

ACHIEVING MAXIMUM VALUE IN PERSONAL INJURY CASES

Dell Cross
Cross & Smith, LLC
907 17th Avenue
Tuscaloosa, AL 35401
(205) 391-9932
www.crossandsmith.com

INTRODUCTION

In every personal injury case, the goal should always be to achieve the maximum value available based on the applicable liability and damages.

Personal injury claims involve both special and general compensatory damages and punitive damages in cases involving wantonness. There are numerous factors to be considered in evaluating a personal injury case, including the basis for fault, whether negligence or wantonness, the type of injuries and medical treatment, the amount of special damages, especially medical expenses and lost income, availability of collateral source payments, the extent of permanent injury and disfigurement, jurisdiction and venue, whether the defendant is an individual or corporate entity, and the appearance and demeanor of plaintiff and defendant.

The preparation and handling of personal injury cases encompasses all of these factors, but we have found that certain activities and factors play a large role in achieving the maximum value. Although certainly not an exhaustive list, the following considerations are ones that we believe and have found to be particularly important.

INVESTIGATION

An investigation conducted before and after suit is filed often yields information that can greatly increase the value of a case. The information can be gathered from several different sources.

As an initial matter, we routinely research Alacourt, Accurint, Motor Vehicle Reports, and Pacer to obtain information regarding the prior history of defendants and/or employees of defendants. Information regarding residency, employment history, criminal records, civil lawsuits, driving records and bankruptcy filings are available from these sources. The information derived from these sources often leads to the discovery of evidence that advances our cases. In addition, social media is increasingly a valuable source of information regarding opposing parties and witnesses. It is amazing what people will post on Facebook, Instagram, Snapchat, Twitter, etc. In fact, we now caution our own clients to refrain from sharing anything about their cases on social media.

Attorney groups and federal and state agencies are available for information in specific types of cases. A few examples are listed here. The Attorneys Information Exchange Group (AIEG) contains a treasure trove of information that is available to its members. It is a particularly valuable source in products liability, roadway design and trucking cases. In collision cases involving large trucks and 18-wheelers, a FOIA (Freedom of Information Act) request made to the Federal Motor Carrier Safety Administration can result in production of a large amount of information regarding interstate trucking companies and drivers. In bad faith or insurance fraud cases, a visit to the Alabama Department of Insurance in Montgomery often leads to the discovery of pattern and practice evidence or provides leads to other sources of information and evidence. In environmental cases, the Alabama Department of Environmental Management (ADEM) will often release the results of its investigation of certain matters that are involved in the case. In construction accident litigation, information supplied to local and state agencies and on file with them should be reviewed.

In addition, we find simple tasks that are relatively easy to do and inexpensive are often equally effective in increasing the value of a case. An accident site inspection early on by the lawyer handling the case, preferably with the client, can be very helpful in understanding the environment and circumstances surrounding the event at issue in the case. This is especially true in premises liability cases, construction site accidents and car and truck wreck cases. Interviews and statements from an injured client's relatives, friends and co-workers regarding how the client's injuries have adversely affected him or her are highly persuasive. These are people who have no financial interest in the outcome of the case, which adds to their credibility as damages witnesses.

By doing these types of things, we have found that the results often significantly increase the value of a case.

JURISDICTION/VENUE

Selection of jurisdiction and venue is one of the most important factors in the value of any case. The jury venire, rules of court, and judges are all considerations. We typically prefer state court, but sometimes choose to file the case in federal court if there is diversity of jurisdiction. We often do so because the state venue may be more conservative. For instance, the Western Division of the Northern District is made up of at least three counties that are historically far more liberal than Tuscaloosa County (Greene, Pickens and Sumter). The jury venire is drawn from the Western Division, which includes these three counties. An additional factor involves expert testimony. Under the Federal Rules of Evidence, expert witnesses are permitted to give opinions as to the ultimate issue in the case.

We handle a number of cases in Mississippi. My law partner, Justin Smith, is licensed to practice in Mississippi. Occasionally, we have cases that allow us to choose between the two states. In those instances, we compare and contrast the available venues in both states and consider any evidence of negligence on the part of our client. Mississippi is a pure comparative negligence state while Alabama has maintained contributory negligence as a defense.

We believe it is imperative to explore all options regarding venue in state court. For better or worse, the county where the case is filed will play a significant role in the evaluation by both plaintiff and defendant. We owe it to our clients to choose the most favorable venue available and to ensure that we have considered all possibilities. Factors to consider include the cause of action, residency of all the parties and witnesses and the location where the event or events giving rise to the cause of action occurred. We frequently review the venue statutes and applicable case law when determining where to file to make sure that we are not overlooking anything. We recently filed a case in which venue was proper in several different counties across Alabama. After considering all of the factors, we chose the most favorable venue. It will make a substantial difference in the value of the case.

DISCOVERY

The completion of well prepared and exhaustive written discovery is imperative. We typically serve our first set of interrogatories and request for production of documents with the complaint. In document intensive cases, after we receive complete and adequate answers to the first set of discovery, we serve more specific and specially tailored discovery requests. Persistence is paramount in successfully completing this process. Motions to Compel and court intervention are often required.

After we have exhausted the written discovery process, we are then much better prepared and equipped to take more effective depositions. We take a lot of depositions of corporate employees who reside in other states. We almost always videotape these depositions so that we ensure that the jury can see and hear the deponent at trial.

We are currently handling a serious personal injury case that involves egregious misconduct by several defendants. We are seeking substantial compensatory and punitive damages. The case has been very document intensive. We have engaged in aggressive discovery with all defendants and have recovered explosive material every step of the way. This material will drive the punitive damages awards in the case. But, if we had not been persistent with specific and specially tailored discovery requests, we never would have discovered the damaging evidence.

We believe that it is equally important to employ the same time and attention to detail in defending discovery requests as it is in seeking discovery. The lawyers in our firm review answers to interrogatories and document production ourselves. Our staff does an excellent job of preparing responses to most discovery requests, but we carefully review everything before it is served.

We also spend a considerable amount of time with our clients to prepare them for deposition. Every detail is covered with them in a two-part preparation session. The first part is preparing them to give an effective deposition in any case. The second part is preparing them for the specific law and facts in their particular cases. In every case, we have at least two meetings with the clients prior to their depositions.

DAMAGES

Obviously, the nature and extent of damages play a central role in obtaining the maximum value in personal injury cases. It is incumbent upon us as lawyers for the injured client to employ the most effective ways to present the injuries and damages.

We find that by doing certain things in the work up of the damages part of the case the value is greatly enhanced.

As a preliminary matter, we make certain that we have copies of every medical record and medical expense involved in the client's course of treatment. We also request copies of all prior medical records for at least five years before the injury occurred. That way, we are prepared to address the presence or absence of any pre-existing injuries or conditions. Our staff does an excellent job of collecting this information and making summaries of the medical treatments and records.

In addition to photographs that depict the injuries at various stages of the client's recovery, we often order specially prepared medical illustrations that depict the internal damage resulting from a personal injury. The medical illustrations are prepared from the client's medical records, x-rays, CT scans, MRIs, etc. by Medical Legal Art in Kennesaw, Georgia. They are expensive, but can be very compelling evidence of serious internal injuries and surgeries.

It is important to document past and future lost income as an item of special damages. We have a form letter that we mail to the client's employer for completion so that total time and income lost is properly documented. If the client's injury results in diminished earning capacity, we retain the services of a vocational rehabilitation expert and economist to provide testimony or statements regarding future lost opportunities and income, including any fringe benefits.

Permanent injury is an important element of a personal injury claim, but is often overlooked by attorneys representing injured victims. Unless the injury was on the job and involves treatment covered by workmen's compensation, physicians rarely address permanent injury or impairment ratings in their office notes or hospital records. If we believe that there is any degree of permanent injury, we visit with the client's treating physician and address the issue. We handle a lot of car wreck cases that are settled without filing suit. In those cases, we take a sworn statement from the physician and include it with our settlement package. The treating physician will provide sworn testimony regarding the client's permanent injury, impairment rating, prognosis, future treatments, etc. We think it is important to demonstrate, for example, that a 10% permanent impairment rating to the upper extremity means that the client has lost 10% of the function of his arm for the rest of his life.

In a catastrophic injury case, we will present a Life Care Plan that is prepared by a certified professional in the field. Life Care Plans are absolutely necessary in these types of cases so that the defendants, insurance companies and juries fully appreciate the current and

future needs of the injured client and the costs associated with those needs. A “Day in the Life” video and “Before and After” videos are compelling as well.

As mentioned previously, the statement or testimony of relatives, friends and co-workers regarding how the injury has affected the client is very persuasive evidence of damages. These witnesses can describe apparent physical limitations, fatigue, emotional changes, etc.