Mediating motorcycle personal-injury and products-liability cases

Issues of comparative negligence typically abound when a motorcycle is involved

By Dave Rudy

The motorcycle death or injury case presents a number of challenges on the plaintiff's side. Some apply uniquely or differently to motorcycle cases. Some are common to all serious injury and death cases. Motorcycle products cases present issues typically similar to other types of products-liability cases.

The injury or death case

In many respects, mediation of a motorcycle injury or death case is similar to any catastrophic injury or wrongful death case. The elements of negligence, causation and damages are still the basic building blocks of evaluation, settlement and trial.

What is different is that issues of comparative negligence typically abound in motorcycle cases. And a negative predisposition by the public to motorcycles – sometimes subtle, sometimes not – becomes a key factor in determining reasonable settlement value and assessing litigation risk. The fact that jurors (and judges, and lawyers, and claim representatives) sometimes have preconceived negative ideas about motorcycles and those who ride them can easily and quickly become significant to both settlement and judgment. Any plaintiff's lawyer who handles motorcycle cases (or defense lawyer or claims representative, for that matter) is intimately familiar with the problem. A significant component of it is trial-related and requires adjustments, especially in jury selection. This article is limited to discussion of the problem in settlement, rather than trial.

Identify the issue[s]

Like any other genre of litigation, motorcycle cases do not present as "one size fits all." There are significant differences in possible comparative negligence issues, which obviously affect settlement strategy. For example, having a motorcycle passenger as plaintiff is different than having the motorcycle rider. A weekend recreational motorcycle rider with a helmet and appropriate safety gear will likely present differently than a full-time "biker" who rides without helmet or other safety gear. A dirt-bike racing case involves very different discussion than a freeway case. A chopped Harley will likely present differently than a BMW or Honda cruising model.

Acknowledge the issue

The best-negotiated results are obtained when plaintiff's counsel acknowledges the issue and specifically addresses it in the negotiation. Denial of a litigation risk does not eradicate it. Indeed, denial of a known and obvious litigation risk usually undermines credibility with the other side. Part of the mediator's job (assisted by counsel for plaintiff) is to present the risk to defendant in its strongest light. If plaintiff's credibility is diminished, convincing the defense of greater exposure becomes far more difficult. In most cases, credibility issues lead to lower settlement offers. Of course, we are not referring here to typical credibility issues of plaintiff individually as a witness, but to the "credibility" of the case as a whole.

Acknowledgement of any risk in settlement negotiation without a plan to address it is a confession of weakness which adversely affects settlement value. Admitting the risk by itself, will tend to harm, not help, your settlement position. Equally important to owning the risk is demonstrating that you are able to deal with it at trial. Whether you plan to minimize trial risk through a human factors expert's testimony, through voir dire, utilizing techniques that have proven successful for you in previous jury verdicts, or in some other manner, disclosure of that plan *to some extent* will help to offset the presumptive reduction in settlement value. Of course, any tactical information provided in negotiation should be carefully and thoughtfully timed and presented so as to maximize its benefit and minimize the risk that the whole exercise is for the benefit of educating the other side instead of improving your settlement position.

The bottom line here is that a Rambo-like refusal to acknowledge the issue is likely to harm rather than help the offer your client receives. This writer suggests that a critical part of your *mediation* preparation is to determine what your *trial plan* is, and how and when and under what circumstances you will be prepared to reveal all or part of it in negotiation. A critical part of the mediation session is to work collaboratively with the mediator to maximize impact and minimize risk in negotiation.

Helpful witness testimony

In many cases, the best time to mediate is at completion of the *smallest* amount

of discovery necessary for both sides to fully evaluate the case. Often, pre-mediation discovery does not include third-party witness depositions. In a motorcycle case however, consider taking favorable third-party witness depositions prior to mediation. The negotiation benefit should far outweigh the added cost. Favorable testimony from an independent witness may go a long way to dampening the special risk in a motorcycle case.

In an appropriate case, consider going even further. In a recent mediated settlement of a complex wrongful death and serious personal injury case, plaintiffs' counsel took an unusual step. An entire mediation session was devoted to plaintiffs' human factors and motorcycle experts making a direct presentation to the defense, giving a "preview" of what that expert testimony would be. Alternatively, a short video clip could be presented, as in some "day in the life" movies where there are excerpts from physicians showing resolution of key medical issues. Of course, you must always weigh the negotiation benefit of such disclosure against risk of a better-prepared opponent.

In sum, preparation for mediation in a motorcycle case should include, at a minimum:

• A plan for handling motorcycle-adverse attitudes at trial

• A plan for limited disclosure of otherwise tactical information (that portion of your trial plan) in order to gain credibility and persuade the defense that the "motorcycle problem" is under control and therefore that the risk to defendant and case value are greater.

Expert testimony

Accident reconstruction is often a large part of the dispute in motorcycle cases. For trial purposes, the ideal reconstruction expert is one who is well-qualified, is thorough in her analysis, withstands cross-examination and is likely to make the best impression on the jury. For settlement purposes, the desired attributes are significantly different, but obviously the impression to be made is on the defense and not the jury. The purpose is to raise the defense evaluation of the case insofar as possible.

Defendants (especially insurers) do not evaluate what has not been presented to them. The more they know about your expert, his background, experience and track record, the more they will take that into account in evaluating the case. The more they understand his analysis (even tentative, pre-disclosure analysis) and its bases, the more they can evaluate the risk that he will be persuasive at trial and therefore increase the settlement value of the case.

As with other disclosure decisions, the more you tell, the less surprise you maintain until later. If you are holding surprise for trial, the decision is more complicated. But if you are holding surprise for later in discovery, when experts are disclosed and deposed, then disclosure might weigh more heavily in favor of settlement (early disclosure) than trial tactics (keeping information confidential as long as possible, trying to keep the defense expert guessing, etc.). The most successful plaintiffs' lawyers think carefully about disclosure as part of settlement mechanics, and especially in the context of mediation, where the privilege is strongest. They weigh the loss of tactical advantage with the probability of an increased settlement offer and make thoughtful decisions.

Consider disclosure (whether of specific evidentiary information or of issues and how they will be addressed) *before, not during,* the mediation. Insurers are virtually unable to respond on the fly to new information received at the mediation. If you expect multiple mediation sessions and want to deliver information carefully and through the presentation abilities of an experienced mediator, then the early mediation session is undoubtedly the best occasion for the disclosure. If, on the other hand, you expect one session of mediation and don't need a mediator to communicate the disclosure, you should seriously consider doing so well in advance of the mediation, to give opposing counsel time to evaluate and report and the insurer time to digest and develop settlement authority consistent with the new information.

Mediator: Subject matter or skill set

It is always helpful to retain a mediator with some subject-matter experience. But it is definitely not desirable to prefer a mediator with more subject-matter expertise to one with better mediation skills. In the specific context of a motorcycle case, it is certainly better to have a mediator who understands something about motorcycles, has experience dealing with the special aspects of motorcycle cases, and is familiar with attitudinal issues and how they play out in mediation. But far more important is the mediator's "skill set." A mediator you can trust and with whom you can work will best serve your client. Most importantly, retain a mediator who can most effectively bring home to the opponent the strengths of your case and your trial management skills and strategy.

The motorcycle products case

The same attitudinal risk issues are typically present in the motorcycle products case as in the personal injury case. But since the motorcycle manufacturer will focus even more on the plaintiff and her driving, the attitude of prospective jurors becomes a potentially helpful issue to the organization of the products' defense.

Where the manufacturer starts

Products' manufacturers almost universally share the belief that a lawsuit against them is essentially a direct attack on the reputation of the product at issue. It is an attack that every manufacturer will resist forcefully. Manufacturers of common products like motorcycles expect to get sued. They also plan to try cases. The question for them is: "is this a case to

try, or a case that if possible should be settled?" Note that the question is different for the self-insured manufacturer than for the liability insurer, for whom every case should be settled if possible, but at the right price.

The manufacturer's decision with respect to your motorcycle case turns on several factors:

- How good is your technical case?
- How much do you know about the technical aspects of design and manufacture of the motorcycle or component?
- How good are your experts?
- How serious is the threat that after their forceful defense, you and your experts can convince the judge/jury that the product is defective when used in a foreseeable manner?
- Do the facts of this case *commend* the product in any way?
- How much does the manufacturer have to talk to the jury about with respect to driving, use of safety equipment, care and thoughtfulness in the management (including maintenance and repair) and driving of the motorcycle?
- What are the dollars at stake and what is the jury likely to award if the plaintiff wins the case, all adjustments and discounts included?

Notice that the dollar valuation of "exposure" to the defendant, while relevant to the analysis, is not the first or most critical factor on the list. Contrast this with the thinking of the liability insurer, for whom exposure valuation is often the most critical part of the process.

Experienced products' plaintiff counsel understand that the conversation will be very different with the manufacturer than with other liability defendants. Often, the conversations in negotiation will differ radically from one defense room to another because of this.

Identification of the defect

A major issue for virtually all product manufacturers is the frequent reluctance or even refusal of counsel to provide a concise statement of defect(s). Products' cases are inherently technical. The defense of them will almost always include a significant technical component. In order to get into settlement ranges beyond "nuisance" or "cost of defense" dollars, virtually every product manufacturer needs to be convinced that plaintiff has a presentable technical argument, backed by competent technical testimony that has a reasonable chance of prevailing at least some of the time. As noted above, manufacturers are sensitive to lawsuits as attacking the reputation of their product. On a bad day for them, that reputation can be grievously harmed by a significant plaintiff judgment. There is more at stake than just the payment of a products' liability judgment.

On the other hand, almost no manufacturer will agree to a significant settlement solely to avoid the risk of a jury. Product cases are usually overseen in great detail by claims' counsel, who become intimately involved and familiar with all of the technical (and other) aspects of the case. Significant settlements are typically only paid in cases where the manufacturer is convinced that the plaintiff has the knowledge, preparation and evidence to be able to meet the technical case which the defense will mount. Unlike the typical personal-injury case, a motorcycle manufacturer in a products' case should be expected to vigorously mount its own technical case, pro-actively. In other words, the product defendant will probably seek to validate the design and manufacture of its product – to counteract any perceived reputational slur – even if the defense preparation goes beyond what the plaintiff may claim about the product.

Plaintiff counsel's task is more difficult in light of the fact that the manufacturer, before it pays for complete expert workup in the case, has virtually unlimited access to all relevant technical information. The defense has access throughout the case and at low cost to all of the research, development, design history, engineering and manufacturing resources involved bringing the particular brand and model of motorcycle to market.

This is a complex problem for plaintiff to manage in negotiation. Plaintiff has to be sufficiently prepared to identify the defect by the time of mediation in order to have fruitful settlement discussion. Complete workup of the case by experts prior to mediation may be financially undesirable. Yet, it is almost impossible to have a successful products mediation without enough involvement of plaintiff's principal experts to present a credible threat to the manufacturer on the technical side.

When do you show your cards?

Even with adequate technical preparation, how, what and when to disclose remain tricky issues for plaintiff. On the one hand, it is rarely wise or productive to present an "open book" to your opponent. There is serious risk that the mediation may be more productive as an information-gathering session for the other side than as a means to an effective settlement. On the other hand, playing the cards too close – for example, refusing to even identify the defect(s) – is likely to ensure a mediation which results in no productive settlement offer, or no offer at all. Maintaining that the motorcycle is defective because the plaintiff reasonably expected that it would behave in a manner which did not produce the injury is not the equivalent of identifying the defect. Navigating the mediation strategically requires not only skill of counsel, but thorough and thoughtful preparation. Making the strategy effective in the negotiation requires, in addition, selecting a mediator you can work with, and working with the mediator you select.

Major motorcycle manufacturers are willing to spend large dollars to defend the reputation of their bike. In one mediation, the lead rider was killed allegedly as the result of a design and/or manufacturing defect in the fork. His companion was seriously injured when he collided with the lead rider's motorcycle after it came to rest in the middle of the road. In order to prove that decedent's driving rather than the motorcycle was the cause

of the death and catastrophic injury, the manufacturer had commissioned construction on private property of a long section of roadway identical to the one in question on which to conduct numerous tests. The cost of the roadway copy, testing and associated expert workup was estimated to cost at least several hundred thousand dollars. Nor will the dollars the defendant is prepared to spend to defend the case be offered to the plaintiff in lieu of trial. Product defendants are inevitably concerned about the "precedent" of encouraging more lawsuits by getting a reputation for payment based on cost of defense as opposed to merits.

Selection of the mediator

In the motorcycle products case, subject matter experience is probably more important than in many other types of cases (including the motorcycle injury/death liability case). Nonetheless, it remains the case that mediator skillset is more important than depth of subject matter experience.

Indeed, it is not putting too fine a point on the matter to suggest that the critical "subject-matter" qualification for a motorcycle products' mediator is the ability to understand and work with the technical case, more than specific experience in the precise technical area at issue. In other words, experience in dealing with forensics and the ability to understand the technical aspects of the case are preferable to experience with particular defects in particular motorcycles. From reality testing to developing mediation strategy, you need a mediator you can work with, who can understand and advocate for your technical case as well as the other points at issue. In the other room, you need a mediator to whom the defense will listen as the technical "threat" is being presented. In summary, select a mediator with whom you are personally comfortable and who understands enough about forensics, technical products liability and motorcycles that he or she can work effectively in both rooms.


Rudy

Dave Rudy is in his 24th year as a full-time mediator, beginning with the opening of Bates Edwards Group *in San Francisco in 1991. After stints at JAMS and AAA, he is delighted to be affiliated statewide with* Judicate West. *Before his career as a neutral, he tried approximately 20 jury trials to verdict (including one of 13 months' duration). He has extensive experience in mediation of motorcycle and other catastrophic injury and death cases, including many kinds of on- and off-road products, from motorcycles to golf carts, jet skis to side-by-sides, automobiles to giant earth-moving equipment.*