

10 Tools for Pounding Allstate in the Auto Case

By Albert G. Stoll, Jr.

Here are ten ways to pound Allstate in the automobile negligence case.

1. Case selection, get the bad news about the plaintiff before Allstate.
2. Don't let Allstate dupe the plaintiff during discovery.
3. Get Allstate's extreme positions verified during discovery.
4. Pare down the plaintiff's claim.
5. In voir dire distinguish yourself and the plaintiff from the juror's stereotypes.
6. Opening statement - why are we here?
7. Your first witness is the defendant.
8. Preparing the plaintiff for cross -examination.
9. Direct examination of the plaintiff.
10. Destroying Allstate's self proclaimed injury causation expert.

1. Case selection, get the bad news about the plaintiff before Allstate.

As the attorney working on a contingency fee and advancing litigation costs it is important to know all the bad news before you accept the case. Prior to accepting what may seem to be a straightforward case slow down and take the following steps.

First, with an authorization have a copy service copy the last 10 years worth of employment records from your client. Regardless of whether or not there is a wage loss claim it is important to know if your client has a good work history. Clues to a person's character may be visible if a person is not able to hold down a steady job. Does your prospective client file claim after claim for various reasons or do employers give glowing performance reviews? Have there been prior back injuries that have affected work performance?

Second, collect the life long medical records of the plaintiff. You can ask the plaintiff if they have any prior neck and back complaints and nine times out of ten they will get the question wrong. The only way to refresh the plaintiff's recollection about the one time they slept on their neck wrong and went to the emergency room is to show them the medical record.

Third has the prospective client had any psychotherapy? If so get the records, review them, and find out what the therapy was for. It is better to be aware of prior psychotherapy before the lawsuit is filed then to first learn about it at the plaintiff's deposition.

Fourth if there are any prior claims go get the documents. Get the file from the workers compensation lawyer or the prior plaintiff's attorney. Read the interrogatories from the prior cases so you have an understanding of the types of prior claims that were made. If there were prior med pay claims or a prior underinsured motorist claim obtain the records from your client's insurance company. We all know these records will be requested once litigation starts. It is smart to know what is in the records so you can take action to prevent their discovery when appropriate.

Once you have collected and reviewed all of these records you will have a pretty good idea of the history of your client. Now you can intelligently decide whether you want the case or not. Do you represent a person with a good character or do you represent a person with a flimsy character who has a propensity to blame others for their problems. Once you have all the records you will be able to refresh your client's recollection about events in the past that

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will be investigated during the litigation. You will be able to protect the plaintiff from themselves.

2. Don't let Allstate dupe the plaintiff during discovery.

The single most common way for a plaintiff's injury case to be lost is while the plaintiff is on the stand being cross-examined. The process of minimizing the damage during cross-examination starts with the preparation that is done before the case is filed, interrogatories are answered and the plaintiff is deposed.

The Holy Grail for the insurance company lawyer at trial is to highlight inconsistent statements by the plaintiff. Before the plaintiff answers interrogatories or is deposed they must be made aware of all the prior statements attributed to them in any kind of written record. When interrogatory and deposition questions are answered they must be prepared to testify consistently with the statements attributed to them in the medical records, employment records, prior injury claims, prior depositions, and police reports.

Before discovery starts show the client where the danger lies in the written record. The prior medical records, medical questionnaires, doctor intake forms, prior personal injury complaints, and prior workers compensation claims all contain statements that can be attributed to the plaintiff during cross-examination. The plaintiff must review the written records and be prepared to testify consistently. Schedule two separate meetings with the plaintiff before their deposition to go over the statements attributed to the plaintiff in the written record.

3. Get Allstate's extreme positions verified during discovery.

Allstate has learned that the way cases are defended is to develop a case that shows how unreasonable plaintiff's claims are. The Allstate attorney will know how to take complete advantage of an exaggerated wage loss claim. If your client has the misfortune of being treated by a chiropractor that charges \$150 dollars per visit for 12 months on a lien get ready to be pounded. We can learn from Allstate's ability to capitalize on exaggerated claims. The answer is for the plaintiff to highlight Allstate's exaggerated claims on injury causation and liability.

Allstate will give you every opportunity to highlight Allstate's unreasonable positions. In most auto cases Allstate will not admit that the collision caused any injury. They want a defense verdict on causation. Allstate's brazenness creates a wonderful opportunity for you to set up Allstate during discovery using request for admissions and the 16 series from the Judicial Counsel form interrogatories.

The purpose of serving requests for admission is to be able to explain to the jury the reason they have to sit through the trial. After you read Allstate's request for admission answers into the record where Allstate denies responsibility for the emergency room bill on the day of the collision the jury will begin to see Allstate's unreasonable positions.

Here are five requests for admissions that will usually be denied.

1. Admit that the collision was a cause of injury to plaintiff.
2. Admit that the collision was a substantial factor in bringing about harm to plaintiff.
3. Admit that as a result of the collision plaintiff sustained a cervical strain.

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4. Admit that as a result of the collision plaintiff sustained a headache.
5. Admit that plaintiff's visit to Summit Medical Center on January 4, 1995 was reasonably required to treat injuries plaintiff sustained in the collision.

If these requests are not unequivocally admitted or denied immediately send a meet and confer letter. Allstate may object that questions about legal cause call for an expert opinion or are not within the personal knowledge of the defendant. However courts have held that a party may not refuse to admit or deny matters set forth in a request for admissions merely because they lack personal knowledge, if the means of obtaining knowledge of the fact are reasonably within his power. International Harvester Co. v. Superior Court of Shasta County (1969) 273 Cal.App.2d 652. Moreover, a party without personal knowledge is required to make a reasonable investigation, so that admissions or denials can then be made on information and belief. Lindgren v. Superior Court of Los Angeles County (1965) 237 Cal.App.2d 743.

In a case where a customer sued a drug company, the California Supreme Court addressed the issue of request for admissions pertaining to complex facts as follows:

"That the request is for the admission of a controversial matter, or one involving complex facts, or calls for an opinion, is of no moment. If the litigant is able to make the admission, the time for making it is during discovery procedures, and not at the trial." Cembrook v. Superior Court (1961) 56 Cal.2d 423, 429. (Emphasis added).

Requests for admissions are not limited to matters within personal knowledge. The responding party has a duty to investigate the facts before answering a request for admissions. Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App.4th 618, 634. If a party then denies an obvious truth, that party cannot be forced to admit that fact, but is then subject to sanctions pursuant to CCP section 2033(o).

Allstate's attorney may respond that "the responding party does not have sufficient information and belief to admit or deny this request." This boilerplate response does not follow CCP section 2033(f)(1)(c);

If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter.

In your meet and confer demand that Allstate use the language from the code. Most of the time Allstate has hired an accident reconstructionist or biomechanic expert early in the litigation or during the claims stage who says the likelihood of injury is nil. In reality Allstate has investigated the facts and paid an injury causation expert to say there is no causation, so make Allstate put up or shut up with a request to admit that the collision was a substantial factor in causing an injury.

In my experience when you depose the doctor chosen by Allstate they will testify the collision was a substantial factor in causing an injury, it was just very minor and would have healed in a few weeks without seeing a doctor. Remember if Allstate denies an obvious truth, here legal cause, Allstate's insured is then subject to sanctions pursuant to CCP section 2033(o).

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4. Pare down the plaintiff's claim.

The stereotype many jurors have about injured people and their claims is that they have come to court to try and get something they don't deserve. The plaintiff is probably being unreasonable. Many jurors feel that plaintiff's are trying to reward themselves by suing the poor person who bumped into them from behind. An overblown wage loss claim or excessive testimony about all the activities the plaintiff can't do anymore fit the jurors stereotype. If you present your case in a conservative manner stripping down the claims to a bare minimum it will have two effects:

1. The defendant won't have as much to find fault with your client.
2. The jury will believe the plaintiff is looking to be compensated not rewarded.
3. Greater general damages will result and more than offset the reduced special damages.

One school of thought is that there is a direct relationship between special damages and the amount of general damages a jury may award. The greater the special damages the greater the general damages? Don't assume this is always true. In fact just the opposite may be true; an overblown wage loss or an excessive amount of treatment gives the defendant the arguments the jury is waiting to hear. The jury's stereotype about the plaintiff is that they have an overstated claim and are trying to get money they do not deserve. Do not toss the defense lawyer a home run pitch; limit flimsy economic loss claims.

5. In voir dire distinguish yourself and the plaintiff from the juror's stereotypes.

Overlooking jury selection in the small auto case is a huge mistake. During voir dire the plaintiff lawyer has to neutralize 30 years of insurance industry dogma about the evil characteristics of people who sue for pain and suffering from a fender bender. To accomplish this feat the lawyer has 20 to 30 minutes and can only ask questions. Here is how to accomplish the feat.

One goal is to neutralize the stereotypes about lawsuits and pain and suffering awards. The second goal is to neutralize the fact that there is such a small dent in your client's car, yet a significant injury is being claimed as a result.

Here is a dialog you can start with the jury to deal with negative stereotypes about personal injury cases.

I am a personal injury attorney. I am very proud of the work I do. From time to time I am able to truly help out a person. I understand that many of us have very negative feelings about personal injury attorneys, do any of you have negative feeling about personal injury attorneys? Tell me how you feel? Some of us hear the term ambulance chaser, have any of you seen me in the emergency room trying to get cases?

The last line will cause all the jurors to laugh. You have just subtly established the absurdity of the ambulance chaser stereotype and separated yourself from the jurors picture of an ambulance chaser.

Many of the cases Allstate forces to trial may be characterized as minor injury cases. A person is rear-ended, gets some therapy for two to three months and recovers completely. If this is the case I recommend the following line of questions during voir dire:

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1. This is not a case where my client has an expectation of recovering millions of dollars. In fact this is a relatively modest claim. Do any of you think that a person must suffer life threatening or catastrophic injury before they can come into court and ask to be compensated?
2. Do you think that someone with a less than critical injury should not be entitled to compensation?
3. Do you have a problem with a system of civil justice that allows a person to be compensated in a minor automobile accident?
4. Do you think that people with less than critical injuries should suffer in silence?

One of the problems plaintiffs have in the small auto case is that the defendant is usually an individual. Allstate marches their insured into court and they dutifully sit next to the Allstate lawyer. Most of the time there is no way the jury is going to find that the defendant is a bad person who should be punished for a minor fender bender. Here is a dialog to deal with this problem.

This case is what is called a negligence case. My client has to prove that the defendant was negligent and that that negligence caused an injury. We do not have to prove that the defendant is a bad person. In fact I will represent to you that the defendant is a very good person who would make a good neighbor to any one of you. Does everyone understand?

From here it can only get worse for the defendant. You have also shown the jury that you are a compassionate person who is not out to get the defendant.

A big problem the plaintiff lawyer faces in most auto injury cases is that on first glance the damage to the cars looks very minimal. The plaintiff lawyer must prepare the jury for the defendant's opening statement when they pull out the blow up of your client's bumper that does not have a scratch. Here is how it is done?

Sally was in a collision where nine times out of 10 no one is hurt. Do any of you believe that there is always a direct relationship between the amount of damage to a car in a collision and the amount of injury to an occupant?

The jurors will respond, "No I don't believe there is always a correlation between the dent and the amount of injury." The prospective jurors will talk about their friend who was in a very violent collision and not injured or a family member who was in what seemed to be a minor collision yet they were severely injured. Continue the discussion with the following question:

In this case there was no damage to my client's bumper. Do any of you believe that because my client's car was not damaged that it would be impossible for her to be injured? What else about the collision would you want to know?

The jurors will respond in many different ways. Some will say cars are built very sturdy. The jurors will want to know thing like how the collision happened, was the plaintiff aware of the impending impact, did she brace, what happened to her body on impact, what do the doctors say, and how was she positioned when the impact occurred. By telling the jury in voir dire that there was no dent from the collision you have just neutralized the defendant's main argument. No dent no injury. We all know that is not true. Don't hide from the small dent in the plaintiff's car, embrace it and you have a much better chance of winning.

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6. Opening statement - Why are we here?

Three points about opening statement in the auto case. First the theme of your opening is the unreasonableness of the defendant.

In this case the defendant does not want to take responsibility for crashing into my client from behind without any justification. Through his attorney and a couple of smooth expert witnesses the defendant is denying all responsibility for this collision. They deny the collision caused any injury to Sally. What does this mean? It means that the defendant is not willing to be held accountable for the cost of my client being checked out in the emergency room just hours after the collision. The defendant does not believe they are responsible for any of the follow-up visits my client had with her primary care doctor. The defendant's position is clear. He broke the rules of the road, but does not want to be held accountable.

In order to avoid responsibility for the harm that was caused the defendant's attorney has hired two very seasoned expert witnesses who are hired over and over again by the defense attorney's law firm to say the same thing in court cases like this. This very smooth expert witness will testify that he rear ended himself in a similar collision and was not hurt, he therefore concludes that if he was not hurt, Sally could not have been hurt either.

Keep in mind you will find the defendant's expert very impressive. He is a highly educated engineer with impressive credentials. He is a nice person and speaks well, but just because he was not hurt when he rear-ended himself does not mean that Sally was not hurt.

In voir dire establish that sometimes people are hurt in automobile collisions and sometimes they are not hurt. It is impossible to predict a given probability of injury from any given collision. Many people are involved in violent collisions and walk away, and sometimes people are in what seem to be minor accidents, yet walk away with serious injuries. Defendant's smooth expert witness is not able to prove after the fact whether the plaintiff was injured or not.

7. Your first witness is the defendant?

Your objective is to focus on the defendant and their weaknesses. Let the jury second-guess the defendant before they are allowed the chance to second-guess the plaintiff. The first witness is the defendant. Have the defendant explain how his foot slipped off the brake pedal causing him to roll into the plaintiff's car. Then introduce the defendant to his verified request for admissions, which deny that the plaintiff's visit to the emergency room was reasonable. Let the jury figure out for themselves that this is an unreasonable position to take in a clear rear end collision case. The defendant did not follow the rules of the road and does not want to take responsibility. Keep the testimony pointed at the defendant's weaknesses not the plaintiff's weaknesses.

The plaintiff's strengths are slam-dunk liability and a defendant that is denying causation. The plaintiff's weaknesses twofold:

- Proving an injury that is heavily dependent on what the plaintiff says; and
- A plaintiff that is often times very easy to impeach with inconsistent statements culled from the police report, life long medical records, and the plaintiff's deposition.

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Do not allow the defendant the opportunity to focus the issue on the plaintiff's weaknesses. If the main focus of the trial is about plaintiff's inflated treatment, and inconsistent statements, get ready for a defense verdict!

Call the defendant first and then call the defendant's biomechanic expert second. Keep the focus on the defendant's weaknesses. Have the defendant's biomechanic expert discuss his relationship with the defendant's law firm and how his opinion is based primarily on the fact that he rear ended himself and was not injured so the plaintiff could not have been injured.

Here is the trap that is easy for the plaintiff to fall into. If we tell the jury in our opening statement about the grave damages the plaintiff has suffered and how her treating doctors will explain how and why she was injured we are making a big mistake. If we follow the opening statement up with the plaintiff as the first witness and the treating doctor as the second witness we are compounding a grave mistake. The trial has begun by giving the defendant first crack at exposing the plaintiff's weaknesses.

At this point instead of hearing the defendant try to explain how slight the impact was and how the emergency room bill was not his responsibility, and all about the crooked defense biomechanic expert the jury will hear the best part of the defendant's case first. They will have heard about all of the plaintiff's inconsistent statements, all of her daily activities that are inconsistent with a back injury, and through the treating doctor how his opinion is based solely on what the plaintiff has told him. The result is a defense verdict. You just gave the jury all the information they need to second guess your client who has the burden of proof and who they suspect is probably trying to make money on a lawsuit. Start the trial by spoon feeding the jury the evidence they need to second-guess the defendant's case before they can second-guess the plaintiff's case.

The effect of focusing the early testimony on the defendant and the defendant's weaknesses will have a devastating effect on the defendant. The jury will second-guess and be critical of the defendant's claims and forgive a few inconsistencies from the plaintiff. The result is a fair verdict.

8. Direct examination of the plaintiff

Your client is the last witness. If your client goes last there will not be much the jury has not already heard. This allows for a very short direct examination. The goal of the plaintiff's direct is to limit the cross-examination. The shorter the direct exam the shorter the cross-exam. I recommend thinking of your client's direct examination as a short personal introduction of the plaintiff to the jury. Just ask enough questions to give the jury a good impression and sit down. Where do you work? What are your responsibilities at work? Are you married? What are your responsibilities at home? This can be done in about 10 minutes. The defense lawyer will not know how to react. Allstate's lawyer will have prepared a two hour cross-examination and will be confused when you get up introduce your client and sit down. Before you know it the cross-examination will be over and your client will have their credibility intact.

This approach is beneficial for one very important reason. A short direct encourages a short cross-examination. In the small auto case with a neck or back injury the plaintiff can easily lose a great deal of credibility while being cross-examined. The circumstance of a back injury from a car accident lends itself to a very harmful cross-examination.

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It is very difficult to protect the plaintiff from all of the prior statement culled from two years of medical records. A notation in the physical therapist records that the client had an aggravation of her injury after picking up a toolbox ten days after the collision can be devastating. A note in the medical record that states, "Today pain free" can be transformed into a cutting cross-examination question. For example, the defense lawyer may state, "Let me get this right, after two weeks you told your treating doctor that you were completely pain free? The more of this type of questioning that can be avoided the better.

The automobile negligence case is very different from a toxic tort, insurance bad faith or product liability trial where there is often some very bad conduct by the defendant. The egregious conduct by the defendant makes it difficult to attack the plaintiff on cross-examination. It also makes it easier for the jury to forgive a few inconsistencies by the plaintiff. In the automobile negligence case the conduct by the defendant was an accident, there is no evil conduct to take the pressure off of plaintiff's credibility. The opposite is true with many jurors who believe the individual defendant is the victim and the plaintiff is trying to make some money by inflating a minor back sprain.

9. Preparing your client for cross-examination

Once you are completed with you ten minute direct examination all is lost unless you prepare the plaintiff for the next exercise, cross-examination. The cross-exam of the plaintiff is the most critical stage of trial. Surviving cross-examination is a prerequisite to a fair verdict. Here is how to get the plaintiff ready.

The plaintiff must understand the mechanics of a leading question. Explain to them how most of the questions they will be asked will call for a yes or no answer. Explain to the plaintiff how most of the questions they will be asked will be taken directly from a statement that can be attributed to them from their medical records or deposition. A good leading question cannot be avoided with a clever answer. Explain to the plaintiff how they will be impeached if they do not agree with the questioner. The, "I don't recall" answer will be followed up with the damaging medical record being shoved in front of their face, which will awaken the jury from their post lunch food coma to watch your client wither on the stand. Cross-examination is essentially a speech in the form of questions, it is painful to listen to, but much more painful when it is resisted. Just let it happen and get it over as quick as possible.

Prepare a binder that has all of the damaging medical records and prior statement indexed and highlighted by date so that the plaintiff can become familiar with where the arrows will be coming from. Take the medical record that states, "Today pain free" and show your client how a cross-examination question can be crafted by the defense lawyer. Discuss how the plaintiff will respond to the question, "After two weeks you told your treating doctor that you were completely pain free, correct?" Explain to your client what will happen if they say that is not accurate. The defense lawyer will show them the medical record and ask if this medical record refreshes their recollection that after two weeks you told your treating doctor they were completely pain free. A simple yes while the jury is half-asleep is much less damaging than a debate about the accuracy of a quote from the medical records. If the plaintiff is defensive get ready for a defense verdict. If the plaintiff is straightforward they will make a better impression.

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10. Destroying Allstate's self-proclaimed injury causation expert

There are four steps to destroying Allstate's injury causation expert. First, take the biomechanic experts deposition with the goal of excluding his opinion on legal cause at trial based on the *Kelly* test. For the good of the plaintiffs' bar forward the deposition transcript to www.depoconnect.com so that all plaintiff lawyers have access to the transcript in the future. The expert will conclude that the plaintiff could not have been injured. The bottom line is that the only method used is to compare staged collisions that other people have been involve with to the plaintiff's collision. If you would like a sample motion to exclude the injury causation expert along with sample deposition questions e-mail me at astoll@stoll-law.com and I will forward them.

Second, if you lose your motion to exclude, neutralize the injury causation expert's opinion during voir dire. Tell the jury that your client was in a collision where 9 times out of 10 no one is hurt. Tell them there was a very small dent in her car from this collision and then discuss the relationship of property damage to damage to the person. Ask the jury if they believe there is always a direct relationship between the amount of damage to the car and the amount of injury to the occupant. You will find jurors do not believe there is a direct correlation between damage to the car and damage to the person.

Step three is to neutralize the injury causation expert in your opening statement. Tell the jury how the defense has an expert who has rear ended himself and not been hurt. As a result he will testify that the plaintiff could not have been injured in this relatively minor collision. All the jurors will understand the absurdity of that position. Make it very clear in opening statement that the defendant's injury causation expert has a close relationship with the defendant's attorney because he testifies over and over again for the defendant's law firm. He always says that people cannot be injured in a rear end collision unless there is a large dent in their car.

Step four is optional but effective. Call the defendant's injury causation expert as your own witness. Ask him about all the work he has done for the defense attorney's law firm in the past. Ask him about when he rear-ended himself. And ask him if his experimental rear endings form the basis for his opinion that since he was rear-ended and not injured that the plaintiff was not injured. Buy the time he gets to explain his real opinion he will have lost credibility in the eyes of the jury.

Conclusion:

In order to consistently win these cases in the new millennium it takes a wholesale reappraisal of what lawyers have done in the past. Telling the jury how bad the injury was and what a drastic effect it has had on your client's life is not effective. What is effective is to make the trial a fight about issues where the plaintiff has the strongest positions. If the primary issue at trial is whether the defendant is responsible for the emergency room bill on the day of the collision the plaintiff will win. If the trial is about whether or not plaintiff over treated or has an overblown wage loss the plaintiff will lose. Good luck with your next case against Allstate.

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