

Fender Benders Pose Malpractice Risks, Too

Anne E. Thar, Vice President and General Counsel, ISBA Mutual

Every area of the law has its nuances and plaintiffs' work is no exception. Legal malpractice claims often arise when the subtleties of representing plaintiffs are not handled correctly. In this month's column, we'll review commonly missed nuances in the plaintiffs' field.

The secret of the missing dram shop action. A frequent source of legal malpractice claims against plaintiffs' lawyers is the alleged failure to file a dram shop action when one or more drivers in a car accident have been drinking. There appear to be several reasons why lawyers miss dram shop actions. Some who are new to personal injury practice may not realize that the Dram Shop Act can be an additional avenue of recovery. In addition, the dram shop limitations period is only one year, while the statute of limitations for personal injury actions is generally two years, depending upon the defendant.

Even lawyers astute enough to identify the dram shop action sometimes fail to name the right defendants (the liquor license holder and the building owner or lessor). And lawyers may be unaware that the dram shop statute of limitations does *not* toll for minors. In one claim reported to ISBA Mutual, a lawyer representing a minor who was injured by a drunk driver assumed that the dram shop limitations period tolled for minors and missed the one-year filing deadline as a result.

How can plaintiffs' attorneys avoid dram shop problems? First, file a dram shop action whenever there is evidence that one or more drivers were drinking prior to the accident. Do this even if the client has significant unpaid medical bills that would set off any dram shop recovery. In those cases you can use the dram shop action as leverage to help



Plaintiffs' lawyers take note – many of those “routine” cases come with not-so-ordinary malpractice pitfalls.

negotiate medical lien reductions.

Second, conduct your own auto-accident investigations promptly and file suit well before the one-year limitation date. That way, you have sufficient time to conduct discovery and verify that the correct defendants, including the liquor license holder, have been named and served.

“CTA” stands for “Completely and Totally Accurate.” Section 41 of the Metropolitan Transit Authority Act requires that notice of an injury be provided to the Authority within six months of the date it occurred. Our attorneys have experienced several legal malpractice claims over the past few years because they failed to file the six-month notice with the CTA or because the notice itself was deficient.

How picky are the courts in interpreting what constitutes sufficient notice? Really, really picky. For example, in one case, Lawyer filed notice with the

CTA listing the time of the accident as 11:00 a.m. Further discovery indicated that the accident actually occurred at 4:00 p.m. The notice was deemed insufficient, even though all other aspects of the notice were proper. In another matter, the notice was found defective because it did not list the address of the treating physician.

Yet another case was dismissed by the court based upon several minor deficiencies in the notice to the CTA. The case involved a client who was run over by a CTA bus and seriously injured. Lawyer had only sketchy facts after the first few meetings with Client. Client then disappeared. On the eve of the six-month notice deadline, Lawyer filed the notice based upon the information she had previously obtained from Client. Client eventually resurfaced, suit was filed, and discovery commenced.

The CTA later won a motion for summary judgment based upon defective notice. Among the notice deficiencies cited by the court: (1) the time of the accident was originally reported as 8:39 a.m. but the plaintiff later stated in his deposition that the incident occurred between 10:00 and 10:30 a.m.; (2) the notice identified the treating facility but not the treating doctors; and (3) the notice cited the incorrect bus stop.

On the question of the accident's location, Lawyer had listed the place of the injury as “at or near 34th Street and King Drive.” In fact, 34th Street does not intersect with King Drive. However, there was a bus stop on 35th Street approximately 35 feet before the turn onto King Drive and another bus stop on King Drive approximately 15 feet south of 33rd Place. Nonetheless, the court held that the location listed on the notice was insufficient to allow the CTA to

investigate the accident.

To avoid similar problems, gather critical facts about the accident from as many sources as possible – client recollection, witness accounts, police and medical reports, and visits to the accident scene, among others – to nail down the facts you need for an effective notice. Also, be wary of situations in which the client’s recollection of events seems fuzzy or is continually changing. Experienced plaintiffs’ lawyers will tell you to quickly decline or withdraw from such matters, even if the potential recovery appears high. Finally, we suggest that you promptly send withdrawal letters by both certified and regular mail whenever you lose contact with a client.

More government gobbledygook. The CTA six-month notice requirement is just the tip of the iceberg. There is a myriad of rules governing actions against public entities and their employees.

For example, claims against local public entities and their employees must be filed within a one-year statute of limitations period. This deadline is often missed when one of the vehicles in the accident is driven by a local government employee, such as a sheriff or police officer. In some cases, lawyers erroneously assume that the statute of limitations is two years for all defen-

dants in car accidents. In other cases, however, the lawyer overlooks a one-year statute of limitations because he or she is not aware that the driver of the other vehicle is a local government employee. Similar issues crop up in accidents involving school buses and ambulances.

To complicate matters, there are different limitations periods and notice requirements for claims against the state and its agencies and institutions. Take the case of the lawyer hired by a student who slipped and fell in a dormitory at the University of Illinois. Although Lawyer correctly identified the two-year statute of limitations for claims against the Board of Trustees of the University of Illinois, he failed to file notice of the accident with the attorney general and the clerk of the court of claims within one year of the accident, as required by the Court of Claims Act. Again, the best advice for preventing such problems is to investigate every plaintiff’s claim immediately so you can identify any government entities or employee defendants that may be involved.

Insurance red tape. One more danger for unsuspecting plaintiffs’ lawyers is uninsured and underinsured motorist coverage. In a recent claim, Lawyer represented Client who had been injured by an uninsured driver.

Lawyer obtained a \$50,000 judgment against the uninsured defendant. Client then submitted an uninsured motorist claim to her own carrier in the amount of the judgment. Client’s carrier denied the claim, however, because Lawyer had failed to demand arbitration pursuant to the terms of Client’s uninsured motorist policy.

In another claim, Client sustained soft tissue injuries in a car accident with Defendant. Client maintained underinsured motorist coverage with limits of \$100,000. Defendant’s policy limits were \$50,000. Client rejected an \$18,000 offer from Defendant’s carrier.

Lawyer did not file an underinsured motorist claim under Client’s policy because Lawyer did not believe that Client’s case was worth more than Defendant’s \$50,000 policy. To Lawyer’s surprise, Client was awarded \$98,000. Client collected the \$50,000 policy limits from Defendant’s carrier. Client could not collect the remaining \$48,000 from her underinsured carrier because no claim had ever been made under the underinsured motorist policy by Lawyer.

The difference between a good lawyer and a great lawyer is in the details. The principle holds in determining who will be sued for legal malpractice and who will not. ■