

Pre-litigation

For new attorneys, an overview of the issues in the pre-litigation stage and how to address them

By Rogelio Ruiz

Attorneys tend to focus on the litigation stage of personal-injury cases and seem to forget the importance of the pre-litigation stage. And that's completely understandable. We practice law after all; the litigation stage is where our talents shine. However, the pre-litigation stage is a crucial point in every personal-injury case to maximize compensation. Failing to timely address pre-litigation issues early in the case can result in a disastrous outcome. When the pre-litigation stage is mishandled, no amount of stellar litigation can undo the mishandling.

To maximize compensation for plaintiffs, attorneys need to thoroughly investigate the incident. Not only will it help establish liability, but it will show the defense that you're an attorney up to the task. The following are steps in investigating the incident.

Obtain a traffic-collision report

In the event of a motor-vehicle collision, a traffic-collision report must be obtained. While this is an obvious first step, it's worth discussing. A driver of a vehicle in a motor-vehicle collision involving an injury or death, must report the collision to law enforcement. (Veh. Code, § 20008.) However, not just anyone can obtain a traffic report. Generally, a traffic-collision report is deemed for the confidential use of the police department. However, per Vehicle Code section 20012, a traffic-collision report is obtainable by those who have a proper interest of the report, which includes the drivers involved, any injured individuals, and any attorney who represents those with a proper interest in the report.

The traffic-collision report provides an abundant amount of information to maximize the claim. First and foremost, it identifies the defendant and their insurance information. Often, plaintiffs fail to obtain the defendant's information, so this is a great item to obtain and/or confirm the information provided to you by the plaintiff.

Further, it provides the basic facts of the collision. It provides statements made by your client, the defendant, and witnesses. This is all extremely valuable. This is your starting-off point for understanding the collision. It also provides a glimpse into the defendant's view of the incident. And finally, most importantly, it provides witness information to contact and solidify their view of the incident; it would be wise to obtain a recorded/written statement from those witnesses. Not only will this again solidify your understanding of the collision, but it can be used as impeachment evidence in the event that a witness changes their recollection of the incident.

While it is true that a traffic collision report is not admissible evidence at trial, (Veh. Code, § 20013), it is important to remember that this is the launching pad to your investigation.

Investigate the scene with an expert

In an incident leading to a personal-injury claim, it is common for a report of the incident not to be made as the incident simply does not call for a report to be made, or a report is simply unhelpful or wrong. Whatever the case may be as to why a report was not obtained, it is important to hire an expert to assess the scene.

In a personal-injury claim arising out of trip-and-fall on a public sidewalk, it's extremely important to send an expert to assess the sidewalk to take pictures of the dangerous condition that caused the injury. Without a proper and early assessment of the size, inclination, and other factors contributing to the dangerous condition of the public space, a plaintiff's case is susceptible to losing a motion for summary judgment due to the trivial-defect doctrine or open-and-obvious doctrine.

Moreover, it is of particular importance to send an expert to the scene as soon as possible because government entities have often addressed dangerous conditions shortly after being informed of an actual injury. If an expert does not assess the dangerous condition prior to the government entities' subsequent remedial measures, then the dimensions and other factors contributing to the dangerous condition will never be identified.

Further, it should be noted that an expert can assess an unreasonably safe condition even on private property that is open to the public. (*Pullins v. Sup. Ct.* (2000) 81 Cal.App.4th 1161.) As long as the expert assesses a portion of the private property that is open to the public, the expert is not asked to leave, and the expert does not damage or vandalize the private property, then an expert can inspect the premises. (*Ibid.*)

Finally, attorneys tend to forget the importance of an expert to inspect the scene of a motor-vehicle collision. Attorneys are keen on sending experts on claims involving a premises case, but when it comes to a motor-vehicle collision, too often experts are not sent to the scene. When liability is contested, an expert can help. For example, in a disputed traffic-signal case (he said/she said) an accident reconstructionist can help in establishing liability by measuring and assessing the tire marks left by the vehicles involved in the collision. Moreover, in a motor vehicle collision, an

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expert can help assess if a dangerous condition of public property contributed to the incident. This can be a revolutionary change for a case and increase the value tremendously.

Property damage and vehicle inspections

When assessing a claim, often our inclination is to focus on the injuries expressed by the plaintiff, as well as the injuries identified by the plaintiff's providers. From that point on our focus is on our plaintiff's treatment. And that's not a bad thing, but when assessing a claim to determine how we can prove those injuries, attorneys need to also assess the vehicle.

First and foremost, obtaining images of the property damage helps in proving the large forces at play. The size of the damage and location of the damage bolsters the claim for higher compensation as it evidences a larger injury. In instances where the property damage is not evident through photos, it is important to search for other means to maximize recovery.

One alternative is the property damage-repair cost. Often, the property damage is not evident in pictures because the bulk of the damage to your client's vehicle is in the structure found within the husk of the vehicle.

Secondly, in motor-vehicle incidents in which the photos fail to support a large impact, obtaining the Event Data Recording and other devices that store data on the vehicle to assess the collision is imperative to maximize compensation. Of particular importance in these scenarios is the delta-v of the impact. The delta-v is simply a measurement in the change of velocity. Of particular importance to attorneys is the delta-v at the time of the impact, as this can have an implication to injury potential – yet another way to maximize compensation as it evidences a larger impact, which supports the causation of a larger injury that merits an even larger compensation.

Interview collision witnesses

Witnesses, as they relate to maximizing compensation, are often thought to only be those who can talk about the plaintiff's non-economic damages. And there certainly are witnesses that can specifically address those issues, but we often forget about the importance of witnesses to the collision. We often observe a traffic collision report and obtain the plaintiff's version of the collision and determine liability. We then fail to interview the witnesses to the collision because we don't deem it necessary since liability has been established.

This is where attorneys take the wrong turn. Witnesses to the collision cannot only cement liability, but they can also heighten the compensation for your clients by painting a picture regarding the severity of the collision. Simply looking at a report does not tell the true story of what occurred. At the end of the day, a report is just a series of documents that memorialize a collision. Independent collision witnesses that can indicate the speed of the collision, describe the sounds that they heard, the scene and the aftermath of the terrifying event, can have a significant effect in maximizing compensation.

Insurance adjusters and defense counsel often make the pivotal mistake of failing to understand a human story. And I don't blame them; they're just looking at documents all day, and paper files simply can't provide the full story. Witnesses can bridge that gap.

Use the medicine and medical treatment to your advantage

Use prior injuries to maximize compensation

Often, attorneys tend to err on the side of hiding or masking prior injuries in an effort to prevent a prior injury from reducing the value of a claim. It is typical for the defense to point out that a plaintiff's injuries have been pre-existing and therefore the plaintiff's compensation should be lowered. This is simply not the case. Prior injuries should be used to maximize compensation.

CACI No. 2928 (Unusually Susceptible Plaintiff) states the following:

> You must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for all damages caused by the wrongful conduct of [name of defendant], even if [name of plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

CACI No. 3927 (Aggravation of Preexisting Condition or Disability)

> [Name of plaintiff] is not entitled to damages for any physical or emotional condition that [he/she/nonbinary pronoun] had before [name of defendant]'s conduct occurred. However, if [name of plaintiff] had a physical or emotional condition that was made worse by [name of defendant]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her/nonbinary pronoun] for the effect on that condition.

Taking into consideration these CACI civil jury instructions, a dive into the plaintiff's prior medical history and highlighting the plaintiff's prior condition will assist in maximizing compensation. For example, highlighting that a plaintiff suffers from osteoporosis and then suffers a fracture from a minor impact collision can show that the collision did indeed cause the injury (the "eggshell client"). The fact that the client suffered from osteoporosis does not lessen the client's compensation.

The same argument can be made when a plaintiff suffers from an osteophyte. It is a common occurrence that a plaintiff's MRI reveals an osteophyte near a disc. If a nerve is being pinched in conjunction with a disc bulge, causing an irritation, then a plaintiff is entitled to full compensation. Simply because an osteophyte is contributing to the nerve-pinching does not absolve the defendant's liability to the entire injury.

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Moreover, it should be noted that the existence of an objective finding prior to the incident that did not change post-incident, does not mean that your case is in the water. Rather, if the client's injury worsened in intensity, frequency, or simply became symptomatic, per CACI 3927, the client is still entitled to compensation.

Obtain necessary medical treatment

While this is obvious, obtaining the necessary medical treatment is crucial to maximize compensation. However, obtaining the necessary medical treatment is not always so easy because some injuries are not so easily identified. When it comes to orthopedic or nerve injuries, it's typically very easy because plaintiffs identify pain or sensations associated with specific body parts. Whether that be the plaintiff's neck, back, extremities, plaintiffs can easily identify an injury, so it becomes easy to refer the plaintiff to the best provider to address the client's injuries. Mild traumatic brain injuries, however, are not so easily identified. Often, a plaintiff does not recognize the symptoms because of the nature of their injury or simply because the plaintiff fails to recognize the severity of the injury.

To determine if a client has suffered a traumatic brain injury, it is important to ask the plaintiff if they have experienced the following symptoms: headaches, attention deficits, difficulty sleeping, vision defects, word blindness, difficulty understanding, short-term memory loss, change in sexuality, inability to focus, dizziness, and nausea. This is not an exhaustive list; however, it is a starting point in assessing whether the plaintiff has experienced a mild traumatic brain injury or brain injury.

Moreover, it is important to discuss these symptoms with a plaintiff's loved ones and/or those who interact with them on a daily basis. As mentioned above, it is common for a plaintiff to not recognize their brain injury symptoms. However, those who are around the plaintiff can discuss the differences that they have noticed in the plaintiff.

Finally, it is imperative that the plaintiff obtains medical treatment as soon as the plaintiff can and as often as the plaintiff can. Insurance adjusters and defense counsel love to tackle gaps in treatment. To obtain the maximum compensation, gaps in treatment must be avoided.

Explain the injury and severity

Too often, I notice that attorneys fail to really advocate for the plaintiff's injuries. Attorneys may gather the medical treatment and, after a cursory review, will mention to the adjuster or defense counsel the diagnosis given by the plaintiff's medical providers. However, that will be the extent of the attorney's discussion of the medical treatment. The attorney will make no effort to explain the severity of the injury, the potential dangers that the injured plaintiff can experience as a result of the injury, and the medical treatment that the injured individual may need to undergo to address her injuries.

This is a missed opportunity to maximize the compensation for the plaintiff. Insurance adjusters and defense counsel are typically not well versed in the medical field and/or injuries. That is why attorneys should take the opportunity to explain the injuries and their severity. This will allow the insurer to better assess the claim.

In all the demands that I send, there is now included a section in which I explain the actual injuries that my clients have suffered. I explain the objective findings, the severity of the objective findings, the potential of a worsening injury over time, the correlation of the plaintiff's complaints, and the results of objective tests that correlate with the objective findings. Since I've been doing this, I have noticed an uptick in higher settlement offers.

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