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Handling auto vs. auto cases in your first year of practice

FOUR TIPS FOR THE FIRST-YEAR ATTORNEY

It's tough to be a first-year attorney. I'm not going to sugarcoat it. First-year attorneys are expected to perform and produce results just like any other attorney. The legal world is a results-driven profession and inexperience is not a valid excuse. And to make matters worse, defense attorneys love exploiting recently barred attorneys at first whiff of inexperience.

Auto vs. auto cases are tough. They are riddled with land mines and it takes a very detail-oriented attorney to properly handle one. Seemingly straightforward auto vs. auto case will crash and burn when details are overlooked.

This article offers the first-year PI attorney four tips on handling common issues in auto vs. auto cases.

1. Identifying automobile insurance coverage

A successful auto vs. auto case needs to have insurance coverage – full stop. An auto vs. auto case that has large damages and clear liability means nothing without insurance coverage. A $10,000,000 judgment is not worth the paper it is written on if there is no insurance policy to recover from – generally. So, before we discuss finding insurance coverage, lets go over the two types of policies generally available and their landmines.

Defendant's liability insurance

Under California Law, all drivers must have third-party liability insurance, i.e., insurance to cover another person's damages. (Veh. Code, § 16020, subd. (a).) Failure for a driver to produce proof of liability insurance at the time of the incident could lead to the suspension of the driver and/or the owner's privilege to operate a vehicle in the state of California. (Veh. Code, § 16070, subd. (a).) As it relates to bodily injury, drivers must have a policy that consists at minimum of $15,000 for any one person and $30,000 for any one incident. (Veh. Code, § 16056.) As it relates to property damage, the driver must have a policy that consists at minimum of $5,000 for any one incident. (*Ibid*.) However, despite the law's requirements, there are a series of instances where liability coverage is not afforded, or liability coverage does not cover non-economic damages. The following are common scenarios, you should be on the lookout for.

Excluded drivers

A named insured can exclude specific individuals from their policy. The exclusion of a specific individual is generally done to lower the named insured's premium. Unfortunately, if the excluded driver is involved in a vehicle collision owned by a named insured, the named insured's liability policy will not issue coverage.

Exclusion for commercial purposes

It is not uncommon for insurance policies to exclude coverage when a vehicle is being used for commercial purposes. Unfortunately, if the tortfeasor is using the vehicle for commercial purposes at the time of the incident and the policy excludes vehicles used for commercial policies, then the liability policy will not issue coverage.

Intentional acts

Under Insurance Code section 533, an insurer is not liable for an insured's intentional acts. In short, if a tortfeasor intentionally rams their vehicle against the plaintiff's vehicle, the tortfeasor's insurance will not issue coverage.

Uninsured plaintiffs

Under Civil Code section 3333.4, subdivision (a)(2)(3), an uninsured plaintiff cannot recover non-economic damages (i.e., pain and suffering), from a tortfeasor. There is an exception however – an uninsured plaintiff who owns the uninsured vehicle, can recover non-economic damages if the tortfeasor was under the influence of alcohol or drugs at the time of the collision. (Civ. Code, § 3333.4, subd. (c).) This is not technically limited to insurance coverage, but it affects insurance coverage nonetheless.

Under influence of alcohol or drugs

Under Civil Code section 3333.4, a plaintiff who was under the influence of alcohol or drugs and convicted for that offense at the time of the collision, cannot recover non-economic damages from the tortfeasor. This is not technically limited to insurance coverage, but it affects insurance coverage nonetheless.

Uninsured/underinsured motorist coverage

Uninsured/underinsured motorist coverage is intended to ensure that a plaintiff is protected from an uninsured/underinsured driver. An uninsured/underinsured policy must provide at the very minimum $15,000 for any one person and $30,000 for any one incident. (Ins. Code, § 11580.2, subd. (m)-(n).)

Uninsured motorist coverage applies when there is no automobile insurance policy to recover from. (Ins. Code, § 11580.2, subd. (b).) Generally, this occurs when the tortfeasor does not have applicable auto insurance, or the tortfeasor cannot be identified.

Underinsured motorist coverage applies when the tortfeasor is insured for an amount less than the injured party's underinsured motorist coverage. (Ins. Code, § 11580.2, subd. (p)(2).) However, in order to obtain the funds from the underinsured policy, the funds from the at-fault tortfeasor must first be exhausted. (*Quintano v. Mercury Cas. Co*. (1995) 11 Cal.4th 1049, 1056; *Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 327; *Farmers Ins. Exch. v. Hurley* (1999) 76 Cal.App.4th 797, 799). In other words, the injured party must obtain the entirety of the at-fault party's insurance in order to seek additional insurance from its underinsured policy. The underinsured payment is then offset by the amount paid by the at-fault tortfeasor. (Ins. Code, § 11580.2, subd. (p)(4)).

Identifying applicable automobile insurance coverage

Determining whether insurance coverage exists should *always* be done immediately upon signing the case. As mentioned above, insurance coverage is just as important as liability and damages; no insurance coverage = no case, generally.

As such, you should immediately seek the plaintiff's declaration page to determine coverage. This does two things: (1) it identifies uninsured/underinsured coverage; and (2) it provides evidence that the plaintiff is entitled to non-economic damages. If a traffic collision report was created, the attorney should immediately obtain the

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police report to determine the tortfeasor and verify that the vehicle was insured. Upon determining the tortfeasor and the existence of an insurance policy, the attorney should immediately file a claim with the tortfeasor's insurer and confirm that there is applicable coverage for the collision.

If everything checks out, then the PI attorney is on the way to obtaining compensation for the plaintiff.

2. Preparing for the mechanism-of-injury issue

The term "mechanism of injury" refers to the manner in which the collision caused the plaintiff's injury. Often, the mechanism of injury is obvious, i.e., the nature of the impact and the nature of the injuries make the correlation obvious. In those instances, the mechanism of injury won't be discussed. It is obvious to the defense attorney that the incident caused the plaintiff's injuries.

Other times however, the correlation is not so clear. In those instances, defense attorneys will attempt to disprove the plaintiff's injuries by attempting to show that the nature of the impact could not have caused the plaintiff's injuries. It is at these times that identifying the mechanism of injury is crucial. Merely showing a medical report identifying the plaintiff's injuries may not be enough; rather, you should show the mechanism of injury by describing how the incident caused the plaintiff's body to move, and if the plaintiff's body struck a part of the vehicle, explain that as well.

While injuries can be caused in many ways, the following are some common ways that certain injuries can occur.

- **Triangular Fibro Cartilage Complex Tear (TFCC)**: These injuries can be caused by a plaintiff striking their hands/wrists against the vehicle and/or airbags.
- **Head injuries:** These injuries can be caused by a plaintiff striking their head against the vehicle or by the force of the collision causing the plaintiff's head to whiplash.
- **Neck injuries:** These injuries can be caused by a whiplash movement.
- **Shoulder injuries:** These injuries can be caused by the plaintiff placing their arm against the steering wheel at the time of the impact.

The mechanism of injury can be proven by (1) the plaintiff's testimony; and (2) through accident reconstructionist and biomechanics experts. The following is a brief description of these avenues.

Plaintiff's testimony

The plaintiff's testimony is crucial in proving the mechanism of injury. In the vast majority of cases, the plaintiff is the best person to testify as to their movement at the time of the collision. So, it is extremely important that the plaintiff gives a clear description of the forces and their movement inside the vehicle at the time of the collision that is consistent with the plaintiff's injuries. If the plaintiff fails to give a clear description of the incident and/or the plaintiff's testimony is not consistent with the plaintiff's injuries, proving the mechanism of injury will prove extremely difficult.

To avoid the troubles of the plaintiff giving unclear and inconsistent testimony, it is imperative that the plaintiff is thoroughly prepared to address the issue. It should be emphasized to the plaintiff the importance of this question and that the plaintiff should patiently wait for the issue to come up at deposition/trial. This will prevent the plaintiff from getting confused when the question is asked and providing a guess.

Accident reconstruction and biomechanics experts

These are the two most commonly used experts to prove the mechanism of injury. Biomechanics experts use both medicine and physics to determine the effects of the forces of the collision on the human body. Accident reconstructionists study the accident scene and the vehicles to determine the factors that caused the collision.

3. Dealing with prior injuries

It's been my experience that first-year attorneys are terrified of prior injuries. While it's perfectly reasonable for an unseasoned attorney to believe that prior injuries are a bad thing, that is simply not the case. You should not be afraid of prior injuries; you should embrace them. California Civil Jury Instructions Nos. 3927 and 3928 make it very clear that prior injuries are not a problem. In fact, in some instances, prior injuries are a good thing.

CACI No. 3927 reads:

> [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 aware damages that will reasonably and fairly compensate [him/her/*non binary pronoun*] for the effect on that condition.

A "worsening condition" can be when an asymptomatic condition becomes symptomatic, or an already symptomatic condition increases in terms of intensity, frequency and duration. A real-life example of a worsening condition is when an asymptomatic disc bulge becomes symptomatic, when an already existing, symptomatic injury begins to exhibit new symptoms, or when an already existing, symptomatic injury increases in pain level – i.e., prior to the incident the plaintiff rated their pain at a 2/10, post incident however, the plaintiff rates their pain at a 10/10.

CACI No. 3928 reads:

> 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.

An example of "unusually susceptible plaintiff" (a/k/a/ "eggshell plaintiff") is a plaintiff who suffers from osteoporosis. Osteoporosis is a condition in which a person's bones become weak and brittle, and thus more susceptible to a bone fracture than a person without osteoporosis. Therefore, if a plaintiff with osteoporosis fractures a bone in a motor vehicle incident

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in which a non-osteoporosis plaintiff would not have suffered the fracture, the plaintiff with osteoporosis is still entitled to full compensation of their injuries.

Addressing prior injuries

While I firmly believe that prior injuries are not to be feared, that does not mean that prior injuries should be left unchecked. You must still properly deal with the issue. Failure to do so will reduce the plaintiff's compensation or could potentially destroy the plaintiff's case. Here, is what you should do.

At the inception of the case, attorneys must discuss with the plaintiff their injuries and symptoms prior to the collision, and their injuries and symptoms post-collision. You must then obtain and thoroughly review all of the plaintiff's prior medical records to corroborate the plaintiff's statements about their relevant medical history. It is very important to review the plaintiff's medical records.

A person's medical history is usually long and full of doctor visits; it is not uncommon for a plaintiff to inadvertently leave out pertinent prior injuries. Upon determining the plaintiff's prior injuries and symptoms, you should then be hypervigilant for any changes to plaintiff's objective findings post-collision.

If there exists pre- and post-collision imaging, you should compare the imaging for any changes. Finally, it is important for you to be transparent with the defense attorney about the plaintiff's prior injuries. The object is to get ahead of the defense attorney by owning plaintiff's prior injuries. Attempting to hide them does no good.

4. Keep liability simple with negligence per se

Auto vs. auto collisions generally have lots of factors at play, i.e., weather, lighting, where the parties were looking, what the parties were listening to, what the parties were holding on to, etc. And just like any case with lots of factors, the case can turn into a liability mess – that's never a good thing for plaintiffs and always a great thing for the defendant. It's not a pretty sight. You can avoid that mess and prove liability by establishing negligence per se. Here is a brief description of negligence per se, and California Vehicle Code sections that can be used for negligence per se purposes.

Negligence per se and its rebuttals

Under Evidence Code section 669, subdivision (a), negligence per se is a doctrine that creates a presumption of negligence by the defendant, if the plaintiff can establish the following:
(1) He violated a statute, ordinance, or regulation of a public entity;
(2) The violation proximately caused death or injury to person or property;
(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
(Evid. Code, § 669, subd. (a).)

However, simply proving the presumption does not establish liability. The burden then shifts to the defendant to rebut the presumption. (*Baker-Smith v. Skolnick*, (2019) 37 Cal.App.5th 340, 347.) Under Evidence Code section 669, subdivision (b), the presumption is rebutted if the person who violated the statute "did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." While presumably there are an array of ways that can justify non-compliance of a statute, the following are those deemed justifiable under CACI No. 420:
(a) The violation was reasonable because of [name of plaintiff/defendant]'s [specify type of "incapacity"]; [or]
(b) Despite using reasonable care, [name of plaintiff/name of defendant] was not able to obey the law; [or]
(c) [Name of plaintiff/name of defendant] faced an emergency that was not caused by [his/her/nonbinary pronoun] own misconduct; [or]
(d) Obeying the law would have involved a greater risk of harm to [name of plaintiff/defendant] or to others;

Applicable California vehicle codes

While the vehicle codes are perfect for the use of negligence per se, not all are applicable – remember, the code must have been both intended to prevent the type of injury involved and protect the class of person injured in the incident. (Evid. Code, § 669, subd. (a).) For example, Vehicle Code section 22526 cannot be used to establish negligence per se, as the section specifically states that the "violation of this section is not a violation of law relating to the safe operation of vehicles…." (Veh. Code, § 22526, subd. (e).) That being said, the following vehicle codes are applicable for negligence per se principles:

Speed limits

Basic speed laws and maximum speed laws are applicable for negligence per se principles (See *Hargrave v. Winquist* (1982) 134 Cal.App.3d 916, 926; *Hert v. Firestone Tire & Rubber Co.* (1935) 4 Cal.App.2d 598, 599.) Applicable codes consist of Vehicle Code sections 22350, 22349, subdivision (a), and 22356.)

Right side of the road

Statutes mandating drivers to drive on the right side of the road have routinely been held to be applicable for negligence per se principles. (See *Jolley v. Clemens* (1938) 28 Cal.App.3d 55, 67; *Haase v. Centraal Union High School Dist.* (1938) 27 Cal.App.2d 319, 324; *Ferrula v. Santa Fe Bus Lines* (1948) 83 Cal.App.2d 416, 419.) Applicable codes consist of: Vehicle Code sections 21650, 21660, 21751, and 21752.

Conclusion

While I believe that these tips are helpful to young attorneys, the best tip I can give is to be patient with yourself. Rome wasn't built in a day, and great attorneys weren't formed in a year.

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