1943).

Wage loss. Loss of earnings from the time of the alleged injury to the time of trial is a legal item of damages, and its measure is the value of the earnings which the evidence shows with reasonable certainty the plaintiff has lost as a result of the injury. You may consider what the plaintiff was making at the time of the injury, what was made since the

injury, the amount customarily paid in the locality for the kind of work plaintiff does, and such matter. There must be some evidence before you as to the plaintiffs' loss. Atlantic C R.R. Co. v. McDonald, 103 Ga. App. 328(1961)

Lost profits. May be recovered with proof of reasonable certainty.

Attorney Fees and Expenses of Litigation. The expenses of litigation are not generally allowed as part of the damages. But if the defendant has acted in bad faith or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense they may be recovered. O.C.G.A. §13-6-11. See, Daniel v. Smith, 266 Ga. App. 637 (2004).

Personal property. The plaintiff seeks to recover for the alleged damages to plaintiff's personal property. If you find that plaintiff is otherwise entitled to recover, this is a proper item of damages. The measure is the difference between the fair market value of the damaged item just after the damage, if any, was inflicted. Douglas v. Prescott, 31 Ga. App. 684 (1924)

Punitive (Aggravated or Exemplary) Damages. O.C.G.A. §51-12-5.1. In tort actions there may be aggravating circumstances which may warrant the awarding of additional damages called punitive damages. In order for punitive damages to be awarded, the plaintiff must prove by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. If the plaintiff fails to prove, by clear and convincing evidence, that the defendant was guilty of willful misconduct, malice, fraud, wantonness, oppression or that entire want of care which would raise the presumption of conscious indifference to consequences, then you would not be authorized to make an award of punitive damages. Mere negligence, although amounting to gross negligence, will not alone authorize a recovery of punitive damages. Punitive damages, when authorized, are awarded not as compensation to a plaintiff, but solely to punish, penalize, or deter a defendant.

Pre-Judgment Interest. O.C.G.A. § 51-12-14(a) provides that where a claimant has given written notice by registered or certified mail to a person against whom claim is made of a demand for an amount of unliquidated damages in a tort action and the person against whom such claim is made fails to pay such amount within 30 days from the mailing of the notice, the claimant shall be entitled to receive interest on the amount demanded if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the amount demanded.

How the Vehicle May be Your Best Evidence

Challenges Involved in Preparing Expert Witnesses for Trial

How to Prepare Lay Witnesses That Don't Fall Apart in Trial

III. TAKE THE CASE TO TRIAL

11:35 - 12:45

A. PLANNING AND PREPARATION FOR TRIAL

Creating an Effective Outline or Trial Notebook

1. The trial notebook should be considered in any case involving complex litigation or an area of practice new to the attorney handling the case.
2. A trial notebook which is developed as the case is prepared will assist in organization, case analysis and preparation, discovery and presentation at trial. The attached Appendix is an article describing the authors trial notebook preparation system.

Composing Motions in Limine and Memoranda to Address In-Trial Issues. The evidentiary SWORD AND SHIELD.

1. Motions in Limine
2. Trial Memoranda. Think economically; both for your costs and the courts time. The court will appreciate your directness. If there is a single controlling authority consider providing a copy of the case to the court and opposing counsel. If the issue warrants further detail keep the brief BRIEF. If there is a life or death issue controlling the case take what time and space is necessary to brief the issue thoroughly.

Making a Preliminary Decision as to the Order of Witnesses: Why chronological facts are seldom the best presentation and how juries make decisions.

1. Principles of primacy, simplicity, hindsight, prototypes, issue framing, and mutating facts.
2. Example: Benjamin Case. Placing her mother first humanized the deceased and obliterated jurors assumptions about her as a recent emigree from Jamaica.

Preparing Witnesses for Examination and Cross-Examination

1. General preparation.
2. Visit the Courtroom. A visit to the courtroom before the case may help calm the witness and familiarize and it may be well worth the time and effort for a particularly important witness.
3. Direct Examination: "Describe and Explain"; Let them tell who they are and their story based on what they did, saw heard and experienced. "Use your head, but speak from the heart."
4. Cross Examination: "Don't take it personally"

Planning for Opening Statements and Closing Arguments. Choosing and Developing a Case Theme. The case theme is shorthand to identify to the jury the essence of your client's case. An effective theme aids in framing the issues for the jury. It acts as an organizing principal for them to receive and process facts and evidence. The theme may be a word or phrase but should be no longer. Often, the theme will be used in the opening statement, "This case is about, i.e. TRUST/GREE/REPONSIBILITY/SELFISHNESS"; and, returned to in the closing argument. As the military says, the use of a proper theme is a "force multiplier"

Principles for developing a case theme:

- a. The case THEME grows from your clients unique experience.
- b. The case THEME must have integrity.
- c. The case THEME should fit like a glove.

1. Opening Statement.
2. Closing Argument.

Practical Tips for Voir Dire Question Construction. The dual purpose of voir dire is to identify bias and prejudice; and, educate and sensitize the jury to the issues in your case.

1. Grouping by Issue
2. Communicating with the prospective jurors.
 - a. Describe and Explain.
 - b. “Be Not Afraid” - You cannot control juror’s responses. You are always in control because of the principle of fairness. Example: “I don’t like lawyers” - “Knowing that you don’t like lawyers, tell us how that might effect our ability to be fair as a juror?”

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- A. **What to Expect When Establishing Jurisdiction**
 - B. **Choose Your Trial Methods: Jury or Non-Jury?**
 - C. **Using Experts, Evidence and Exhibits in Court to Gain an Edge**
 - D. **The Dangers in Using Law Enforcement as Expert Witnesses**
 - E. **The Secrets to Delivering an Effective Direct Examination**
 - F. **Prepare for the Unknown During the Cross-Examination**
 - G. **A Checklist of Points to Include in Your Closing Argument**