

# CHAPTER 6

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## Investigation of the Case

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## I. Introduction

### § 6:10 Role of Investigation

The difference between a major recovery in a soft tissue injury case and a disappointing loss can be the effectiveness of the investigation. Proper and thorough investigation can give you the proper defendants to sue, the proper causes of action on which to rely, the witnesses you need to prove your case and the evidence you need to establish liability and damages. Without proper investigation, no matter how clever, imaginative, skilled or hardworking you are, the results will not be as successful as they could be.

A thorough investigation can also help you determine whether the case is an appropriate one to take. The client's story may sound convincing and the damages may be real. The theory of liability may also seem to make sense at the initial interview. Once initial investigation is undertaken, however, witnesses may provide statements that implicate the client as a contributing cause or exculpate some or all potential defendants.

Therefore, before making a firm commitment to take the case, if it is at all feasible, do some initial investigation. This can be accomplished either through your in-house staff (yourself, other attorneys, paralegals, etc.) or through professional investigators. The small amount of time and money involved will generally be well worth the effort in the long run. If the case is a good one, the work will have had to be done anyway. Conversely, if the case is a bad one, you can come to that conclusion promptly and refrain from undertaking further unproductive employment.

By thoroughly investigating the case before suit is filed, remember that all you are doing is what the defendants do. Usually, insurance companies have their adjusters on the scene immediately to gather evidence, to take witness statements and to make initial evaluations of liability and damages. It is amazing how quickly insurance adjusters and defense investigators are on the scene. Accordingly, they have a "jump" on the plaintiff and are immediately geared up to prepare the defense. Therefore, the same kinds of proper investigative tactics that the defense is using should be undertaken as soon as possible by the plaintiff's attorney.

Finally, counsel must carefully preserve evidence that is gathered during the investigation. If evidence is lost, destroyed or misplaced, it is just as bad as if there were no evidence at all.

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### Practice Tip

*Although there are a variety of approaches to the investigation of the soft tissue injury case, the key words are immediacy and organization. Without immediate and organized attention, witnesses disappear, evidence is lost and the chances for recovery diminish.*

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### § 6:20 Role of Investigator

It is not always as important who investigates the case as what is investigated and how the investigation is conducted. Some attorneys always use professional investigators. Others rely solely on office staff, such as younger associates, paralegals or in-house investigators. When properly managed and supervised, any of these "investigators" or "evidence gatherers" can be used effectively, economically and productively. Generally, the key to effective investigation is control over the investigator.

In most cases, the investigator is not an attorney. You may know exactly what you want to look for, how you want to document what you find, and how that piece of evidence or witness statement will fit perfectly within your theory of the case. The people you have investigating the case for you may not have the same insight into the case. In most cases, they will not. Accordingly, they need direction and supervision from you.

You must know your investigator, particularly the person's strengths and weaknesses. Never expect too much or require too little of the investigator. Some investigators are excellent and can be given a substantial amount of responsibility. They can be given primary responsibility for evidence gathering, evidence documentation and witness statements. Other investigators must be given specific instructions and complete directions on how to proceed. The latter should be given a complete set of forms to use. Explain the forms before the investigator sets out with them.

In a pre-investigation conference, outline the theory of the case, the potential defendants, a list of witnesses you know should be interviewed and suggestions for checking into other potential witnesses. The forms and checklists can help ensure that the investigator does not overlook any important part of the case.

### § 6:20.10 Sample Transmittal Letter to Investigator



#### Forms on Disk:

- **Sample Transmittal Letter to Investigator**

### § 6:20.20 Sample Investigation Report Form

Rather than rely on the investigator to follow through with a complete and detailed report, consider providing the investigator with a pre-printed report form. All the investigator needs to do is fill in the report and provide the investigator's own observation and notes at the end of the form.



#### Forms on Disk:

- **Sample Investigation Report Form**

### § 6:21 Role of Professional Engineers

In certain cases, it is necessary to retain a professional engineer immediately to investigate and document evidence of a motor vehicle accident. A professional engineer can help to evaluate the necessity of retaining and preserving physical components that later can become salient pieces of evidence in the investigation and analysis. Skid marks, tire marks, measurements and photographs of the scene, analysis of weather conditions, diagrams and exhibits can all be prepared and documented carefully. The professional engineer should also begin an analysis of the position of each of the vehicles at the instant of the collision plus the motion of the vehicles. The professional engineer will consider tire marks, gouges and other damage characteristics to indicate the vehicles' motion and travel paths. The vehicles' speed will also have to be determined along with impact areas, vehicle damage characteristics and the like. The analysis can involve simple drawings and tape measurements to sophisticated computer digitizing equipment.

The professional engineer should consider and be actively involved in the investigation of lighting, weather conditions, visibility, driver dynamics, sound measurements, force measurements, accident scene geometry, crash tests, road surface variations, changes in elevation, roadside features and analysis of relevant scientific data. See Kennedy & Pfeiffer, "*Roles of Professional Engineers in Reconstructing Motor Vehicle*

*Accidents*," at 214 in 1997 WILEY EXPERT WITNESS UPDATE: NEW DEVELOPMENTS IN PERSONAL INJURY LITIGATION.

A well prepared and knowledgeable engineering expert can play a variety of roles in the neck and back case including investigation consultant, litigation consultant, and expert witness at trial. *Id.* at §§ 6.23-6.26.

### § 6:30 Role of Attorney

If the attorney relies on someone else to conduct the investigation, the attorney should take steps to remain informed of all progress on a daily or weekly basis. If problems are developing, the attorney must know about them immediately. If a particular witness is being recalcitrant, if an important piece of evidence cannot be located, or if an expert witness is having difficulty obtaining the necessary factual information to support his or her opinion, the attorney is the proper person to address and solve the problem.

The attorney should review the file once or twice a week to make sure that everyone who is working to resolve the client's problem is doing so in a coordinated, productive and economical fashion. Duplicate work will not only cost you and the client more, but will also increase the time necessary for resolution and unduly complicate matters.

Insurance adjusters, particularly those who will be handling uninsured or underinsured motorist's claims, should be contacted as soon as possible. The case may not be ready for submission on an uninsured motorist claim or for any kind of settlement, but it is best to make the initial contact as early as possible. That will help prevent the insurance company from trying to contact the client or claim late notice or statute of limitations defenses under the uninsured or underinsured motorist provisions of the policy.

Finally, the attorney must review the witness statements, the inventoried evidence and other information provided by the client, the investigator or others. Using it, the attorney can identify all possible defendants, causes of action, impediments to recovery and aspects of damage involved in the soft tissue injury case. This allows the case to move from the investigative stage to discovery and litigation.