Denver Law Review

Volume 46 | Issue 2 Article 3

April 2021

Representation, Suit, and Trial in Automobile Liability Claims

H. Laurence Ross

REPRESENTATION, SUIT, AND TRIAL IN AUTOMOBILE LIABILITY CLAIMS[1]

BY H. LAURENCE ROSS*

Drawing upon empirical data, interviews, and observations of the automobile injury claims settlement process, Dr. Ross explores the effects of representation, suit, and trial on the recovery of damages from an insurance company. These effects are explained largely in terms of an analysis of the negotiation process which disposes of the vast majority of claims which arise. He also delineates what kinds of cases are most likely to be represented and most likely to go to trial, and suggests some explanations for these findings. The evidence supports the author's thesis, presented more thoroughly in his forthcoming book, that the attorney's ability to negotiate settlemens skillfully is far more significant in terms of its effect on recovery than is his knowledge of the formal law.

HOW does the claimant represented by an attorney fare, in comparison with the unrepresented claimant, in securing recovery for bodily injury from an automobile liability insurance company? Are there differences in recovery in sued and tried cases, as opposed to cases that are merely represented?[2] What types of claims are most likely to be represented, sued, and tried? This paper will address these questions with empirical data drawn from a larger study of the claims settlement process.[3]

The data presented below were obtained from a sample of files provided by a large insurance company, which shall be called Acme. The company is reputed to be rather typical of large stock companies in its claims procedures. The files are a random sample, numbering 2216, drawn from the closed files received by the main office from its field offices in March and April of 1962. Preliminary analyses revealed that, as expected, there were strong relationships between the amount paid on a file and the economic loss, or total special damages, documented in the file, and between payment and apparent liability, as measured by the configuration of vehicles

*Professor of Sociology and Law, University of Denver College of Law.

[1] To be published and copyrighted by the author as part of a forthcoming book; H. ROSS, SETTLED OUT OF COURT (Aldine Publishing Co. in 1970).

[2] The term *trial cases* refers to those cases which involve the trial process for the resolution of a claim. The term *suit cases* refers to claims which have been filed and which may, but do not necessarily, involve the trial process since they may be settled prior to the actual court proceedings. The term *represented cases* refers to those cases which involve the attorney-client relationship. A represented case may be settled prior to filing suit, settled after the filing of suit but before trial, or it may actually go to trial.

[3] *Supra* note 1.

in the accident. These relationships are legitimated in the formal law, and the factors are specifically identified as conditions for payment in Acme's training materials and rule books. Representation, on the other hand, is not treated by the formal law or by official company policy as a factor to increase the value of a claim. Juries are not to consider attorneys' fees in computing an award,[4] and Acme's executives declare opposition to any increment in payment in represented cases. On the other hand, many adjusters acknowledge paying more in represented cases, and this situation has been cited both in nonempirical commentaries and in the few empirical studies that have been made of bodily injury claims payments.[5] With this contradiction in mind, the Acme files were analyzed according to whether or not an attorney was present. Other analyses, not reported here, concerned such matters as age, sex, and race of the claimant, and employment status of the defendant.

I. REPRESENTATION AND RECOVERY

Apart from liability and damages, representation was found to be the most important single factor accounting for payment. Although it is formally irrelevant to the worth of a claim, and is denied or minimized in discussion by most insurance company executives and by many adjusters, the presence of a lawyer is nonetheless a major influence on the outcome of bodily injury claims.

A first glimpse at the effect is provided by Table 1, which shows the average recovery of represented claimants to be from 5 to 20 times as high as that of unrepresented claimants. Although some of this apparent advantage is spurious — related to the kind of claims that attorneys agree to represent — the fact remains that at every level of damages and liability, the outcome in a represented case is likely to be more favorable to the claimant than the outcome in an unrepresented case. This fact is documented in Table 2, which shows the recovery in represented and unrepresented claims with a simultaneous control for liability and injury. The judgment concerning liability and injury was made for each case by coders, who looked mainly at the accident configuration to determine apparent liability, and at medical reports and statements to determine injury.

---

[4] *See,* Atlantic Coastline R. Co. v. Brown, 93 Ga. App. 805, 92 S.E.2d 874, 876 (1956). *Compare,* 25 C.J.S. *Damages* § 50 (in some jurisdictions attorneys' fees may be considered in estimating the amount of damages where an award of exemplary damages is authorized, — *e.g.,* in cases of "gross negligence").

[5] *See,* A. CONRAD, J. MORGAN, R. PRATT, JR., C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS, 181 *et. seq.* (1964); Franklin, Chanin & Mark, *Accidents, Money, and Law: A Study of the Economics of Personal Injury Litigation,* 61 COLUM. L. REV. 1, 16-20 (1961).

Table 1. Recovery and representation.

Type of Representation	All Cases		Paid Cases Only	
	Number	Mean Recovery	Number	Mean Recovery
Unrepresented	1601	$ 254	950	$ 427
Solo attorney, non specialist	471	$1499	390	$1810
Firm attorney, non specialist	70	$2226	59	$2641
Specialist (NACCA)	74	$4815	70	$5090

Table 2. Recovery and representation with control for apparent liability and injury.

	Liability Likely		Liability Unlikely	
	Injury Moderate, Severe or Fatal	Injury Minor	Injury Moderate, Severe or Fatal	Injury Minor
Percent represented	60%	29%	53%	20%
Percent recovering				
Unrepresented cases	79%	69%	61%	42%
Represented cases	93%	92%	81%	62%
Mean (average) recovery in paid cases				
Unrepresented	$ 1652	$ 329	$5769	$235
Represented	$11,603	$1438	$1655	$763
Total cases with information available	94	1350	49	723

The top line of Table 2 indicates that representation is a function of both liability and damages, but that damages are the more important factor. When injuries are moderate, severe, or fatal, more than half the cases are represented, even with unlikely liability on the part of the defendant; in fact, diminished liability reduces representation only by 7 percent. On the other hand, minor injury even combined with likely liability is represented in only 29 percent of the cases.

Table 2 shows that in every liability-injury category the *proportion* of claimants recovering some award is considerably higher when the claimants are represented. The advantage of the represented claimant in terms of chance of recovery is not eliminated by unlikely liability. The table also shows considerable advantage in terms of *average* settlement for all paid claims, in all categories except the one embracing unlikely liability and serious injury. In this category the median[6] payment still shows a difference in the expected direction — $1125 for the represented as compared with $500 for the unrepresented — but the mean is affected by the small number of paid cases (14) and the presence of two extraordinary settlements in this group: one for $61,000 and the other for $11,000.

[6] The "median" payment refers to that figure exceeded by 50 percent of the payments and in turn greater than 50 percent of the payments. The "mean" payment refers to that figure which is the arithmetic average of all payments. Where there are very few cases in a particular category, the "mean" figure may be distorted by unusually high or unusually low figures.

An additional tabulation, controlling for size of known economic loss (special damages) indicates that the average recovery in represented cases is roughly double or triple that in unrepresented cases, and furthermore that attorneys recover in 41 percent of cases in which special damages are either totally absent or unknown, as compared with 24 percent of the unrepresented claimants in this situation.

The facts reported in this section suggest that there is some value accorded to claims merely because of representation. This situation is understandable, less in the light of the attorney's knowledge of the formal law, than in the light of his negotiation power.[7] Were knowledge of formal law the cue to the attorney's advantage, one might expect the advantage to weaken proportionately as the case became weaker in formal law; but the facts are that the represented claimant has as great an advantage over the unrepresented claimant in cases where liability is weak and injury is insignificant as in cases where liability is clear and injury is significant. On the other hand, negotiation power is present throughout the range of liability and injury combinations. The attorney, as compared with the unrepresented claimant, understands the rules of negotiation; he knows that payment will be made on a danger or nuisance value basis in nearly any bona fide claim, providing the insurance company believes that the claim will be pressed, and the attorney can threaten to take any claim to court. He may also credibly threaten to accumulate testimony favorable to liability and to accentuate the extent of any injury. Moreover, an attorney in accepting a case, has the advantage of a tacit commitment: both he and the insurance adjuster know that his (the attorney's) business and reputation would be threatened by a trivial settlement or a denial. This knowledge lends additional credibility to the attorney's threats, and makes these threats and rationalizations more effective tools in securing a higher settlement for almost any given claim.

To this point I have been concerned with the effects of representation on recovery. To continue, I would like to consider some prior correlates or causes of representation. Table 2 and Table 4 below suggest a correlation of representation with size of loss or injury. Although part of this correlation may be explained as manipulation of the facts concerning a given claim by the attorney,

[7] Negotiation power will be discussed in more detail in Chapter 4 of SETTLED OUT OF COURT, *supra* note 1. The principal techniques or "plays" in the negotiation "game" are: proposals, which serve as a cue to the expectations of each side; rationalizations, which legitimate proposals in terms of agreed general principles; threats and promises, stating consequences of particular choices; and commitments, which bind a party more convincingly to his proposals, rationalizations, and threats. Negotiation power refers to the ability to use these techniques in a sophisticated and successful fashion. *See,* CARL M. STEVENS, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION (1963).

I believe that the bulk of the association is due to the inclination of claimants with higher losses to seek representation, and to the greater willingness of attorneys to accept claims with larger losses and thus potentially larger recoveries.

Representation is also shown, in Table 2, to be greater when liability is likely, although this relationship is smaller than with degree of injury. The Acme files show lawyers accepting some proportion of claims even when liability is most doubtful, but the proportion here is small. Where claims with unlikely liability are accepted by lawyers, the results are generally more favorable than in similar unrepresented claims, again indicating the existence of bargaining power unavailable to the unrepresented claimant.

Two additional relationships with representation can be shown with other data. Table 3 shows the relationship between representation and recovery controlling for size of city, and shows clearly that representation is strongly related to the urbanization of the jurisdiction. The proportion of claims represented in the large central cities is double that in small cities or in the countryside, and this in turn can probably be explained by the relative sophistication and wariness of the city-dwellers. On the other hand, the proportion of claimants that recover does not fluctuate much in this instance, and the average settlement in represented paid cases actually declines with increasing urbanization. This apparent paradox is most likely explained by the inclusion of larger numbers of small cases and cases of tenuous liability in the total mix accepted by the urban lawyers. The small town and country lawyers probably deal with a more selected group of cases. The higher payments on unrepresented claims in the more urbanized jurisdictions are in accord with general expectations concerning the effect of city size on claims; however, the effect is not as drastic or as uniform as one might have thought prior to viewing the data.

Table 3. Recovery and representation with control for size of city.

	City Size				
	SMSA* More Than 1 Mill		SMSA Less Than 1 Million	Other Urban	Rural
	Central	Ring			
Percent represented	38%	33%	21%	16%	19%
Percent recovering					
Unrepresented	61%	58%	60%	58%	57%
Represented	81%	90%	87%	90%	85%
Mean recovery in paid cases					
Unrepresented	$ 576	$ 344	$ 405	$ 386	$ 326
Represented	$1422	$2452	$2609	$4891	$2697
Total cases with information available	698	383	576	268	136

*Standard Metropolitan Statistical Area

Finally, representation is related to the type of claimant, in particular to whether the claimant is Jewish or Gentile, as measured by surname. Claimants with Jewish names were found far more likely to be represented than others (59 percent as opposed to 26 percent for other whites). The probability of their receiving any award, however, was somewhat lower (77 percent as opposed to 84 percent, respectively). The explanation for the lower recovery of represented Jewish claimants is probably identical to that for the relationship with urbanization — the larger number of Jewish claims represented must have included some less meritorious claims. No differences were found in representation by age or sex of the claimant, and an attempt to investigate race was abandoned because of the unsatisfactory state of the data concerning Negroes.

In sum, representation is unequally distributed in the population of claims: large claims, claims with apparent liability, claims of metropolitan residents, and claims of Jews are instances of categories where representation is relatively high. Although groups with high proportions of represented cases may experience a somewhat smaller proportion of paid claims, the level of payments in represented claims is considerably higher than in unrepresented claims, regardless of the fact that the official policy of the company and the formal law are both to the contrary.

II. NEGOTIATION, SUIT, TRIAL, AND RECOVERY

As far as the actual negotiation of claims is concerned, the meaning of filing suit is ambiguous. On its face, this act may be seen as a sign of incipient failure of the negotiation: the attorney for the claimant prepares for an expected trial. Another interpretation is that filing suit is a move in the game of negotiation: it establishes the credibility of a threat to go to trial, but relies on a long delay between the filing of suit and the setting of trial to produce a negotiated settlement. This interpretation seems to me most satisfactory for the bulk of suit cases observed. The filing of suit may also be required to preserve the legal basis for the claim, and thus to continue negotiation when the statute of limitations threatens to bar the claim. Finally, it is the practice of some attorneys, particularly in urban areas with long delays in trial calendars, to file suit as a routine matter, regardless of their confidence that a settlement will take place. The latter procedure is also reputed to be encouraged by contingent fee agreements that provide a higher share for the attorney in sued cases.

The bringing of a case to trial is a less ambiguous indication of failure of negotiation. Even though many cases brought to trial may settle during the course of trial, major processing costs are assumed by both parties. Since a principal benefit of the negotiated settlement is the mutual avoidance of these costs, a conclusion of at least partial failure of negotiation is unavoidable. In this section data will be presented concerning recovery in tried cases as compared with those settled prior to trial, and reasons will be suggested as to why these failed to be settled out of court. There were too few cases brought to trial to make distinctions among them, and these cases will be treated together with those cases that settled during trial (23 percent), and those that went to verdict (72 percent), and those that were appealed (5 percent).

Table 4 presents a summary picture of proportions of cases entering the successively more advanced stages of the legal process, and indicates the recoveries in each stage.[8] The columns control for known economic loss. The table shows first, that except where special damages were nil, or unknown, there was recovery in more than 90 percent of the total cases. Reading down the table we find that the proportion of claimants recovering *decreases* with every advance towards trial, from representation to suit to trial itself. With the minor exception of a tie in the first column, this finding holds in every category of damages. In apparent opposition to this finding, the average recovery of those who receive anything increases with representation and suit. This increase does not, however, continue to include the step of trial. Although the number of cases on which the trial figure is based is very small, the fact that a decrease is observed in three of the five categories marks this step as a distinct departure from the observed trend.

Reading across the table, the proportion recovering at different levels of damages is quite low where damages are nil, and fairly uniformly high in all other categories, whether one speaks of total cases, represented cases, or sued cases. In marked contrast, tried cases show a rather steady increase in proportion of recovery, from extremes of 15 percent where damages are nil or unknown to 71 percent where they exceed $500. A similar steady increase is seen in the proportion of cases reaching successive stages in the legal process, as damages increase.

[8] *Supra* note 2.

Table 4. Recovery according to representation, suit and trial, controlling for damages.

	Special Damages				
	0 or Unknown	$1 - $50	$51 - $200	$201 - $500	$500+
Total cases —	867	395	450	258	246
Percent recovering	25%	92%	92%	91%	95%
Mean payment, paid cases	$ 87	$123	$374	$ 911	$4453
Represented cases —	75	67	186	135	152
Percent of total	8.7%	17.0%	41.3%	52.3%	61.8%
Percent recovering	41%	90%	90%	89%	93%
Mean payment, paid cases	$579	$247	$546	$1166	$5916
Suit cases —	39	40	104	72	122
Percent of total	4.5%	10.1%	23.1%	27.9%	49.6%
Percent recovering	41%	83%	85%	85%	90%
Mean payment, paid cases	$632	$265	$564	$1258	$6736
Trial cases —	13	6	20	20	34
Percent of total	1.5%	1.5%	4.4%	7.8%	13.5%
Percent recovering	15%	17%	35%	55%	71%
Mean payment, paid cases	$1172	$8.00*	$449	$1289	$4655

*Based on fewer than 10 cases.

Support is given to the established generalization that large cases go to trial more frequently. Tried cases are nevertheless a distinct minority of the large cases, and there must be something special about them.

Even disregarding processing costs, trial does not seem to yield systematically larger net recoveries than representation alone. With respect to the proportion of claimants recovering, it is considerably worse.

These findings do not appear to be explainable by simple principles other than tautological statements such as: cases which go to trial are those that could not be settled, or are those on which agreement as to evaluation was impossible. However, I am willing to speculate concerning these findings, basing my thoughts on my interviews and observations.

A first factor that may result in trial is the presence of zero special damages per se.[9] A claimant without medical bills or lost wages has very little with which to interest an insurance company, other than his signature. The latter alone is worth something, *i.e.*, nuisance value, but the amount that an adjuster can pay in that category is too small to buy off a represented case. Many of these cases may verge on the fraudulent, or at best represent noncom-

[9] Where damages are nil or unknown, a high proportion of represented and sued cases go to trial. This finding may be partly an artifact of the data: claims denied early in their history may produce a file without any indication as to damages, although serious injury may have been involved along with very doubtful liability. The following discussion assumes that, allowing for this artifact, there remains some overrepresentation of zero damages cases among all tried cases.

pensable damages to dignity. Others may involve a genuine hurt, but injuries in the absence of bills do not impress the bureaucratic supervisory structure within which an adjuster works. It will be noted that few of these cases are represented, but an attorney accepting a case makes a tacit promise to secure more than nuisance value, and this frequently sends him to the courtroom. The wisdom of the companies in opposing this type of claim is borne out by the low proportion of recoveries in this category, yet the relationship between the attorney and his client may make trials of these cases inevitable.

A different situation may be involved in many claims with high special damages. Very serious claims are supervised not only at the local level, but also at the regional or even home office levels of a company. It is not only the adjuster who has to justify his evaluation to a supervisor, but the supervisor in turn must justify a joint evaluation to one or more higher executives. The understandable tendency in this situation is to be very conservative in evaluation. Moreover, where much is at stake, assumption of processing costs inherent in trial is easier, because these costs become trivial compared to the potential verdict. Trial in this case may serve a bureaucratic function. A supervisor may recriminate with his subordinate if he disagrees with the reasonableness of the latter's negotiated settlement. He cannot disagree with a subordinate's payment of a judgment ordered by a court. In this situation, trial may be a way of preserving the bureaucratic structure of the insurance company. Support for this interpretation comes from the fact that a relatively high proportion of tried cases in the highest bracket of damages do recover, and with an average payment higher than the figure for total cases, albeit the figure is lower than that for represented cases as a whole.

Another principle can be deduced from Table 5, which introduces the simultaneous control for injury and liability. It is seen in this table that trial is more related to injury than to liability; in fact, more cases weak than strong on liability are tried. Resistance to cases of weak liability might reasonably be expected from the companies, but why should lawyers press these cases? The answer may be related to the type of gamble offered by these cases of weak liability. It is precisely where liability is weak and injury is moderate or severe that the highest proportion of cases go to trial. It is in these cases that the danger value rule[10] operates, and the adjuster

[10] In cases with liability unfavorable to the claimant, but with bad injury, Acme's policy is to permit local offices to offer somewhere in the neighborhood of ten percent of "full value" as a compromise payment. This is termed danger value, the reference being to the possibility of a high award if the case manages to get to a jury despite apparent nonliability.

is legitimately able to offer compromise payments. However, the offers in these circumstances may appear trivial both in the light of expenses borne by the claimant and in the light of possible recovery if the liability barrier can be passed. Heavy expenses on the part of the claimant mean that a considerable sum must be offered merely to pay existing bills and the attorney's fees. In the extreme, as in one case observed, if no payment is forthcoming the bills will simply go unpaid. The case in question involved a woman of 60 whose income was $30 per week and whose life savings were $900. Her medical bills exceeded $4,000. This woman would be no better off personally with a settlement for medical expenses than with no settlement at all. For this reason, the adjuster declined to make any offer. In contrast, even with one chance in 10 of getting to a jury in such a case, it might be worthwhile to the lawyer to press for trial, since at least one significant recovery might be expected in the course of many trials.

Table 5. Recovery in tried and untried cases, controlling for liability and injury.

	Liability Favorable to Claimant		Liability Unfavorable to Claimant	
	Injury Mod. or Ser. (N-94)	Injury Minor (N-1333)	Injury Mod. or Ser. (N-49)	Injury Minor (N-716)
Percent tried	12.8%	3.0%	16.3%	4.6%
Percent recovering				
Untried cases	88%	76%	78%	47%
Tried cases	88%	63%	38%*	21%
Mean recovery in paid cases				
Untried cases	$ 7288	$ 660	$3565	$380
Tried cases	$12,847*	$2990	$ 483*	$521*

*Based on fewer than ten cases.

A final principle, relevant to the whole range of cases, may be deduced from the example in Table 6. Where the case is complicated, trial may be necessary because the negotiation task becomes too complex. The example here is additional defendants, as would result, for instance, from a multiple-car collision. In this instance, agreement as to liability and damages is required from a larger number of parties. Over four times as many cases go to trial where there is more than one defendant. Whether tried or untried, claims in which there is more than one defendant are paid much less often, doubtless because Acme's insured is sometimes only peripherally involved.

Table 6. Trial, recovery and multiple defendants.

	Number of Defendants	
	One Only (N-1648)	More Than One (N-544)
Percent tried	2.6%	10.6%
Percent recovering		
Untried cases	74%	48%
Tried cases	86%	25%

SUMMARY

This research has confirmed the generalization that big cases go to trial, which I believe to have been the only generalization of this nature to have appeared in the academic literature. However, inspection of the Acme files shows that even among cases with large losses only a small proportion goes to trial, and among those cases with negligible losses a surprisingly large proportion is tried. A closer look at the data suggests some additional principles accounting for trial; trial may occur disproportionately in cases which, lacking bureaucratically acceptable accounts, cannot justify a significant offer from the bureaucracy. It occurs in cases where the stakes are so high as to make processing costs inconsiderable, and in these cases it helps to protect the supervisory structure of the company bureaucracy. It occurs where it presents a long-shot chance of a very high judgment as a choice counter to a very low settlement, in which case the utility of the small sum would seem to be negligible. Finally, it occurs in cases that are more complex, involving difficult fact situations or numerous negotiators, where agreement on a definitive allocation of costs and responsibilities is harder to obtain.