

---

**How-To**

# How to steer a successful plaintiff's personal injury case



by Thomas J. Curcio

In analyzing and developing a plaintiff's personal injury case, it is helpful to recognize an analogy that a very successful plaintiff's personal injury lawyer told me years ago when I began practice. When considering whether to accept a case, look at it like a three-legged piano stool. As the piano stool has three legs, a successful personal injury case has three legs: liability, damages, and coverage (or collectibility). As the piano stool will not stand if it is missing a leg, so too will the personal injury case collapse without all "legs." So while tempting as a possible case may be, if one of the three "legs" is missing, do not take the case.

As in many things in life, successfully handling a plaintiff's personal case is simple, but not easy. Simple in that to prevail, you must prove that the defendant was negligent and that negligence caused injury to your client; hard because the burden of proof is on the plaintiff (and you as his or her attorney) and much work and focus is needed to prove liability and damages. It is my hope that this outline will help you better choose, develop, and try a plaintiff's personal injury case.

### Develop an appropriate library

To properly analyze the liability, damage, and collectibility (insurance) aspects of a personal injury case, it is necessary to develop or have access to source materials on these subjects. The Virginia Model Jury Instructions are an excellent source of research on liability and damages as they lay out the elements of proof. For example, Chapter 10 "Motor Vehicles-Operation" states, in instruction form, most of the "rules of the road" that apply in the majority of auto case. Chapter 9 "Damages" states the law as it relates to damages. Most importantly, each instruction has a memorandum which explains the instruction, cites statutory or common law authority and the leading cases interpreting it.

Other helpful sources are Michie's Jurisprudence, *Handling an Automobile Negligence Case in Virginia* (West Group Practice Guide, 2006), *Virginia Torts Case Finder* by Brien A. Roche (Lexis Law Publishing, 1999), and *Personal Injury Law in Virginia*, 3rd Ed., by Charles E. Friend, (LexisNexis, 2003). Also, attend seminars on personal injury cases as the written materials for those seminars are often excellent sources of materials.

In analyzing and developing the damage portion of the case, in addition to being familiar with the damages instruction, it is very important to have source materials available to help you understand the medical records and the injuries. Recommended materials include a current medical abbreviations list, *Stedman's Medical Dictionary*, (Williams & Wilkins, 25th Ed. 1990), *Gray's Anatomy*, (Bounty Books, 1977), and anatomical drawings by Frank Netter, M.D.

On the issue of insurance and collectibility, an excellent source material is *Sources of Coverage*

by W. Coleman Allen, Jr., (Nov., 2003), a VTLA publication. *Liens in Personal Injury Actions*, (2nd Ed, 2006), a joint LexisNexis/VTLA publication, is a great source on the issue of liens.

### Determine whether a case is worth taking

While fundamental, it is worth emphasizing, that to end successfully, you must begin successfully. This requires you to take a hard look at the case to determine whether it has merit. Do not accept a case with the expectation that you will be able to settle it. Analyze each case from the standpoint of whether you will prevail at trial.

To determine whether the case has merit, it is necessary to review various documents. When arranging the first meeting with the potential client, instruct him or her to bring the following documents:

- Police report
- Photographs
  - Scene
  - Vehicles
  - Injuries
- Medical records/bills
- Doctors names/contact info
- Insurance declarations page
  - UM/UIM coverage
  - Medical payments coverage

In interviewing the potential client, be certain to ask the potential client about the following:

- Liability-description of event by potential client. Consider whether the client's description of the event rings true and makes sense.
- Use of alcohol or drugs.
- Damages-nature and seriousness of injuries, treatment.
  - prior injuries, treatment
- Prior claims & prior lawyers.
- Prior lawyers consulted or retained on subject claim.

Other matters to consider:

- **Consider the intangibles and use common-sense and instinct.** If you do not find the potential client likeable or credible, it is unlikely the defense attorney or jury will either. Also consider whether you and the potential client will be able to get along and whether the client is likely to require time and attention disproportionate to the case. Human nature is such that it is easier to work on a case for a client that you truly like versus one you do not.
- **Set proper tone with client.** Explain that tort system is to compensate individuals for all the harms that they suffered as a result of the collision. Review with potential client the various elements of damage which apply to his case. Be alert to clients who have unreal expectations. If client is motivated by "principle" or desire to punish and not will-

ing to recognize purpose of the tort system, consider declining the case as client will not be satisfied.

- **Competency Rule 1.1 of Rules of Professional Conduct** requires that a lawyer provide "...competent representation to a client..." which "...requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Consider whether you are competent to handle the case? For example, products liability, medical malpractice, and brain injuries cases are complicated and often require several different experts. If not, associate competent counsel.
- **Funding the case.** Is your office able and willing to fund the case if client cannot?

### Engagement

As in other areas of practice, success with a plaintiff's personal injury case requires a good relationship with the client. The client must respect you as a lawyer and have confidence in your advice. Discussing the terms of your representation and the written retainer agreement are important to establishing a solid relationship with the client.

**Written fee agreements are required in contingency cases.** Rule 1.5 (c), *Rules of Professional Conduct* requires that the agreement specify the percentage of the fee and how it is determined. If outside counsel is to be associated, the client must be advised and the lawyer must obtain his or her consent; any division of the fee must be disclosed and the client's consent must be obtained; and the foregoing should occur before you begin providing legal services.

**Use a simple, straightforward, one page retainer agreement.** (Sample retainer available online.) Multi-page agreement can be intimidating and may create distance between you and potential client. Explain the fee and make clear the distinction between the fee and the costs.

**Administrative fee for collecting medical payment coverage.** An hourly rate for work performed staff is ethically permitted.

**Costs.** It is advisable to obtain a costs advance from the client if he or she is able to pay. I usually request \$200 and explain to the client that the money will be deposited into the firm's escrow account and used to pay costs as incurred. I also tell the client that if sum is depleted, that monthly bills will be sent. I also explain that any money remaining in escrow will be returned at the conclusion of the case as the money belongs to the client. Obtaining a cost advance serves to purposes: first, it gets the client financially committed to the case, which helps with client control; second, it helps to relieve some of the financial pressure on you or your firm.

**Release of Medical Information.** At the time the client signs the retainer agreement, also have

him or her sign a HIPPA compliant authorization permitting the healthcare providers to release medical records and billing information to you. (Sample medical authorization available online.)

### Discuss potential liens.

### Review everything

Documents to review include current medical records and prior medical records.

Success requires that you read all documents when received. For example, it is critical that you read the medical records to make certain that the description of the event given you by the client matches the description contained in the emergency room records and all other records containing a description of the event. Similarly, look for references to alcohol or drugs use by your client in the emergency room records and blood work.

Also, determine whether the client's description of his or her injuries and symptoms are consistent with that reported in the records. Consider whether the records as a whole support the client's injuries (i.e. positive x-rays or MRIs) or whether the health-care provider questions the injury or the reported symptoms.

### Developing liability

To be successful at any endeavor, you must be good at the "fundamentals." In a plaintiff's personal injury case, knowing the law as it relates to liability in your case is a "fundamental." It is axiomatic that you cannot effectively gather the evidence necessary to prove liability if you do not know the elements of your liability case. The jury instructions define negligence as "... the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case." V.M.J.I. #4.000. To prevail, you must prove the following:

- the defendant owed plaintiff a duty;
- the defendant breached that duty; and
- the breach caused the accident and plaintiff's injuries.

Several sources exist to help you determine what your theory of liability is and what you need to prove to prevail. First and foremost are the Virginia Model Jury Instructions. Read the instructions early in your case preparation and become familiar with them. After all, the instructions are what your evidence will ultimately be weighed against. Additionally, the instructions contain the elements of common defenses such as contributory negligence and assumption of risk. Becoming familiar with these defenses will assist you in case selection and preparation. In an automobile case, Title 46.2 of the Virginia Code lays out the duties owed by motorists and others persons using the highways (i.e. pedestrians and bicyclists). In a commercial trucking case, the Federal Motor Carrier Safety Regulations should

be reviewed to determine the many statutory duties required of commercial truckers. In a premises liability case, the Uniform Statewide Building Code should be consulted to determine industry practices and possible code violations. Bulletin board services such as the Virginia Trial Lawyers Association listserve is also a valuable source. Posting a description of your case will often generate contact from others who have handled similar cases.

In addition to learning the law as it relates to liability, it is necessary to develop a working knowledge of evidence law. That is, you must know whether a particular piece of evidence is admissible as the case's success may depend on it.

Investigation of the facts surrounding the incident and documenting those facts is similarly important in developing the liability part of the case. The earlier the investigation, the better. Contacting witnesses soon after the event shows that you are diligent and fosters a better relationship with these individuals. The following lists those steps to be taken in investigating the usual personal injury auto cases:

- Speak with witnesses
  - eyewitnesses
  - police officers
  - meet with police, review his file
- Visit scene
  - Photograph
- Obtain police report
- Obtain police photos
- Obtain photos of vehicles
- Monitor traffic hearing (send court reporter or attend yourself)
- Obtain certified copies of official documents
  - Traffic Summons showing guilty plea
    - Admissible as admission & pursuant to Va. Code §8.01-418 (1950, as amended)
    - Blood Alcohol Certificate

Consider/Consult/Retain appropriate experts. In developing your liability case, it may be necessary to consult an expert witness. For example, to prove that the defendant had a .15 percent blood alcohol content or higher at the time of the crash to support a punitive damage claim, a toxicologist may be needed. In this regard, it is helpful to note the distinction in the discovery rules between a consulting expert and a testifying expert. Generally, the opinions and materials of a non-testifying are not discoverable and those of a testifying expert are. See Rule 4:1(b)(4) of Rules of Supreme Court of Virginia. As a practical you should assume that all correspondence between you and a testifying expert is discoverable.

### **Developing damages**

To properly and effectively represent a plaintiff in a personal injury case, it is fundamental that

you understand and document all aspects of your client's damages. Again, reference to the Virginia Model Jury Instructions early in your case is helpful. V.M.J.I. # 9.000 lists the elements of damages recoverable in a personal injury case as follows:

If you find your verdict for the plaintiff, then in determining the damages to which she is entitled, you may consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

- (1) any bodily injuries she sustained and their effect on her health according to their degree and probable duration;
- (2) any physical pain and mental anguish she suffered in the past and any that she may be reasonably expected to suffer in the future;
- (3) any disfigurement or deformity and any associated humiliation or embarrassment;
- (4) any inconvenience caused in the past and any that probably will be caused in the future;
- (5) any medical expenses incurred in the past and any that may be reasonably expected to occur in the future; and
- (6) any earnings she lost because she was unable to work at her calling.

Your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

Not all elements will apply in each case and it is important to remain mindful of the elements that do apply to be better able to develop evidence to support those elements that do apply in your case.

The following lists steps to be taken in developing the damages portion of your case:

- Obtain all medical records related to claimed injuries
  - Read and understand all records
  - Be alert for pre-existing conditions
  - Obtain x-rays in broken bone cases
  - Obtain medical records for any pre-existing condition related to current injuries
- Obtain all related medical bills
  - Be familiar with the collateral source rule  
*Acuar v. Letourneau*, 260 Va. 180, 192, 531 S.E.2d 316 (2000)
- Determine and document lost wages
  - sample lost wage statement available online
  - confirm doctor ordered off work in records
- Determine and document permanency
  - Speak with treating doctor
  - Obtain a report stating level of impairment

- Obtain photographs of scarring
- X-rays of post-surgical hardware
- Future medical expenses and consequences
  - Nature, extent and cost of future medical care
    - *i.e.* plastic surgery
    - any needed additional surgeries
- Consequences of impairment
  - Ability to continue in chosen field
    - if unable, consequences. *i.e.* lessened earnings capacity
  - Ability to perform activities of daily living
    - life care plan
- Consult/retain appropriate experts
  - Vocational rehabilitation
  - Economist
- Life expectancy table. Va. Code §8.01-419 (1950, as amended). If permanent injury and impairment is claimed, it is important to know the client's life expectancy to determine full and fair compensation for those aspects of damage.

### **Dealing with a claims adjuster**

It is my practice to make a good faith effort to settle each case with the claims adjuster. Such efforts serves your client by resolving the case sooner and less expensively. Conducting pre-suit negotiations also sets a floor for when negotiations resume after suit is filed. To increase the likelihood of settling the case with the claims adjuster, the following is recommended:

- Establish credibility with the claims adjuster.
  - Provide medical records and bills as received.
  - Be cooperative. Set tone that you are both working towards the same goal, *i.e.* to fairly compensate your client.
  - Provide materials that are requested that are discoverable, *i.e.* related prior medical records.
  - Allow recorded statement of plaintiff on condition that you get to listen and a obtain copy of transcript. There's no real downside as statement not usable per Va. Code §8.01-404 (1950, as amended), which provides in pertinent part:
 

“This section is subject to the qualification, that in an action to recover for a personal injury or death by wrongful act or neglect, no *ex parte* affidavit or statement in writing other than a deposition, after due notice, of a witness and no extrajudicial recording of the voice of such witness, or reproduction or transcript thereof, as to the facts or circumstances attending the wrongful act or neglect

complained of, shall be used to contradict him as a witness in the case. This section is subject to the qualification, that in an action to recover for a personal injury or death by wrongful act or neglect, no *ex parte* affidavit or statement in writing other than a deposition, after due notice, of a witness and no extrajudicial recording of the voice of such witness, or reproduction or transcript thereof, as to the facts or circumstances attending the wrongful act or neglect complained of, shall be used to contradict him as a witness in the case.”

- Requests for pre-suit medical examinations. Such requests are becoming more common in larger cases involving claims of permanency. Experience dictates that each request is to be handled on a case-by-case basis. If claims adjuster appears sincere in desire to resolve case and needs an opinion from a non-treating doctor, more likely to agree. If it appears to be a stalling tactic, then no sense in agreeing and delaying filing suit. Make any agreement to the exam conditioned upon receiving copy of the report and that the exam will serve as the Rule 4:10 exam. That is, you do not want to have to deal with two defense experts at trial. If there is more than one carrier involved, attempt to get all carriers to agree that the requested exam will serve as the Rule 4:10 exam.
- Submit a comprehensive written settlement demand that lays out your case to the claims adjuster on both liability and damages. To prepare the liability portion of the letter, review the entire file as to liability points and evidence in support. The following should be included:
  - copy of police report, scene photos, photos of vehicles, certified copy of Traffic Summons reflecting guilty plea (if applicable). In case involving drunk driving, obtain copy of certified BAC certificate or hospital blood test. If punitive drunk driving case seeking statutory damages pursuant to Va. Code §8.01-44.5 (1950, as amended), attach copy of toxicologist's report.

In preparing the damage portion of the demand, the following should be done:

- Read all medical records and explain client's injuries and describe medical treatment in chronological order.
- List all medical expenses and provide any bills not previously provided.
- Document lost wage claim by providing lost wage letter and pointing to medical records



where client was instructed by doctor to remain off work.

- Speak with client about their physical pain, their mental anguish, and their inconvenience and use examples provided by them. Also, point to examples in the medical records documents complaints of pain or mental anguish.
- If case involves permanency, highlight the medical opinion stating so. If x-rays show permanency, i.e. hardware, provide them.
- In a scarring case, provide current photos showing scarring.
- If case involves future medical expenses or care, provides documentation supporting that.
- If case involves claim for lessening of earnings capacity, include copies vocational rehabilitation report and economist report.

Before submitting the demand, it is critical that you review with the client your analysis of the case and your valuation as to both settlement and trial. Include in your discussion expected costs of trying the case and explain how costs affect the client's net recovery. Get client's agreement on what would be an acceptable settlement, again explaining to the client your 1/3 fee, costs, and any outstanding liens to be paid. Also, emphasize to client that your assessment of the case may change as things develop. Be realistic and reasonable in making a demand. You have worked very hard to this point to establish and maintain credibility with the adjuster and the client and you don't want to blow it by making a demand that will be dismissed out of hand or one that you will have to cut in half to get the ball rolling.

Convey all offers to client and confirm client's rejection. Discussing each offer with client helps to educate the client on how the insurance carrier, and eventually the defense, see the merits of the case. It may also help in the case where the client, despite your best efforts, has unrealistic expectations.

If you are unable to settle the case with the adjuster following the submission of the demand and negotiations, end the negotiations on a professional note by stating that you have a sincere difference of opinion on the value of the case and that you appreciate his or her sincere efforts to settle it. This will set the stage for any later negotiations on the case with that same adjuster, as well as negotiations on any future cases with that adjuster.

Depending on how close the parties are to settlement, it sometimes helps to include a cover letter with a copy of the suit to the adjuster inviting further negotiations.

### Settlement and disbursement

If the case settles after the demand is made, the following steps should be taken:

- Confirm the settlement reached with the adjuster in writing promptly. Avoids any misunderstandings between you and the adjuster.

- Have the settlement check made jointly payable to the client and your law firm, and provide the firm's tax I.D. number to the adjuster. Have client come to your office to endorse the check for deposit into your firm's escrow account.
- Review the release with the client, make sure he or she understands that the release is a full and final release and that if medical problems related to the injury occur in the future, he or she cannot make a further claim. Promptly return the signed release to the adjuster.
- At time of disbursement, provide client with a disbursement letter setting forth all monies collected on the case and all costs and other disbursements, such as payment of medical bills or liens. *Rule 1.5 (c) of the Rules of Professional Conduct.*

### Filing suit and discovery

If you are not able to settle the case, the next step in the process is to file suit. If the case has a value of less than \$15,000, serious thought should be given to filing the case in the General District Court. See Va. Code §16.1-77 (1950, as amended). Benefits of filing in the General District Court are that plaintiff can avoid the additional time and expenses associated with a jury trial. For example, Va. Code §16.1-88.2 (1950, as amended) provides for the introduction of medical reports in civil cases tried in the General District Court if accompanied by a sworn affidavit of the healthcare provider. The statute requires that the medical reports be provided at least 10 days before trial to the opposing party, along with notice of intention to rely on such records, accompanied by an affidavit from the doctor stating that the patient was treated by him, that the information contained in the report is true, accurate and complete, and that any statement of costs contained in the report is true and accurate.

**Preparation and filing the Complaint.** Effective January 2006, the Virginia Supreme Court amended Rule 3:2 of Rules of Supreme Court of Virginia naming all forms of civil actions a "complaint." Note that under the Rules changes effective January 2006, a jury trial must be demanded in the Complaint or not later than 10 days after the service of the last pleading directed to the issue. *See Rule 3:21 of Rules of Supreme Court of Virginia.*

The complaint should lay out in simple, straight forward numbered paragraphs the facts in support of the complaint and your demand for damages. *See Rule 1:4 (d) & (j) of Rules of Supreme Court of Virginia.* (Sample Complaint available online.)

Do not plead any claim for which you do not have a good faith basis. See Rule 1:4 (a) of Rules of Supreme Court of Virginia stating that "Counsel tendering a pleading gives his assurance as an officer of the court that it is filed in good faith and not for delay."

Give consideration to the amount sought in damages. You do not want to seek an amount that is unrealistic or one that you will be embarrassed about or put on the defensive if mentioned in court by the defense attorney. See Va. Code §8.01-379.1 (1950, as amended), which allows either party to mention the amount sought by the plaintiff in opening, closing, or both.

Once the case is in suit, you have the valuable tools of discovery available to you to help you build your case and to destruct your opponents' case. These include interrogatories, request for production of documents, subpoenas duces tecum, request for admissions, and depositions. In fashioning your discovery, stay focused on what you need to prove to prevail in your case. It is also very helpful to have a solid working knowledge of the discovery rules and the scope of permissible discovery. Sample interrogatories, requests for production, and request for admission are all available online.

As a final practice tip, it is critical that you obtain copies of all documents subpoenaed by the defense and read them.



*Thomas J. Curcio is the principal in the Law Office of Thomas J. Curcio, PC, in Alexandria. He is a graduate of the State University of New York at Stony Brook and George Washington University National Law Center in 1983. He is an active member of numerous professional organizations, including service of the Board of Governors for VTLA. Mr. Curcio is author of Evidence for the Trial Lawyer (Lexis/Nexis and VTLA, 2006), and an author in Handling an Automobile Negligence Case in Virginia (West Group Practice Guide, 2000). He also serves on the faculty of the Virginia College of Trial Advocacy and as a Neutral Case Evaluator and Civil Case Conciliator for the Fairfax Circuit Court as well as an Arbitrator for personal injury cases in Virginia.*