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PI Pitfalls for Non-PI Lawyers

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PERSONAL INJURY SECTION

Pitfalls in Personal Injury Cases



Jonathan Litster

Introduction

Personal injury cases are not simple or easy. They have many traps for the unwary. Here are some common pitfalls.

1. Statutes of Limitation

Many people think statutes of limitation are easy. They can be, except, you don't know what you don't know.

For example, in Arizona, an injured person typically has 2 years to file a lawsuit from the date of injury. A.R.S. § 12-542. But, if the claim is against a governmental entity like the State, a County, or a City, the time period is only 1 year. A.R.S. § 12-541.

Dram shop cases have another trap. Last year, the Supreme Court of Arizona held that "dram-shop actions are not based in a right of action recognized by our pre-statehood common law" and therefore, among other things, the statute of limitations is no longer 2 years. It's only 1 year. See *Torres v. JAI Dining Services (Phoenix), Inc.*, 256 Ariz. 212, 536 P.3d 790 (2023), see also A.R.S. § 12-541(5) and A.R.S. § 4-311.

Arizona's Dog Bite Statute provides strict liability for the owners of dogs. A.R.S. § 11-1025. However, the claim must be filed within 1 year. A.R.S. § 12-541(5). Otherwise, the 2 year limitation applies, but strict liability does not.

2. Notices of Claim

Notices of Claim are tricky as well. Like statutes of limitation, failing to timely serve a sufficient notice of claim to the correct person or entity will bar any recovery for your clients. A.R.S. § 12-821.01.

Notices of Claim are required for any governmental entity. Seems simple enough, however, certain entities you may think are not governmental entities are still entitled to a Notice of Claim.

For example, Banner University Hospital is associated with the University of Arizona, a governmental entity. Therefore, tort claims against Banner University require a notice of claim.

Also, a portion of the Salt River Project ("SRP") is an "improvement district." In Arizona, "irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts" are entitled to the immunities of governmental entities. Ariz. Const. art. XIII, § 7. Therefore, some claims against SRP require a Notice of Claim.

3. Failing to Preserve Evidence

Sending preservation letters to potential defendants as early as possible is crucial. If defendants fail to preserve evidence relevant to your clients' claim(s), at trial, the jury may receive a spoliation instruction, which can devastate the defendants' case. See *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 955 P.2d 3 (App. 1997).

Also, failing to preserve evidence can poten-

tially eliminate your client's claim(s) because you don't have the evidence to sustain the action.

4. Third Party Interests (Liens, Subrogation, etc.)

There are many horror stories in this area. You may be forced to pay for your client's past medical bills if not careful.

Medical providers may be entitled to a portion of your client's settlement funds. Make sure you search the county recorder's office for existing third party claims on your client's settlement funds. Otherwise, you can be on the hook, and, like all these pitfalls, create ethical problems. Ariz. R. Sup. Ct. ER 1.15.

5. Not spotting claims

So many claimants settle for less than the full value of their claim. This could be due to an attorney not properly evaluating the case, which includes not spotting existing claims. Different claims can yield different discovery responses which can yield more helpful facts for the jury to consider.

In any car crash case, consider claims for:

- Product liability issues against the manufacturer of the vehicle(s);
- Road design/maintenance issues against governmental entities, HOAs, homeowners, and others;
- Distracted driving from sleeping, eating, and/or cell phone use (use discovery/subpoenas to verify cell phone records);
- Toxicology issues;
- Diminution of Value;
- Wage Loss;
- Loss of Earning Capacity;
- Household Services;

- Negligent Entrustment; and
- Uninsured/Underinsured Motorist claims.

In any injury case, consider claims for:

- Negligence Per Se;
- Vicarious Liability;
- Negligent Hiring, Training, Supervision, Retention;
- Negligent Credentialing (in medical malpractice);
- Negligent Referral (professional malpractice);
- Negligent Infliction of Emotional Distress;
- Negligent Undertaking;
- Joint Venture;
- Alter Ego;
- Joint Enterprise;
- Loss of Consortium; and
- Punitive Damages.

Conclusion

Personal injury cases are complex. This is just the tip of the iceberg. There are many more issues such as insurance bad faith, stacking insurance policies, the Federal Tort Claims Act, expert witnesses, and more.

If you ever have any questions, please reach out to me. I'm happy to help. ■

Jonathan Litster is a personal injury attorney at Gallagher & Kennedy in Phoenix, representing plaintiffs in a broad range of tort litigation, including catastrophic personal injury, insurance bad faith, motor vehicle accidents, product liability, and professional malpractice. He has extensive experience helping injured victims and their families obtain just compensation.

Overview

- Statutes of Limitation
- Notices of Claim
- Letters of Preservation
- Third Party Interests (Liens, Subrogation, etc.)
- Spot all the claims

Statutes of Limitation

- A.R.S. § 12-542
 - 2 years generally
 - Including
 - Car Crashes (never say accident), torts generally (A.R.S. § 12-542(1)),
 - Medical malpractice (A.R.S. § 12-542(1)),
 - Wrongful death (A.R.S. § 12-542(2)),
 - Property damage (A.R.S. § 12-542(3)),
 - Conversion (A.R.S. § 12-542(4,5)).

Statutes of Limitation

- Only 1 year SOL for liability created by statute!
 - A.R.S. § 12-541(5)
 - “There shall be commenced and prosecuted within one year after the cause of action accrues, and not afterward, the following action:...5. Upon a **liability created by statute**, other than a penalty or forfeiture.”

Statutes of Limitation

- Therefore
 - Governmental Entity cases have 1-year SOLs (immunity statute)
 - Dram Shop cases have 1-year SOLs
 - Dog Bite cases have 1-year SOLs

Notices of Claim

- A.R.S. § 12-821.01
 - **180 days** “after the cause of action accrues.”
 - “The claim shall contain **facts sufficient** to permit the public entity, public school or public employee to understand the basis on which liability is claimed.”
 - “The claim shall also contain a **specific amount** for which the claim can be settled and the facts supporting that amount.”
 - “A claim is...**deemed denied** sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.”

Notices of Claim

- Therefore
 - Governmental Entities require 180-day NOCs
 - Banner University cases require 180-day NOCs
 - SRP cases can require 180-day NOCs
 - Valley Metro is weird. I recommend sending an NOC just in case.

Letters of Preservation

- What
 - Letter telling potential defendant(s) of their obligation to preserve evidence.
 - Can include lists of potential evidence.
- Why
 - Spoliation Instructions to a jury.
 - Preserving necessary evidence to prove your clients' claim(s).
 - Products cases, distracted driving, premises, etc.

Letters of Preservation

STANDARD 10

Spoliation – Lost, Destroyed or Unpreserved Evidence

[*Name of party*] failed to preserve evidence regarding [*describe unpreserved evidence*] that [he] [she] [it] was required to preserve. Because [*name of party*] failed to preserve the evidence, you may, but are not required to, assume that the evidence would have been unfavorable to [*name of party*].

SOURCE: *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247 (App. 1997); *Smyser v. City of Phoenix*, 215 Ariz. 428 (App. 2007); *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244 (App. 2013).

Letters of Preservation

- If you want an example/template of a letter of preservation, just email or text me anytime:

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Third Party Interests (Liens, Subrogation, etc.)

- You can be on the hook for your clients' medical bills.
- Consensual Liens: Never sign it.
- Liens v. Subrogation
- Keep proof of your search of the County Recorder's office.
 - The county where the crash occurred & where treatment was rendered.
- Check out:
 - Third-Party Interests Handbook: Liens and Subrogation Rights by Geoffrey Trachtenberg & Justin Henry (3rd Edition).

Third Party Interests (Liens, Subrogation, etc.)

- Examples of Third Party Interests:
 - Healthcare Provider Liens
 - State Medical Care Cost Recovery Act (“MCCRA”)
 - County Healthcare
 - Workers’ Compensation
 - Medical Payments Insurer Liens
 - Medicaid/AHCCCS
 - Medicare/Medicare Advantage
 - Employee Retirement Income Security Act (“ERISA”)
 - Federal Employee Health Benefits Act (“FEHBA”)
 - Department of Veterans Administration (“VA”) Recovery
 - and more...

Third Party Interests (Liens, Subrogation, etc.)

- To summarize:
 - At some point you obtain settlement funds for your client.
 - There are laws in place that may give some third parties rights to recover from your clients' settlement funds.
 - E.R. 1.15 is crucial here. You may have ethical obligations **to disburse or to NOT disburse funds** to certain third parties. Don't sell your client short.
 - Also, if you disburse to the client, and later, a third party with a legal and valid interest to those funds comes seeking the funds, **you may be obligated to pay those funds.**

Issue Spotting in Personal Injury

- Never leave money on the table.
- Again...
- Never leave money on the table.
- One essential is to spot all the issues.

Issue Spotting in Personal Injury

- Consider using a master list to check against every case to make sure you're not missing anything.
- Why make sure you make all potential claims?
 - Maximize recovery for your clients
 - Statutes of limitation
 - Notices of claim
 - DISCOVERY

Issue Spotting in Personal Injury

- For ANY injury case, remember AT LEAST:
 - Negligence Per Se;
 - Vicarious Liability;
 - Negligent Hiring, Training, Supervision, Retention;
 - Negligent Credentialing (in medical malpractice);
 - Negligent Referral (professional malpractice);
 - Negligent Infliction of Emotional Distress;
 - Negligent Undertaking;
 - Joint Venture;
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 - Consumer Fraud;
 - Loss of Consortium; and
 - Punitive Damages.

Issue Spotting in Personal Injury

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 - Wage Loss;
 - Loss of Earning Capacity;
 - Household Services;
 - Negligent Entrustment; and
 - Uninsured/Underinsured Motorist claims.

Hypothetical # 1

- Hypo 1:
 - One driver, no passengers
 - Single car crash
 - Roll over
 - Airbags did not deploy
- **What information do you need; what do you need to do ASAP**

Hypothetical # 1 (continued)

- Hypo 1:
 - One driver, no passengers
 - Single car crash
 - Roll over
 - Airbags did not deploy

 - **Secure the vehicle ASAP. This is crucial.**
 - **This is potentially a products liability case. You need to make sure the vehicle is not disposed of.**
 - **Best practice: purchase the vehicle, store it for experts to later inspect.**

Hypothetical # 2

- Hypo 2:
 - 54-year-old male, married to a woman for 34 years
 - Driving vehicle he owns, he says he has car insurance, “full coverage”
 - Rear-ended by teenager looking at phone
 - **What information do you need; what do you need to do ASAP**

Hypothetical # 2 (continued)

- Hypo 2:
 - 54-year-old male, married to a woman for 34 years
 - Driving vehicle he owns, he says he has car insurance, “full coverage”
 - Rear-ended by teenager looking at phone
 - **Preservation Letter to Defendant ASAP for phone data**
 - **Go through issues list (definitely loss of consortium)**
 - **UM/UIM issues if teenager has insufficient coverage**

Hypothetical # 3

- Hypo 3:
 - 85-year-old female, widowed at 80, single
 - Driving vehicle she owns
 - Driving her 8-year-old grandson who was passenger in the backseat
 - Broadsided by someone while she was making a left turn
 - **What information do you need; what do you need to do ASAP**

Hypothetical # 3 (continued)

- Hypo 3:
 - 85-year-old female, widowed at 80, single
 - Driving vehicle she owns
 - Driving her 8-year-old grandson who was passenger in the backseat
 - Broadsided by someone while she was making a left turn
 - **Grandma and 8-year-old have conflict (refer one out)**
 - **Go through issues list**

Hypothetical # 4

- Hypo 4:
 - 16-year-old male, single
 - Driving parents' vehicle
 - Rear-ended by City of Phoenix Parks and Rec truck
 - **What information do you need; what do you need to do ASAP**

Hypothetical # 4 (continued)

- Hypo 4:
 - 16-year-old male, single
 - Driving parents' vehicle
 - Rear-ended by City of Phoenix Parks and Rec truck

 - **180-day notice of claim served on City of Phoenix**
 - **1 year statute of limitations**

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