



IN BRIEF

Berman & Simmons Trial Attorneys Newsletter

Fall 2008

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Product Liability

2008 has been an important year for clients in Berman & Simmons' product liability practice. So far this year we have concluded cases involving dangerous and defective products in the following areas:

- Ski Equipment
- Plastic Chairs
- Bolted Joints
- Unguarded Machinery
- Water Park Rides
- Air Bag – non-deployment
- Air Bag – early deployment
- Snowmobiles
- Automobile – stability & handling
- Gas Appliances

Please contact John Sedgewick (jsedgewick@bermansimmons.com) or Ben Gideon (bgideon@bermansimmons.com) if you would like our assistance investigating or prosecuting a product liability case.

Maximizing Tort Recoveries: Getting Clients the Best Possible Outcome

Author: Steven D. Silin, Esq.



Every lawyer wants his or her clients to have the best possible results from their injury cases. While there is no formula for accomplishing that, an aggressive and imaginative case-handling philosophy, properly and thoroughly executed, will enhance the clients' chance for success.

Cases Cannot Be Valued In The Abstract

The proper benchmark for case value is what a jury would likely award for your individual client's injuries, not what other cases "like it" may have settled for. This is true even if the case may settle before trial. Certainly, it is important to know about other verdicts and settlements to have a sense of comparable value, but no two cases are alike. Getting the best value for a particular client requires using judgment to understand what a jury might award to your client, and why.

Thus, to properly value a client's case, an attorney must know every aspect of it, legal and factual, and think about its strengths and weaknesses. Only after the details of the case are considered can its full value be ascertained. Anything short of a full case work up will get the client the "going rate" for similar cases, but not as much compensation as the injuries warrant. *Continued on page 2*

Recreational Vehicle Negligence: Developing the Snowmobile Case

Author: Daniel G. Kagan, Esq.



Snowmobiles are a staple of recreational life and the tourist industry in Maine. While they can be great fun, they can also be highly dangerous. Nine people died and dozens more were seriously injured in Maine snowmobile accidents during 2008. With over 100,000 snowmobile riders expected to use Maine's 13,500 miles of trails this winter, such deadly events are likely to recur.

Helping victims of snowmobile crashes recover damages for their injuries must be approached with care. Counsel must understand the many factors which, separately or in combination, can hinder the safe operation and use of a snowmobile. It is important to recognize the possibility of pursuing product liability theories in such cases, and the problem of insurance coverage gaps that can ruin the outcome of otherwise good cases. Whether the case is to be analyzed as a negligent operation case or a product liability case, the first step is to investigate and be able to prove the conditions which contributed to the crash. Some of the factors likely to be at play are discussed below.

Visibility Issues

Snow, rain and fog can reduce visibility either directly or by causing moisture to build up on the operator's visor or goggles. Warm weather can cause fogging of the visor or goggles. Full-face helmets with visors hinder both hearing and peripheral vision. When snowmobiles travel in a line, a snow plume or "rooster tail" kicked up behind one sled may limit the sight line of the operator behind. The sun's glare can be worse on a white, snowy field than on a highway. This problem can be made worse by scratches on the driver's visor or goggles. Even the color of the visor lens can contribute to visibility problems, as some lenses are better for low light, others for bright light and glare.

Darkness is often an important issue in snowmobile cases, as operators cross frozen lakes and travel twisting, wooded trails at high speed. Maine law requires that snowmobile headlights project 100' ahead and the taillights be visible for 100' behind. Did the snowmobiles have proper illumination? Did they have operating low beams, high beams, taillights? Were their gauges properly illuminated? Sometimes drivers will remove their visor for nighttime operation, leaving their eyes bare. This presents problems, as an operator tends to squint and ones' eyes get watery in the cold, and as speed increases. *Continued on page 3*

Noteworthy



- **Berman & Simmons** received a “highly recommended” rating by *Benchmark*, the Definitive Guide to America’s Leading Litigation Firms & Attorneys as “Maine’s top plaintiffs’ firm.” Also recognized by *Benchmark* as “Local Litigation Stars” were attorneys **William Robitzek**, **Julian Sweet** and **Steven Silin**.
- **John Sedgewick** made a presentation called “Subrogation Success: Thinking Like a Plaintiff’s Lawyer” at Sugarloaf USA on September 22 at the 16th annual conference for Maine’s worker’s compensation community. He encouraged worker’s compensation carriers and employers to think creatively and constructively about third party cases, and to work with injured employees and their attorneys to get the best possible outcome out of every case. There are significant tort cases in the fields of auto collision, product liability and medical malpractice that arise in the workplace. Handled properly, those cases can benefit the comp insurer/employer as well as the injured worker.
- **Jodi L. Nofsinger** spoke at the Maine Trial Lawyers Association in July in Presque Isle and in August in Eastport addressing the concerns about liens in personal injury cases. **Daniel G. Kagan** addressed the Eastport group regarding ethics.
- In August, **Michael Bigos** spoke at a joint (Maine Trial Lawyers Assoc. and Maine State Bar Assoc.) CLE teleseminar on post-trial civil practice, teaching attorneys how to recapture litigation costs, collect pre- and post-judgment interest, and pursue post-judgment remedies.

Maximizing Tort Recoveries: Getting Clients the Best Possible Outcome *continued*

A client’s recovery can only be maximized when plaintiffs’ counsel prepares to go to trial and win. Otherwise, recovery will be limited to what the insurance company thinks it should pay.

Case Workup

Special damages are usually only a small part of the value of a case, but they are, nevertheless, at its core. Even insurance companies’ computerized case analysis begins with objective or “hard” damages, such as medical expenses (past and future), lost wages and impaired earning capacity. Getting compelling admissible evidence on these points as early as possible will enhance the chances of optimizing the client’s recovery.

With the special damages well understood, counsel can turn to the bigger picture: the client’s personal story and how the injuries have impacted his or her life. Indeed, the heart of the case, and its greater value, usually revolves around the intangible aspects of the damage claims: pain, suffering and loss of enjoyment of life. The job of the trial attorney is to know the client well enough to marshal all of the supporting evidence and effectively communicate the client’s personal story. This story, solidly proven and well told, will lead to the best possible outcome for the client.

Factors Affecting Value

There are a number of factors that may either enhance or reduce case value. Positive factors include, of course, having a client who is credible, sympathetic, and able to communicate well. Such clients are able to explain the changes in their quality of life, and the price they pay every day for their injuries. Other positive factors in the case may include helpful family members, lay witnesses and cooperative, supportive doctors. Another factor which may add to case value is outrageous conduct on the part of the defendant. The more purposeful and conscious the defendant’s choices leading to the injury, the more likely it is that a jury will be willing to send a message to the defendant through the assessment of compensatory damages.

Factors which may reduce case value are most likely related to liability. There may be questions of law or fact that make it doubtful that the defendant is liable at all, or questions about plaintiff’s comparative fault.

Non-fault issues such as pre-existing medical conditions and the plaintiff’s age are factors that can either add to or reduce case value. They are often not fully understood, and aggressive, creative counsel will find that such factors may enhance case value by helping to explain the seriousness of the injury. Since it is the change in the plaintiff’s symptoms or the change in quality of life caused by the injury which is the critical factor in determining damages, an older person or one with a pre-existing condition may suffer more than a young and healthy person with the same condition.

Experts

Clearly, qualified medical doctors who are willing and able to testify enthusiastically and supportively are important to a good outcome in any tort case. Part of counsel’s job is to be pro-active in making sure that all of the client’s injuries are being treated and well-documented. Where catastrophic injuries are involved, additional witnesses qualified in life-care planning and economics will be necessary to establish and present evidence of the present value of future medical costs and economic losses. Where liability experts such as accident re-constructionists or engineers will be necessary, it is wise to employ them early. Such experts can assist with both developing and preserving important evidence. While it can be time consuming and expensive to be sure that the right experts are working for the plaintiff, it is impossible to maximize the value of a client’s case without committing the necessary resources to the task.

Alternative Theories Of Liability

Another way to enhance the value of an injury case is to consider the full range of potential claims and to identify all possible defendants. People who furnish motor vehicles to others, employers, manufacturers and distributors of any defective products involved, servers of alcohol, negligent medical providers and underinsured motorist carriers may all be accountable for the damages suffered by the plaintiff. Each of the possible claims should be explored fully and pursued in a way that puts the plaintiff in the best position to make a full recovery.

Conclusion

To effectively maximize the value of a client’s case, an attorney must invest all of the effort and money required to understand and document the case thoroughly, and to prepare the case as if it is going to trial. This level of preparation and the willingness of counsel to try the case to a conclusion will protect the client from the insurance company’s goal, which is to pay as little as possible for the injuries suffered. Clients can only win through careful, thorough case preparation. ■

Terrain is also a factor in visibility. Many trails wind through the woods, crossing water bars and ditches. Others cross public roadways, where snowbanks can make snowmobiles invisible or block the view of their operators. Because snow levels affect the height and pitch of these terrain features and change so quickly, getting contemporaneous photographs and measurements is critically important.

Snow Conditions

Establishing surface conditions is often a critical part of understanding and proving the cause of an injury related to snowmobiling. Slick or icy conditions can both impede forward momentum and increase stopping distances. Such conditions certainly reduce the "reasonable and prudent speed for the existing conditions" mandated by Maine law. The quality of the snow surface also has a critical effect on steering, because the front skis require snow buildup in order to steer. As the skis are turned, the forward momentum of the snowmobile "plows up" a ridge of snow against the leading edge of the ski. This has the effect of pushing the sled away from the snow buildup. In soft snow, the ridge can get high and mushy. In hard, icy, or bare conditions, there will be little or no ridge. This allows the sled to continue forward in a straight line even when the skis are turned.

Another issue closely related to snow conditions is ice on lakes and streams. The State of Maine and private snowmobile clubs issue advisories on the relative safety of the frozen surfaces. If a snowmobile operator ignores this information and leads a novice rider onto hazardous surfaces, he or she may be liable for the injury or death that results.

Human Factors and Operator Fatigue

Snowmobiles are capable of covering long distances over remote terrain. Because snowmobilers can ride for literally hours on end, and because the cumulative toll of having to control a heavy snowmobile, the engine's steady drone, constant vibration, the thrill of speed, the danger of difficult terrain and fighting cold weather is very hard on an operator, trips must be planned carefully. Many snowmobilers are loath to acknowledge their limits, so routes and fuel supplies must be planned carefully. If it appears that fatigue has contributed to injury by slowing reaction time and impairing judgment, counsel should consult with a human factors expert or a medical doctor to determine what parts of the evidence are significant and how to preserve them.

Alcohol and/or Drug Use

Proving that alcohol impairs one's ability to operate a snowmobile safely is accomplished through expert testimony, just as in other motor vehicle cases. Under Maine law, the threshold for intoxication of motorists, .08% BAC, applies to snowmobiles as well. If you do not have a test, you will need to find and preserve anecdotal evidence of alcohol use. With whom was the operator traveling that day? Where had he or she stopped? What had he or she consumed? Did anyone smell liquor on his or her breath? What had he or she done the night before? Was there a party or a good night's sleep? Use of illicit, prescription and over-the-counter drug use must be considered, too. Was the operator suffering from a winter cold? What medications was he or she taking? Do the instructions for the medication warn against operating machinery? It is not hard to prove that cough medicine containing alcohol can cause drowsiness and impaired judgment.

Speed and Competition

Anyone with money or decent credit can walk into a dealership, buy a snowmobile capable of speeds in excess of 80 miles per hour, and head out onto the lake or trail. This virtually unregulated power is part of the sport's attraction, and also the cause of many accidents and injuries. Who was the offending operator riding with at the time? Was he or she part of a pack that was racing and jockeying with one another? What type of snowmobile were the individuals in the pack operating? Do not underestimate the competitive spirit among the operators of these very dangerous toys. How experienced was the operator with the sled he was operating? Was he or she familiar with the area where the accident occurred? Operators who are unfamiliar with equipment or the terrain should proceed with caution, not abandon.

Product Liability Issues

Snowmobile manufacturers are subject to product liability laws, just like other vehicle manufacturers. There have been recalls, both voluntary and government mandated, of steering, braking, throttle, and other systems on snowmobiles. When it appears that product failure or product defect has contributed to injury or death, all of the issues described above must be understood as a part of evaluating the potential products case. Such cases are difficult and expensive to pursue, and expert assistance is usually required from the outset.

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In Other News

■ **Rear-ender Car Accident Verdict**

Jodi Nofsinger recently tried and won a car accident case in Kennebec Superior Court. Her client was rear-ended while stopped at a rotary in Augusta. There was minimal damage to his rear bumper. He was seen by his internist on six occasions and treated for neck pain, back pain and headaches. Total medical bills were \$1,300. Offer from Allstate Insurance prior to trial was \$5,000. Verdict came in at \$21,300.

■ **Slip and Fall Verdict**

Julian Sweet and Susan Faunce won a verdict in Cumberland Superior Court. Plaintiff fell on ice in the parking lot of a Hannaford store and suffered a comminuted patellar fracture. Hannaford refused to accept liability and did not provide any settlement offers prior to trial. After a two day trial, the jury came back with a verdict in favor of the plaintiff for \$85,000.

About the Firm

Berman & Simmons trial attorneys are aggressive, results-oriented advocates who have obtained many of the largest personal injury jury verdicts ever awarded in Maine courts. Each year Berman & Simmons attorneys take dozens of cases to trial, and settle hundreds more. We have the experience, resources and commitment to get clients the best possible result in the full range of injury cases, from the simplest to the most complex.

Recreational Vehicle Negligence: Developing the Snowmobile Case *continued*

Insurance Coverage

Snowmobiles are not covered under auto policies, and snowmobile claims are often excluded under Homeowner's policies. There are circumstances, however, in which HO coverage may apply. For example, a snowmobile used on its owner's premises may be covered. Snowmobiles may be covered under separate liability policies, and there is sometimes coverage under umbrella policies.

Conclusion

Attorneys whose clients are injured in snowmobile-related incidents must be prepared to move quickly to secure the snowmobile itself as well as evidence of snow conditions and other environmental factors that may have contributed to the injuries. Both negligence and product liability theories must be considered early, and a thorough search for insurance coverage is a must. ■

A CLOSER LOOK

Author: Paul F. Macri, Esq.



In *Tolliver v. Department of Transportation*, 2008 ME 83, 948 A.2d 1223, a case involving a pedestrian who was hit by a car on a newly paved road which had no edge (or fog) line, the Law Court addressed two important and related issues: the admissibility of expert testimony and the extent to which an expert can testify on proximate cause.

The plaintiff's road construction expert had previously worked for a paving company which had been a subcontractor for the defendant Department of Transportation.

The expert testified that the absence of a fog line would confuse drivers and pedestrians and that it was important to get the striping done promptly for the safety of drivers and pedestrians. He was also permitted to testify that the lack of an edge line contributed substantially to the accident. The Law Court held that this part of the witness's opinion should not have been admitted because he lacked the foundation necessary to offer an opinion about the cause of the accident. He could testify that the lack of an edge line was a possible cause but not that it was a substantial factor and therefore a proximate cause.

The Law Court also concluded that the erroneous admission of this testimony was not harmless because there was no other evidence of proximate cause. The Law Court analyzed both elements of proximate cause, substantiality and foreseeability. It found that plaintiff's evidence demonstrating the purpose of the edge line and describing the process of tracking whereby a driver or pedestrian uses markers in the road to help stay in the proper line of travel went only to foreseeability and not substantiality. Thus, while plaintiff proved that injury was a foreseeable result of the lack of an edge line, it would be speculation for the jury to infer that its absence actually caused the accident because the plaintiff himself was unable to testify as to the circumstances of the accident because he had no memory of it, and no experts concluded that the absence of an edge line substantially contributed to the accident.

This is at least the second recent case in which the Law Court has vacated a judgment for plaintiff based on a finding that there was insufficient evidence of proximate cause. *Merriam v. Wanger*, 2000 ME 159, 757 A.2d 778 is the other. In both cases, the Law Court analyzed the evidence in much the same way as a fact finder would, although it couched its analysis each time in terms of the legal elements of proximate cause.¹

This is a troubling trend, reminiscent of the days when the Law Court would set specific damage amounts in personal injury and wrongful death cases when it disagreed with the jury's award, rather than remanding the cases for a new trial. Appellate judges may frequently be tempted to substitute their judgment for that of a jury rather than simply to determine whether there is some evidence supporting the verdict. Under our system, however, appellate courts have limited powers and jurisdiction. Juries find the facts and courts determine the law. That system has worked well over the years and should be honored. The more an appeals court weighs evidence or addresses credibility, the less predictable and more arbitrary its decisions will become and the less trust will be placed in those decisions by the people the system is supposed to serve. ■

¹ The Law Court also decided a third issue involving the interpretation of the Maine Tort Claims Act. The issue was whether scheduling and actually painting lines on the highway were discretionary or ministerial functions. The Law Court, with two dissenting votes, held that they were ministerial because they were implemented on a day-to-day operational level and did not involve making governmental policy decisions or judgments.