

Five cost-effective strategies to reduce risk in low-speed collision cases

Take time to review pre-accident medical records and spend time with the plaintiff

By Albert G. Stoll, Jr.

It is not unheard of for a trial lawyer to take a product liability case to trial with over $1 million in case costs advanced (and often borrowed). Spending $100,000 to prepare for and oppose summary judgment in a difficult, dangerous road or intersection case is a common occurrence for some highly skilled plaintiffs' attorneys. Trial lawyers who take on this amount of risk for injured plaintiffs embody the ideal of the zealous advocate. Happily, there is plenty of risk out there for all of us. A significant injury following a garden-variety, "low speed" or "low impact" rear-end collision can quickly escalate into a very expensive and risky endeavor for a plaintiffs' lawyer and the clients.

A good plaintiff lawyer is a combination of brazen adrenaline freak and risk-averse pragmatist. The reality is we all work hard to eliminate as much risk as we can before a contingency-fee case goes to trial.

In a low-impact, rear-end collision case, typically negligence is admitted, however question number two on the special verdict form can result in a defense verdict. When a bumper looks pristine and shiny; jurors can struggle with the question, "Was this negligence a cause of injury to the plaintiff?" Further, there is real risk a jury will find the collision was a cause of injury, but only award a small amount of the initial medical bills as being related to the injury caused by the collision.

An unfortunate example of this outcome is the San Luis Obispo County case of *Molle-Johnson v. Alderson*, reported in 35 Trials Digest 13th 31 (2010). Defendant served a $100,000 CCP section 998 offer to compromise. Plaintiff's last

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settlement demand was $800,000. Plaintiff claimed neck and back pain, dizziness, traumatic brain injury, ongoing treatment and $1.4 million in lost earnings as a schoolteacher.

Defendant claimed "low speed" impact and conceded a possible neck strain with three months of physical therapy as being caused by the collision. Plaintiff's reported experts were a speech therapist, economist, orthopedic surgeon, physical therapist, two neurosurgeons, neuropsychologist, biomechanical engineer and neuroradiologist.

The defendant reported a retained accident reconstructionist, neurologist and radiologist. The jury's July 9, 2010 verdict was $2,331 which consisted of the emergency room bill and $100 in pain and suffering. Defendant filed a cost bill in the amount of $147,002.

Some lawyers may just classify the low-impact, rear-end collision as no case at all; others may have a look, and see what can be done. Just as there are many sobering jury-verdict results, there are also many good outcomes. Furthermore, many very good "low impact" cases settle for significant money prior to trial. For example, *Hudson v. Vasquez* reported in 26 Trials Digest 14th 29 (2011), was characterized as a minor-impact, rear-end collision that resulted in traumatic brain injury and settled for $13.8 million after motions in limine.

For the risk-averse pragmatist in all of us, here are a few key points to help remove some of the risk from a low-impact collision case.

1. Meet the client in their home

This meeting does two things. First, spending time getting to know your client in their home will help you figure out if you like and trust this person. It is very important that you establish a connection with the plaintiff so you are well motivated to work hard. If you do not like the client at this stage, refer the case out and you will save yourself a lot of time and money.

Second, the meeting at the client's home is the early stages of deposition preparation. For the plaintiff's deposition to be successful, the attorney needs to understand the progression of the symptoms, injuries and efforts made to recover. Set aside half a day and go to the scene of the accident. Just seeing the accident scene will spark your client's memory of that day. Begin to unpack the details of the collision sequence, the plaintiff's awareness or lack of awareness of the impending impact and the initial symptoms and signs of injury. Take the meeting at the scene back to the plaintiff's home. Home is a place of comfort for an injured person. Home is typically the place a person began their recovery and came to the realization that they had a significant injury. This comfortable environment will help you connect with your client and allow you to see and understand the details of the injury and what the client endured during the recovery process.

Contemplative, unrushed time spent with your client is critically important. It allows your client to tell his or her story to help you determine what level of commitment you feel comfortable making to the case. Are you walking away from this meeting thinking this is a powerful and compelling person that a jury is going to really like? Or do you walk away from your time with your client feeling irritated by the visit? The answer to these questions will tell you how much money and time you are willing to advance on the case, if any.

2. The case needs skilled advocacy

During discovery the low-impact case needs to be carefully nurtured. These cases do not speak for themselves. Each medical record must be carefully read, ruminated over and considered in light of the opposing argument that this collision did not cause any injury. A medical record created post-accident stating "patient was doing fine until she went snowboarding and got a sharp pinch in her neck..." needs to be read, reviewed and digested before the case progresses to any significant degree. Medical records that exist before the accident must be tracked down and carefully reviewed for any prior, similar symptoms or complaints the defendant may attempt to rely on to support their no-injury-causation argument.

3. Do not allow the plaintiff to be accidentally impeached

The impeachment can arise from plaintiff's own medical records or by omitting a prior claim in a verified discovery response. It is very important to recognize that honest, hard-working, people with significant injuries following a rear-end collision tend to forget about minor aches and pains they had before the accident. It is very important to track down and discover all the prior medical records that may exist before the collision. The plaintiff lawyer must work to insure that all of the facts regarding any prior similar complaints are known. This is the most critical step in protecting the plaintiff's credibility.

Do not underestimate how easy it is for a plaintiff to be impeached by an incomplete answer to the California Judicial Council form interrogatory series 10.0 and 11.0 on prior similar complaints or injury and other claims or previous claims. These questions must be answered by assuming that there are prior similar complaints and claims that exist and that plaintiff will cooperate with the adverse insurance company and produce any relevant documents. If these questions are answered with an unequivocal no, once the records of prior, similar complaints or claims turn up, the plaintiff's credibility has been impacted.

Do not underestimate how easy it is for a plaintiff to be set up for impeachment at their deposition. The biggest risk of impeachment comes from questions related to their prior health. Any question with the word "ever" in it, can be dangerous. Have you "ever" hurt your back prior to this accident? Have you "ever" been to a health care provider for

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low-back complaints before this accident? Questions about a plaintiff's prior, similar treatment, evaluation or symptoms need to be carefully prepared for and explored before the written discovery is answered and again during the pre-deposition meeting with the plaintiff. The deposition question, "Have you ever had neck pain before the accident?" should be objected to as overbroad. "Ever" means since birth and most defense attorneys will agree to quickly modify and restate the question to a reasonable period of time before the collision.

4. Meet with the treating docs

Once the pre- and post-accident medical records are secured, meet with the plaintiff's primary treating doctors. Show the treating doctors the photographs of the bumpers and ask for their opinion on injury causation. Ask the doctor, "Based on a 51 percent 'more likely than not' standard of proof, what injury was this collision a substantial factor in causing? What treatment and/or care was this collision a substantial factor in causing the plaintiff to undergo?"

It is important to understand what the treating doctor believes happened to the plaintiff in the accident. The treating doctor is the key to explaining the nature and extent of the injury that was caused by the accident. If the treating doctor becomes a defense witness in the low-impact case, the chances of success diminish significantly.

5. How much money to spend on the case

There is no formula for determining how much money to spend on a low-impact case or how many different types of experts to retain. These decisions are unique to the facts of the case and the decisions the lawyer and client make leading up to trial. Good cases can be tried inexpensively by relying on the videotape of a treating doctor at trial or by spending significant sums of money and retaining an orthopedist, neurologist, pain management doctor, radiologist, accident reconstructionist, and biomechanics expert. How much money is going to be spent on the case and why should be discussed with the plaintiff. If your client wants you to spend more money on the case than you are willing to spend, the plaintiff should be asked to put up some of their own money or be introduced to another lawyer who may be interested in taking on the risk.

At trial, plaintiff must prove the collision was a substantial factor in causing an injury and the nature and extent of that injury. Evidence to support these elements can be provided by the plaintiff's treating doctors as long as they are properly disclosed under Code of Civil Procedure section 2034.260. It is a good idea to read *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, when preparing to disclose and rely on the opinion of a treating doctor at trial. There is no dispositive legal requirement for the plaintiff to offer testimony on the severity of the collision, the g-forces involved, or the change in velocity of the plaintiff or defendant's vehicle. Change in velocity is also referred to as the delta V. There is no plaintiff requirement to offer testimony from a biomechanics expert on the question of injury causation.

The unpublished opinion by Justice Reardon in the case of *Harrison v. Smith,* (2008) WL 2673831, is a good template for setting up a motion to exclude the defendant's accident reconstruction and or biomechanic opinion testimony. The unpublished opinion in *Harrison* lays out the argument for excluding an opinion that the collision produced forces on the human body that were the equivalent of harmless activities of daily living.

Conclusion

The biggest financial risk of the low-impact collision case is spending years of time and significant money handling a case, without first taking the time to truly evaluate how the case will do in front of a jury. The most prudent strategy with the low-impact case is to do your homework early on in the life of the case. Taking the time to review all of the pre-accident medical records and spending time with the plaintiff in their own environment, will go a long way toward improving the chance of success at trial. The decision to commit to and work up a significant injury claim following a low-speed collision is a decision that should be made early on in the case, with all of the potentially relevant evidence at hand. Once that is done, you are in a position to make a good financial decision for your client, yourself and your law firm.


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Al Stoll stands up for the rights of individuals in personal injury, employment law, elder rights, and product liability cases. In 2010 he helped found the Attorney Action Club, a network of San Francisco Bay Area lawyers who host monthly topical discussions on attorney work-life balance and law practice management. Outside of the law, he enjoys spending time with his wife and family. See Profile: Al Stoll in Plaintiff Magazine, May 2012 at plaintiffmagazine.com.

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