

SEMINAR TO INSURANCE COMPANY EXECUTIVES

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- ▣ SIMPSON COLLEGE (1970)
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 - ASSOCIATE EDITOR, DRAKE LAW REVIEW
- ▣ CERTIFIED CIVIL LITIGATION SPECIALIST
- ▣ SPECIAL EMPHASIS IN GAS LITIGATION
- ▣ & OTHER SERIOUS PERSONAL INJURY OR PROPERTY DAMAGE CASE

WHY AM I HERE TODAY?

- ▣ MIND OF A PLAINTIFF'S LAWYER
- ▣ MOST EFFICIENT AND COST EFFECTIVE WAYS TO HANDLE A CASE FROM A PLAINTIFF'S PERSPECTIVE
- ▣ PROPANE AND OTHER GAS EXPLOSION LITIGATION & CARBON MONOXIDE POISONING
- ▣ SUBROGATION

STEP 1 – CASE EVALUATION

WHAT GOES THROUGH A PLAINTIFF ATTORNEY'S HEAD WHEN A PROSPECTIVE CLIENT CALLS OR WALKS IN THE OFFICE?

1. WHAT IS THE PERSON LIKE?

- Will this person present well to the jury?
- Will this person's credibility be attacked and can it withstand that attack?
- Is the person educated?
- What is the person's gender?
- What is the person's age?

STEP 1 – CASE EVALUATION

1. WHAT IS THE PERSON LIKE? (CONT.)

- Has this person filed a lawsuit previously?
- What is this person's experience with propane?
- What role did the injured party have?
- Was the injury producing event caused by human error?
 - If so, what is the potential of a warning or human factors claim?
 - Ask Regarding Involved Persons:
 - Did one or more persons act?
 - What is the knowledge base of each person?
 - What was the source of the knowledge for each person?
 - Is any person a professional in that area?
 - Is any person in a managerial capacity?

STEP 1 – CASE EVALUATION (CONT.)

2. WHAT HAPPENED?

- Basic facts
 - Typically a combination of factors brought this about
 - Human Error
 - Mechanical Defect
- What do the reports of the local authorities say?
 - Fire Marshal
 - Sheriff and other law enforcement agencies
 - Fire or emergency responders
 - OSHA
 - NTSB
 - CPSC
 - Other Gov' t Body

STEP 1 – CASE EVALUATION (CONT.)

2. WHAT HAPPENED? (cont.)

- What statements have been taken and by whom?
- What has the injured party reported in the medical records ?
- Is there a transcript of a 911 call?
- Do codes, standards, or laws govern the activity?
 - If so, was there a violation?
 - If not, is the code, standard, or law insufficient to protect people like the person who was injured?

STEP 1 – CASE EVALUATION (CONT.)

2. WHAT HAPPENED? (cont.)

- Was there any type of equipment/mechanical failure?
 - Was it the design?
 - Was it the manufacturing process?
- What resources will be expended?
- How much will this cost?
- How much time will this take?
- Can I accomplish settlement w/ adjuster?
- Chance of early mediation?

STEP 1 – CASE EVALUATION (CONT.)

3. WHAT DO THE EXPERTS SAY?
 - Who do you consult?
 - How many will you need?
 - How much travel is involved?
 - How much will it cost to talk to expert before I know whether or not a case exists?
 - How much will it cost to retain all experts if there is a case?
 - Who will the Defendants use?

STEP 1 – CASE EVALUATION (CONT.)

4. WHO IS THE PRIMARY DEFENDANT?
 - What is the litigation history of this Defendant?
 - How much coverage?
 - Have I dealt with them before?
 - Have they changed procedure or practice?
 - How do they compare to competitors with respect to safety?
 - Is the insurance company an expert in this litigation?

STEP 1 – CASE EVALUATION (CONT.)

5. WHO ARE OTHER POTENTIAL DEFENDANTS?
 - Big Corporate Defendant?
 - Mom & Pop?
 - Individual?
 - How many Defendants in the case?
 - Can I settle with minor parties to fund the case?
 - Remember the Rule – Secure your costs first

STEP 1 – CASE EVALUATION (CONT.)

6. INSURANCE

- Is it adequate?
- Who has it?
- Are they self-insured?

STEP 1 – CASE EVALUATION (CONT.)

7. WHAT ARE THE TORT LAWS OF THE VENUE?
 - HOW DO THEY COMPARE FAULT?
 - Contributory Fault?
 - Pure Comparative Fault?
 - Modified Comparative Fault?
 - ARE THERE CAPS?
 - CAN NONPARTIES BE ASSESSED FAULT?
 - IS THERE MANDATORY MEDIATION?

STEP 1 – CASE EVALUATION (CONT.)

8. WILL THE VENUE BE FAVORABLE?

- Is the venue conservative, liberal?
- Who are the prospective judges?
- What is the breakdown of verdicts in the venue?
- Is there a more favorable venue?
- Will the case remain in state court if filed?
- Will I need local counsel?
 - Is there a town lawyer that everyone in the community respects and admires?

STEP 1 – CASE EVALUATION (CONT.)

9. HOW SEVERE ARE THE DAMAGES?
 - Burns? Broken Bones? Internal injuries?
 - Do we have photographs?
 - Should we get a video?
 - Burn Bath
 - Therapy
 - Will the injured person's treating doctors support him or her?

STEP 1 – CASE EVALUATION (CONT.)

10. What is there in the way of subrogation?
 - Medicare or Medicaid?
 - ERISA?
 - Hospital Lien?
 - What is the possibility of compromising the subrogation liens?
 - What if the subrogation liens are too high?

DEPOSITIONS

- ▣ Purpose
 - Settle
 - For Trial
- ▣ # to take
- ▣ Who
- ▣ What order
- ▣ Let Plaintiff go first

DEPOSITIONS

- ▣ Who to depose?
- ▣ Retailer
 - Manager
 - Deliverymen
 - Office Secretary
- ▣ Wholesaler
 - 30(b)(6) – Person with knowledge
- ▣ Appliance Depositions

KEEP THEM GUESSING

- ▣ What separates the average lawyer from the best is the ability to constantly engage in new ways to litigate a case
- ▣ Just like in football or any other sport, if you don't change, defenses will find a way to stop the offense.
- ▣ I spend more time thinking about this than anything else

ANTICIPATION

- ▣ Equally as important as “keeping them guessing”
- ▣ To be able to litigate a case you must have the ability to look at the case through the opposing parties’ eyes
 - ▣ How will they defend the case?
 - ▣ Who are the likely experts?
 - ▣ What are their interests at a particular point in the litigation?

RESOLVING THE DISPUTE

- ▣ Resolving the dispute is ALWAYS the end goal.
- ▣ The problems is – many lawyers and insurance companies get lost in the process and forget to think ahead to where they're going.

TO SETTLE OR TRIAL

- ▣ Ethical obligation of attorney to try to resolve short of trial if possible

- ▣ So when should you settle?
 - Do you have an established relationship with insurance company so that both parties can avoid costs?
 - If so, best for both parties to settle early.
 - Realize that if you settle early, unlikely to be 100% of probable damages
 - What is the anticipated cost of litigation for the insurance company?

MEDIATIONS

- ▣ #1 Mandate: Insurance representative with authority should always be there
- ▣ #2 Mandate: Superior to person with authority should always be available by phone
- ▣ Always convey the notion that what the Plaintiff is offered that day will never be increased....and mean it

MEDIATIONS (CONT.)

- ▣ Plaintiff attorneys generally believe that mediators who are or were plaintiff's attorneys are not as plaintiff friendly as defense attorney mediators.
- ▣ Mediator must be a take charge person; not a paper pusher
- ▣ Never be in a hurry

MEDIATIONS

- ▣ By the second or third round you should have some idea of where Plaintiff wants to head
- ▣ Never let the mediator know early what your drop dead number is
- ▣ Make a decision if it is in best interest to mediate as a group or individual defendant
 - ▣ If mediating early, probably better off alone
 - ▣ If mediating after summary judgment, probably better as a group

WARNINGS

- ▣ Perhaps the greatest tool for an injured party
- ▣ Allows the jury to excuse party for human failure
- ▣ Very difficult to defend
- ▣ Plaintiff can use a human factors expert
- ▣ Defendants can never effectively use a human factors expert unless:
 - ▣ Roll the dice and attack a co-defendant

WARNINGS (CONT.)

- ▣ Almost uniformly defendants never have made or make a serious effort to warn – instead it is all about attempts to CYA
- ▣ Industries are loath to take action to ensure warnings are effective
- ▣ Defendants at a significant disadvantage in hiring experts

GAS WARNINGS

- ▣ Applies to both natural and propane gas industry
- ▣ If there has been an attempt to warn, it is only a paper warning
- ▣ Typically the industry employees are as ill-informed as the consumers
 - ▣ Plaintiffs win the cases by showing the gas employees are as ill informed as consumers

GAS LITIGATION

- ▣ The only effective means to stop gas explosions is by installation of a gas detector
- ▣ Odor warning effective less than 50% of the time
- ▣ Today, no knowledgeable person debunks gas detectors
- ▣ Gas industry refuses to mandate detectors
- ▣ As long as detectors are not mandated there will be explosions

GAS LITIGATION

- ▣ Industry refuses to go beyond mailings
- ▣ Zero evidence that consumers are informed
- ▣ Zero evidence that consumers consciously and knowingly elect to use or not use gas detectors

GAS LITIGATION

- ▣ At a minimum if the industry refuses to mandate detectors then must adequately warn
 - How do you do this?
 - ▣ Face-to-Face meetings
 - ▣ Mandate consumers watch videos
 - ▣ Mandate consumers sign a document that they have been fully informed, and they either elect to use or not use gas detectors and are assuming the risk if do not install
 - ▣ Each retailer conduct sample survey to ensure everything above is occurring
 - ▣ Each retailer supply detector if necessary
 - ▣ Retailers can charge for installation

CARBON MONOXIDE

- ▣ If exposed, is deadly
- ▣ If exposed, no way to warn consumers other than gas detectors
- ▣ Is being made mandatory in jurisdictions – now so in Minnesota
- ▣ Greater need now than ever to have a gas detector

SUBROGATION

- ▣ Quite enjoyable
- ▣ Dealing with educated and knowledgeable people
- ▣ Everyone has right to an attorney
- ▣ Insurance company stands in shoes of victim
- ▣ Until AIG weekend, insurance companies treated well by juries
- ▣ Proper party must pay for loss

SUBROGATION

- ▣ Insurance companies need lawyers who think like Plaintiff's lawyers
- ▣ Insurance companies need lawyers who can think through potential defenses and EXPEDITIOUSLY litigate the case
- ▣ Able to view the case from the perspective of:
 - Is there a case?
 - How much is it really worth?
 - How much will it cost?

SUBROGATION

- ▣ Contingent fee = no cost to involve the attorney immediately
- ▣ Work with adjuster assigned
- ▣ Handle expeditiously issues:
 - Of spoliation
 - Taking statements or talk to insured and witnesses
 - Photos
 - Investigation
 - Identifying potential defendants and potential of case
 - Reducing amount of loss
 - Help select experts

SUBROGATION

- ▣ Early involvement allows potential of better result
- ▣ Earlier involved = Earlier resolved
- ▣ Keep costs down
 - Talk to experts before simply having a scene inspection
 - Not depose the entire world
 - Keep costs of experts down
 - Keep travel down