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## Experts in slip-and-fall and auto-accident cases

Guidelines for using your experts to prove liability and causation in two common types of PI cases

The use of experts in personal-injury cases is often critical to establishing the case. As a new attorney, the realm of experts may be somewhat overwhelming and it might be confusing to know which one is the best fit for each scenario. This article will guide the new attorney through the selection and strategic use of experts in two common personal-injury cases: slip and fall accidents and auto accidents.

### 1. Slip-and-fall cases

Your client walks into a restroom stall where the trash can is overflowing with paper and a big puddle of water sits in the entry way. As he steps into the puddle, his sneaker hydroplanes on the wet tile, causing him to fall backwards onto his head, resulting in a severe traumatic brain injury.

Proving liability against the owner in this kind of slip-and-fall case is one of the more difficult obstacles plaintiffs' attorneys must overcome. Not only is the burden to prove notice a heavy one, but juries are generally more skeptical in these cases, often actively looking for ways to say "the plaintiff was just clumsy," "he wasn't paying attention," or "is the defendant supposed to have around the clock cleaning?"

However, if you hire top-notch experts early and work closely with them from the start, you will set yourself up to always be ahead of the defense and ultimately prove liability at trial. Many great articles have appeared in *Advocate* about experts in slip-and-fall cases; here we will examine two common scenarios: (1) injury due to a poor inspection system and (2) injury due to a non-slip resistant surface. We will look at ways the proper expert can focus your discovery efforts to gather crucial evidence and meet the burden of proof.

### Inspection system

In a typical slip-and-fall case, the crucial evidence necessary to prove a defendant store/business/public entity is negligent is to show they had an unreasonable inspection system. You will rely on a safety expert to give you the applicable "rules of the road" or customary industry practices that reasonable entities follow to ensure customer safety.

In determining whether the inspection system was unreasonable, you will want to get with your safety expert early in the case to draft discovery on the topics below (this is a small sample of the type of items you want):

- Identify all persons responsible for maintaining/cleaning/monitoring SUBJECT RESTROOM.
- Identify the last time the SUBJECT RESTROOM was last cleaned before the subject incident.
- Produce all written inspection policies for the SUBJECT RESTROOM.
- Produce all custodian schedules for the day of the incident.
- Produce all sweep sheets kept specifically for the SUBJECT RESTROOM.
- Produce all video of the subject area on the day of the subject incident.

Once you have gathered the documents and written discovery with the help of your expert, you will want to depose the defendant's employees.

As with all of the scenarios we present, you will want to depose the person(s) most knowledgeable (PMK) to force the company/entity to commit to their own safety standards. In order to ensure you are deposing the right PMKs within the company, you need to go over all the categories with your expert. Below is a sample list of categories that would be applicable to our bathroom injury example:

### NOTICE IS FURTHER GIVEN

that, pursuant to California Code of Civil Procedure Section 2025.230, Defendant is required to designate and produce for deposition the person(s), agent(s), and/or employee(s) most knowledgeable and capable of testifying about the following subjects:

Cleaning procedures for the SUBJECT RESTROOM at the time of the SUBJECT INCIDENT (which means and refers to the slip-and-fall incident as described in Plaintiff's Complaint, upon which this suit is founded);

Customer safety in the SUBJECT RESTROOM at the time of the SUBJECT INCIDENT;

Policies and procedures for preventing slip-and-fall incidents in restrooms at (defendant entity name) at the time of the SUBJECT INCIDENT;

Custodial training for (defendant entity name) at the time of the SUBJECT INCIDENT;

Policies and procedures for cleaning restrooms at (defendant entity name) at the time of the SUBJECT INCIDENT.

Before the deposition, you will want to consult with your expert to strategize on how to lock the PMK down on crucial facts to prove they had a poor inspection system. Here are some examples of inspection procedures you will want to explore during the PMK deposition:

- Sweep sheets
- Inspection logs
- Methods of accountability
- Sweeps – are inspections reactive or proactive?
- List of all employees responsible for floor maintenance, floor safety, floor inspection, accident prevention for patrons
- Written policy for floor safety/maintenance/accident prevention

*See Kramer-Johnson, Next Page*

Then using the “rules of the road” provided by your expert, you will want the PMK to agree with how all reasonable businesses should act. Here are some examples:

- Guest safety was your number one priority?
- Your goal is accident avoidance and accident prevention?
- You wanted to take all safety precautions that were feasible, practical and desirable to prevent and slip, trip and fall hazards?
- In order to eliminate and/or prevent fall hazards, you constantly and continuously monitor the premises?
- When you become aware of a fall hazard, you eliminate it immediately?
- You want the premises to be as safe as possible, right?
- You exercise exceptional care in the maintenance of your property?
- You wanted to follow all standards, codes and regulations in regard to premises safety?
- One accident that results in serious injury is unacceptable to you if it could be reasonably prevented?
- If an accident can be reasonably prevented, it ought to be, where feasible?
- You would be critical of your employees from a safety standpoint if they did not take all safety precautions to make sure the premises were safe?
- Your goal is to provide the safest environment possible for users of the premise?

Once the PMK agrees with the above (if he doesn't agree with any of these questions, then the defense should be paying your demand on the spot), your expert will be able to impeach him or her with evidence of how the entity deviated from those standards. You will gather the conflicting evidence by deposing the custodial team from top to bottom. Oftentimes, the lowest level custodian will have a completely different understanding of the inspection system than the top custodial supervisor. Your safety expert can then use this conflicting testimony to impeach the PMK's testimony that the company always acted reasonably in their inspections.

Even though you can establish an unreasonable inspection system, you will also want to establish that that condition

was inherently dangerous because the surface was not slip resistant when wet.

### **Coefficient of friction**

The basic fundamentals of a slip and fall occur when the coefficient of friction (COF) between the footwear of an individual and the surface they are walking on is so low that it does not provide the necessary resistance to prevent the person from falling. In our bathroom example, the man was injured when he stepped on wet tile, but could the fall have been prevented if the tile was slip resistant when wet?

To answer this question, you will need your safety expert to analyze the coefficient of friction of the tile in the restroom to determine if the surface meets the industry standard or if it is dangerously slippery when wet. To do this the expert uses a tribometer, a device that can measure the COF or slipperiness of wet floors and quantifies using a slip index from 1.0 to 0.0. The closer to 0.0, the more slippery the surface is. In our restroom example, the expert found that the tile had a 0.18 COF when wet, making it dangerous and equivalent to walking on ice. Using this data gathered by the expert, we will next want to find out if either the defendant created the dangerous condition or should have known about the dangerous condition. The best way to do this is again by deposing the PMK of the following categories:

- Installation of the flooring in the SUBJECT RESTROOM at the SUBJECT INCIDENT;
- Type of floor (ceramic tile, glazed or un-glazed, etc.) in the SUBJECT RESTROOM at the time of the SUBJECT INCIDENT;
- Choice of flooring used in the SUBJECT RESTROOM at the time of the SUBJECT INCIDENT;
- Cost for installation of the flooring in the SUBJECT RESTROOM at the time of the SUBJECT INCIDENT;
- Policies and procedures for installation of flooring in restrooms at Defendant's location;
- Maintenance of the flooring in the SUBJECT RESTROOM at the time of the SUBJECT INCIDENT;

- Flooring in the SUBJECT RESTROOM at the time of the SUBJECT INCIDENT;
- Installation of the flooring at the time of installation in the SUBJECT RESTROOM.

This will allow you to establish that the defendant created the dangerous condition or could have made the surface safe by making some relatively inexpensive alterations.

Using your safety expert to attack the common slip-and-fall scenario from both the inspection system and coefficient of friction from the start will enable you to conduct discovery early to prove your case in litigation.

## **2. Auto accidents**

To win an auto-accident injury claim, a plaintiff must be able to establish causation and liability. This may be a difficult hurdle to overcome; even if the defendant admits liability, many defendants will vigorously contest causation – arguing the forces at play were insufficient to cause plaintiff's injury, or that some other mechanism better explains the plaintiff's injuries.

In rear-end collision cases, where whiplash is often the most common injury, as well as other low-impact cases, often there are no broken bones or other obvious injuries, and pain and loss of function may develop days after the crash. As a result, it may be more difficult to link the injuries to the crash, especially if the defendant contests that the collision could have caused the injury at all.

In these cases, it is imperative to use experts to create strong and convincing causation arguments and further diffuse the defendant's position.

### **Reconstruct the scene to prove liability**

After an accident, firsthand party and witness accounts can help “reconstruct” the scene, and explain what happened at the moment of a crash. However, sometimes photographs and witness testimony is insufficient to explain the more intricate details of the crash. In order to get the fullest

*See Kramer-Johnson, Next Page*

understanding of exactly how the accident occurred, the use of an accident reconstruction expert may be necessary.

Accident-reconstruction experts explain how and why an accident occurred. By analyzing the vehicles' damage, road markings and skid patterns, witness testimony and police reports, as well as various tests, accident-reconstruction experts can establish who was at fault for the collision. Accident-reconstruction experts also calculate the forces involved in the collision (discussed below).

Accident-reconstruction experts take the evidence collected from the scene, witnesses and other measurements and documents, and create possible scenarios of the accident by making models, recreating the accident, and building software simulations. At trial, such simulations and models are good visual aids for the jury to see exactly how the accident occurred, and why the defendant is liable for causing the plaintiff's injuries.

It is important to take care in choosing a good expert, as he or she will explain the technical issues of your case to the jury. While considering the expert's credentials is important, in order to confirm they have the education and background to support their findings, more important is the expert's ability to articulate his or her unbiased perspective to the jury. Credibility will go much farther with the jury than a laundry list of awards.

When choosing the right accident-reconstruction expert, consider their training in science, engineering, or even law enforcement and traffic collisions. Additionally, consider whether they often testify for the plaintiff or defense side, or even for a particular firm.

### Assess the human response

Human-factors experts are often called upon to assist reconstruction experts when difficult questions arise in the reconstruction process. These experts give opinions on how people behave physically in certain environments. Specifically, they assess the human response, capability and performance in a wide variety of situations.

A human-factors expert may be especially helpful in accidents where a driver reacts to poor road design, such as a blind curve or lack of signage, disrepair or deterioration, or other issues with the roadway. Human-factors experts can assess the driver's perception and reaction time under such road conditions. In these cases, the driver's split-second reaction to various conditions before the collision may be what makes or breaks the issue of liability. For example, human-factors experts can explain situations where the defendant took a curve too quickly and could not react in time to the plaintiff's car stopped on the other side of the bend, or conversely where the defendant should have been able to stop in time before hitting the plaintiff who was stopped at the red light.

Where an accident occurs as a result of drugs or alcohol, toxicology experts can study the presence of these substances and their effects on the human body and human behavior. Thus, toxicology experts may be crucial to establishing liability where it is alleged that a certain substance affected the driver's response time or driving ability, and thus the crash itself. The toxicology expert analyzes the effects of a substance to reveal whether it influenced the accident, and if so, how.

### Calculate the forces at play: Delta-V

In most auto cases, injury is not caused by the speed of the impact, but by the change in velocity, also known as the "Delta-V." Delta-V refers to the change in velocity of a subject object, such as a vehicle, driver or passenger, or pedestrian, during a collision.

Accident reconstruction experts measure the Delta-V and related g-forces (rate of deceleration) to determine the impact severity using computer programs such as CRASH III. Delta-V and g-force change based on the circumstances surrounding the accident. For example, how fast the vehicle was going prior to impact, what and where the vehicle was impacted, all may change the Delta-V and g-force, and in turn, the plaintiff's injuries. Thus, your accident-reconstruction expert must

be able to confidently calculate these values and convey his findings to the jury.

In most newer vehicles, cars may have a "black box" data recorder known as an event data recorder, or "EDR." This device records before, during and after a crash, to collect data on speed, airbag deployment and other technical vehicle information, as well as occupant information. Accident-reconstruction experts may take the information from the EDR to use in their analysis of the Delta V and g-force.

However, it is important to note that the accident-reconstruction expert's testimony will be limited to the Delta V and g-forces involved in the crash without venturing into the biomechanics expert's realm of expertise of how these forces impact the human body.

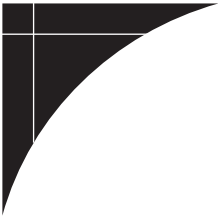
### Assess the impact

Biomechanics experts analyze the Delta-V and g-force in conjunction with the plaintiff's medical history and treatment to ascertain whether the collision was of sufficient force and velocity to cause the injuries claimed. Even minor variations in a person's physical characteristics (such as height and weight), body position in the vehicle, whether he was wearing a seatbelt or had the headrest up or down, can greatly impact the results.

The testimony of a biomechanics expert may be of particular importance in low-impact collisions, which a layperson or juror may see as too minor to cause any injury. In these cases, a good biomechanics expert can explain how even at low speeds a susceptible plaintiff can suffer serious neck and back injuries.

It is important to remember that each auto accident may be different, and not every case will require the use of all these experts. There won't be any need for a toxicology expert, for example, where there is no claim that one party had any foreign substance in their body at the time of the crash. Similarly, a human-factors expert might not be required if the accident-reconstruction expert can sufficiently establish how the

*See Kramer-Johnson, Next Page*



By Dan Kramer and Teresa Johnson — continued from Previous Page

crash occurred. However, using the right experts where necessary will serve to bring your case to life through the use of their testimony and visual aids, thereby allowing you to paint the fullest picture of causation and liability.

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