

## **EVALUATING THE LOW IMPACT AUTO CASE**

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### **I. INTRODUCTION**

Low impact auto cases may be simple or complex. A simple case would be one of clear liability with significant property damage, a likable client and a medical doctor who is able to easily describe the injury and its relationship to the accident. A complex case involves accident reconstructionist and biomechanical experts, very little property damage, a connective tissue or “soft tissue” injury, a client with pre-existing conditions, and a variety of health care providers ranging from a neurologist to a chiropractor. Obviously, it is extremely important at the outset of any case to recognize the difference between a simple and a complex low impact auto case especially in terms of value, costs, and expenses of litigating the case. The simple case, generally speaking, will settle quickly, sometimes without the need for filing suit, and, if you have to file suit, litigation costs can be kept to a minimal. However, the complex case is difficult to settle and can become expensive to litigate. The complex case can involve numerous medical doctors, as well as various experts. This paper will focus primarily on the complex low-impact auto case. It will attempt to give some basic guidelines in evaluating a potential client, liability and injuries in these types of cases.

### **II. THE POTENTIAL CLIENT**

The low impact auto case is an uphill battle from the plaintiff’s perspective from the beginning. Plaintiff’s counsel should recognize from the outset of his/her evaluation that there are forces beyond the case, no matter how good or bad the facts of the case may be, that are working against him/her. These forces are found in the perception among jurors that there are too many frivolous lawsuits. Jurors blame the plaintiff and the plaintiff’s counsel for this alleged

problem. Although this is a misperception, it is nonetheless common and must be part of plaintiff's counsel's evaluation of a case from the get-go.

The easiest way to overcome this misperception and to win the trust of jurors is to have a likable and credible (believable) plaintiff. Having a credible plaintiff is most important when the lawyer is addressing the injury to the plaintiff. Most low-impact cases involve "soft tissue" or "whiplash" injuries. These injuries often involve a medical doctor saying he can find nothing objectively wrong with the plaintiff, yet the plaintiff continues to suffer severe and chronic neck and back pain. Defendant's counsel will hammer on the doctor's testimony and imply that the plaintiff is just faking his injuries. A credible plaintiff will always overcome the defendant's counsel implications. If a jury likes your client, they will believe your client is in pain despite what the doctor finds. Therefore, the most important assessment you can make is whether this potential plaintiff can win over a jury.

Perfect plaintiffs are few and far between, but they do exist. Good clients are likable and are not concerned with how much their case is worth. They are hard-working individuals with a good employment history. Good clients are those you find yourself feeling sympathy for. They are the ones you see as innocent victims of wrongdoing. Good clients are those you believe without any hesitation or doubt. The believability of a client is a judgment call on the part of counsel. Your "gut reaction" to a client is usually your most reliable and accurate reaction.

The initial client interview is key to the assessment of a plaintiff. In a low impact auto case, the initial client interview must be thorough, specific, and detailed. It must cover areas of the client's past that may create credibility problems. For example, a terribly litigious client should be of great concern. That is, a client who has been in five car wrecks in two years and has received some form of compensation in all instances should be looked at by counsel with some suspicion. Maybe the client has not been involved in previous accidents, but has filed

numerous lawsuits and has been represented by several different lawyers. Although the previous lawsuits may not be admissible at trial if they are unrelated to the auto accident, counsel should nevertheless investigate those prior lawsuits. Sometimes a litigious client is indicative of an individual who would sue anyone for anything that has ever happened to him. These types of individuals tend not to accept responsibility for their own actions and blame everyone else. A jury will see through these individuals at trial. Also, these types are often problem clients, and can become a major headache to the attorney.

Also be aware of clients who have moved around a lot, who fail to keep appointments, who are difficult to get in touch with, who have a criminal record, and who are fired from jobs for “no reasons.” These factors indicate that the client will be difficult to find when you need them, not to mention potential credibility problems these characteristics create.

Finally, be aware of the “greedy” client. This is the client who, within five minutes of telling you about his case, he has already asked you “how much is the case worth” or “how much can I get for this case.” The “greedy” client may even be so bold as to tell you what the case is worth, which nine times out of ten, is incredibly excessive for the facts of the case.

Credibility and likeability (if this is a word) of a client are the most critical factors in a low impact auto case. Remember this “If it looks like a skunk, smells like a skunk, it is a skunk!” An individual may have a legitimate low impact auto case, but be a bad person for some reasons or another. The attorney should keep in mind that if you work with a skunk, you are going to come out smelling like one, especially in a low impact auto case. Never accept a case you are not willing to take to trial and never represent a client that you would not be proud to represent in front of a jury.

### **III. EVALUATION OF LIABILITY**

In any type of motor vehicle accident, it is absolutely critical to obtain every detail of the accident when evaluating liability. Probably the most efficient and best way to approach evaluation of liability is to establish a checklist of items and documents that need to be obtained and discussed with the potential client prior to accepting representation of the case. Of course, a checklist of this sort can be used in any case, not just a low-impact automobile case. (At the end of this paper, I have attached a checklist that I have commonly used in cases.)

**A. The Accident Report**

The first document that needs to be obtained in a low-impact automobile case is the accident report. The accident report contains valuable information about liability. It indicates who the police officer thinks was at fault. It contains estimates of the vehicles' speeds, which is a crucial factor in these low-impact cases. If the accident report indicates that the potential defendant was only traveling 5 mph at the time of the wreck, yet your client estimates that the defendant was going at least 20 mph at the time of the impact, obviously, further investigation is needed. The report has names, addresses, and phone numbers of witnesses to the accident. In a majority of the cases, the police officer's determination of fault is based upon statements from the parties and witnesses to the accident. If the police officer places your client at fault in causing the accident, you need to investigate the case further and seriously consider not accepting the case at all.

The accident report also will contain insurance information and owner information. If the owner of the vehicle is different than the defendant, you may want to look at the possibility of a negligent entrustment claim if the driving history of the defendant indicates numerous prior accidents and DUIs.

**B. Driving Histories**

After obtaining the accident report, you should also obtain the driving histories of both the potential client and the potential defendant in the matter. The driving history will show how many prior accidents the parties have been involved in, the number of speeding tickets the parties have had, whether the parties have had any DUIs, and numerous other violations. If your client has been involved in prior accidents, you would also want to obtain the accident reports of those accidents. Those accident reports may have information about your potential client's prior injuries. Obviously, if the plaintiff was involved in an accident with prior injuries, you can anticipate the defendant claiming the injury the plaintiff received in this accident was a pre-existing injury.

### **C. Photographs and Statements**

It is also important to obtain photographs of the vehicles involved in the accident and photographs of the scene of the accident. If your client has not taken any photographs of the damage to the vehicle, you should do so immediately before any repairs to the vehicle have been made. Defendants will argue that it is impossible for a plaintiff to sustain the injuries claimed when the impact was light and the property damage was minimal or non-existent. Photographs of the vehicle will obviously bear out the damage to the vehicle after impact.

Another important part of the evaluation of a low-impact case is obtaining statements from the investigating police officer and any witnesses to the accident. Make sure you interview any witnesses to an accident before accepting a case. Witnesses can tell you how the accident occurred and whether or not your client appeared injured. Your client's behavior at the scene of the accident should be explored completely.

There are many other factors that need to be evaluated prior to accepting a low-impact case. The following is a brief list of just a few areas that should be examined thoroughly:

#### Facts of Collision

1. Description
2. Diagram
3. Location (nearest intersection)
4. Stopped or moving
5. Light or dark
6. Dry or wet, snow or ice
7. Traffic controls in area
8. Sudden stops and turns
9. First observed other vehicle
10. Brake lights and turn signals working
11. Speed
12. Skid marks
13. Obstruction to vision
14. Alcohol, narcotics, or prescription medication
15. Witnesses

Vehicles Involved

1. Owner
2. Operator, driving with permission of owner
3. Year, make, and model
4. License number
5. Vehicle identification number (VIN)
6. Equipped with seat belts (functioning)
7. Mechanical problems or failures
  - a. Date of last repair

- b. Name and address of repair shop
8. Years of driving experience

Property Damage

1. Extent and nature of damage
2. Location of damage
3. Towing
4. Storage charges
5. Rental car expenses
6. Photographs of vehicle
7. Estimates of damage
8. Damage to other vehicle

Accident Investigation

1. Name and department of investigating agency
2. Statements given by parties and witnesses
  - a. To police
  - b. To insurance adjusters
  - c. To private investigators
3. Accident report and diagrams
4. Proof of insurance

Passengers

1. Name and address
2. Relationship to driver
3. Location in vehicle
4. Injuries

5. Statements given

#### **IV. EVALUATION OF PLAINTIFF'S INJURIES**

Probably the most difficult area of evaluation in a low-impact auto case is that of injury. That is because most low-impact auto cases involve “soft tissue” or “whiplash” injury. In medical records, they are described as cervical or lumbar strain. The problem with this type of injury is you cannot point to an x-ray or an MRI and see the injury. With no clear injury, such as a herniated or bulging disc, most medical doctors will refer the plaintiff to physical therapy for a few days and tell the plaintiff that he can return to work. Yet, the plaintiff continues to have chronic neck and back pain. The pain is worse when the plaintiff rides in a car for a long period of time, lifts objects (not necessarily heavy objects), or sits down for a length of time working at a computer screen. The patient continues to see a chiropractor who is the only health care provider giving the patient any relief (although only temporary). The defense counsel will argue that the client was not really injured, or it was just a minor “whiplash” injury and that doctors have said that they could find nothing “objectively” wrong with him that would prevent him from returning to work. Defense counsel will imply that your client is a malinger looking for easy money.

##### **A. Medical Records**

In evaluating the “soft tissue” case, it is imperative to obtain all of your client’s medical records, not just the records from his treating physicians for this particular injury, but for all health care providers he has been to within the last 5 to 10 years. These records will establish the absence or presence of a pre-existing condition. If there is a pre-existing condition, you should obtain all the medical records on that condition. These records will help you determine how difficult it will be to separate previous or subsequent injuries from the injury that is the subject of your case. Obviously, if the medical records indicate that your client was making the

same complaints of neck and back pain a week or a month before the accident, it may be difficult to link his current injuries to the accident. However, if it was several years before the accident since he last complained of pain, then you have a clearer causal connection between current injury and the accident. At the very least, you will have a strong argument that the pre-existing condition was severely aggravated by the accident.

### **B. Objectifying the Injury**

Once you have obtained and evaluated all of your client's medical records, and it becomes clear that you were dealing with a "soft tissue" injury, you must now ask yourself if you can elicit medical testimony that would make these injuries real to a jury. Due to the current climate of cynicism that you are likely to face with a jury, simply proving that the client makes subjective claims of pain to a doctor will not be enough. It is essential that the lawyer find ways of demonstrating the client's injury by objective means. First, you may want to have the medical doctor refer to the injury as a "connective tissue" injury, or, at the very least, a "soft tissue" injury as opposed to a muscle sprain or strain. Have the doctor explain what a "connective tissue" is and the function and role it serves to the neck and back. The doctor or chiropractor should explain that a strain or sprain refers to a partial tearing of muscle tissues or ligaments, which are designed to hold the bones to a normal relationship to one another. If your client has problems with muscle spasms or swelling, develop that testimony from the doctor. Make sure it is clear to the jury that these types of findings are something a doctor can see or feel. That is the reason they are known as objective findings. The following is just a list of suggested techniques to show objectively the injury exists:

1. specific description of muscle spasm location and pattern;
2. findings on needle injection;

3. precise measurement of range of motion (most of the time ROM is estimated and does not take into account other motions);
4. swelling of soft tissues (often reported by physical therapist);
5. strength testing; and
6. videotape of physical therapy.

An essential witness in this process is the physical therapist. If there are any suggestions or hints that your client is a malinger, interview the physical therapist and review the therapist's records thoroughly. The physical therapist is the only one who has frequent contact with your client and make discreet findings and measurements. The physical therapist may see your client three times a week and make copious notes. The objectivity of the injury is in the details and physical therapists often make good witnesses and will come to court and will not cost \$1,000.

If you choose to take a low impact case, one pitfall that must be avoided is the overstatement of the injury. Most low-impact auto cases are hard enough to prove since they involve generally minor impact and soft tissue injury. When a client or an attorney overstates the injury, the jury may believe that the client is a "whiner" and that the trial attorney is simply a puppet for the whiner. If this occurs, the attorney can expect a defense verdict or a low verdict. To avoid this pitfall, it may be helpful to use co-workers or family members as witnesses who can testify to the impact the injury has had on the client. For example, if a co-worker can testify that, prior to the accident, your client was a hard worker and could easily do the physical requirements of his job, but after the accident, the plaintiff could not, this type testimony lends more credibility to the plaintiff's claim than having the plaintiff describe the same thing.

## **V. CONCLUSION**

The low-impact automobile case can be the most challenging type of case for a trial lawyer. In evaluating these cases, ask yourself the following:

1. Do you have a credible and likable client?
2. Is there good liability?
3. Do you have an objective verifiable injury?

As with any aspect of your case, proving injuries and damages in low-impact cases require thorough factual preparation, requires knowing your case, and requires knowing your client. Proper and thorough preparation and evaluation, as well as knowing the strength and weaknesses of your case, will maximize the value of any low-impact automobile case.