



Premises Safety

One of Many Areas of Expertise

When damages are substantial, you need an expert with the experience and resources to articulate the science behind the events in your case.

Robson Forensic is equipped to bring the extensive resources and rigorous scientific approach your case requires.

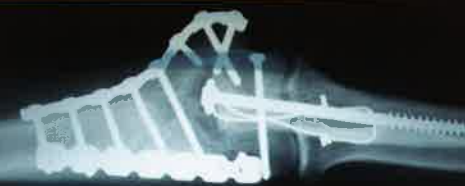
Call us to speak with an expert who has the specific experience to address causation and standard of care relevant to your case.

Areas of Practice:

Marine | Automotive | Aviation | Railroad
Premises Safety | Dram Shop | Food Safety
Toxicology | Biomechanics | Architecture
Construction | Electrical | HVAC | Plumbing
Structural Failures | Highway | Sports Injuries
Toxic Torts | Fire | Human Factors

Ohio Location:
4150 Tuller Road
Suite 216
Dublin, OH 43017

800.654.4344 | www.robsonforensic.com



Robson Forensic

Feature Story



GETTING TO YES: TIPS FROM THE OTHER SIDE

We are trial lawyers. We are trained to try cases before a judge and jury, and we know how to fight hard for our client in the courtroom right to the very end. Our hallmark qualities include fierce tenacity, confidence in our ability to persuade a jury, and confidence in the cases we try. Our clients deserve no less when they finally arrive at their day in court, and we happily deliver. But what happens when the possibility of trial presents a heightened risk for our client? Not every case needs to go all the way to trial. Trial is a risky proposition on all fronts, and good trial lawyers know that part of running a successful practice is knowing which cases present prohibitively high risk and exposure for the client. More often than not, a plaintiff and defendant can come to an agreement and settle their case out of court. The length and success of the settlement process depends on several factors including attorney temperament, client expectations, and quality of communication between all parties.

Continuing efforts to seek fair compensation for our clients while minimizing the risk and expense of trial means we're always looking for the best ways to successfully negotiate and persuade. As part of that process, we at OAJ thought it would be helpful to reach out to respected defense attorneys and ask about their experiences with settlement negotiations. The attorneys we spoke with were enthusiastic and generous in sharing their perspectives. Understanding a different angle can be invaluable in finding the most effective means by which we seek the highest quality of justice for our clients.

So, who did we interview and what did we learn about their point of view?



Matthew Schrader, Columbus, OH

Matthew Schrader of Columbus has been licensed since 2001, and is a shareholder at Reminger Co., LPA. He has tried cases in state and federal courts involving catastrophic personal injury, wrongful death, copyright infringement, premises liability, and professional liability.

Has *Robinson v. Bates* changed the experience of your clients when facing a personal injury lawsuit?

Robinson v. Bates has greatly impacted how the defense evaluates a case and how we make recommendations about what a case might be worth. I insist on knowing the *Robinson* numbers before I negotiate, because the *Robinson* amount constitutes the damages. *Robinson* is true value of medical services when dealing with a lawsuit. If the other side refuses to evaluate damages based on the *Robinson* number, then we'll get a backlog.

There is difficulty in the circumstance where the plaintiff doesn't have health insurance, or when a plaintiff decides not to submit the bills to their health insurance providers. Then I get a stack of bills for full value and it becomes difficult to determine how I value the case to my client. I know the vendors will accept something less than what was billed, but then you are basing the case on the value of what you think it should be.

How do you determine what is an acceptable settlement amount considering the difference between negotiated medical expense reimbursements and the value of the medical care given?

When you go buy a car, everyone knows you don't go by the sticker price. Someone shopping for a car is going to buy the \$25,000 car for \$20,000. This means that the value is \$20,000, not the sticker the dealer chose to stick on it. The write-off amount is not admissible and is of no consequence.

What is your process for determining the amount of non-economic damages when working toward a settlement?

Medical bills factor in so you have to look at that. Was the plaintiff hospitalized? Was the plaintiff at rehab? Did he or she have surgery? If he or she had to go to a rehabilitation facility, the number for pain and suffering is more. Too many lawyers from both sides try to use equations, but medical specials multiplied by a number isn't fair. The injury and how the injury impacted the person's life needs to be considered. A large focus of discovery and negotiations is determining if damage caps apply, and the answer provides some certainty if the case ends up at trial.

What specific strategies help plaintiffs and defendants find common ground to compensate an injured party?

A good mediator. A good mediator is one who pushes, who is aggressive with both sides, and shares her thoughts of what the case is worth with both sides. With a good mediator and two reasonable lawyers, you're going to come to an agreement. Two good lawyers can get it done without mediator, but mediation gives the plaintiff some formality to their day and court. I have no problem letting the plaintiff's lawyer select the mediator, unless it's a mediator that I've had a very poor experience with. This builds the plaintiff's trust in the process.

What do you wish the plaintiff understood before you walk into negotiations?

That I am always right! You can quote me on that! In all seriousness, I want somebody negotiating who has gone to trial. Someone who has won and who has lost knows the risk of taking a case to trial. It's expensive to try a case, calling experts and so on. You do all the prep work and then you try it before eight people who walked in off the street, and it's up to them to decide. It's scary.

What circumstances indicate a settlement negotiation being dead in the water before starting or during the deal?

Refusal to consider what insurance might be available to the defendant or refusal to take into account damage caps.

What cases are most difficult to settle and why?

I don't view it as the type of case that gives rise in difficulty in settling. I see it as a matter of difficult clients or difficult lawyers. Sometimes people overvalue their cases and build-up their client's expectations. Then the plaintiff may already feel like they have compromised their position by 75 percent, but unfortunately it was never worth that in the first place.

Can you give a summary of what works when getting to "yes" and what doesn't?

Everyone needs to be reasonable and practical. They must recognize the risk, the time, and the expense of crossing the finish line at a verdict. If insurance is \$500,000, don't demand \$1,000,000, because you won't get it. If it's clearly a damage caps case, don't demand a number that is more than your day at trial and refuse to come off that number.

OAJ Firm Spotlight



Bordas & Bordas, PLLC

Firm Partners: Jim Bordas & Linda Bordas
Location: Wheeling, WV

Established in 1985, Bordas & Bordas has established a reputation as one of the premier personal injury firms in the region. Our founding partners, Linda and Jim Bordas, are passionate advocates for the injured and are joined by a team of dedicated attorneys and legal professionals. The firm has 17 attorneys and throughout the years, we have established a proven record of success helping the injured and mistreated throughout Ohio, West Virginia and Pennsylvania.

If you or your firm could change one thing about the practice of law, what would it be?

First and foremost, the attorneys at Bordas & Bordas recognize how fortunate we are to practice in the greatest system of justice the world has ever known. With that being said, I would like to reduce the artificial barriers that exist between the public, as represented by our juries, and the victims of so many avoidable and catastrophic events. We should honor and trust our juries to do the right thing, without seeking to impose "one size fits all" limitations on the ability of a jury to deliver justice.

What does OAJ mean to you and your firm?

We are proud supporters of OAJ because of its role in bringing us into contact with some of the brightest and most caring attorneys in the state. We are honored to be part of OAJ, an organization that always seeks to help and protect some of the most vulnerable members of society.

I have found that insurers look at the injury independently of the specials for the most part. If someone has a fracture that requires little treatment but is painful and alters their lifestyle, the amount of specials really won't matter.



Mark Gams, Columbus, OH

Mark Gams has practiced law for more than 30 years and he is a partner at Gallagher, Gams, Pryor, Tallan and Littrell L.L.P., focusing on litigation, bad faith claims and coverage issues. He often has argued in many of the Ohio state appellate courts, the Ohio Supreme Court and the U.S. Court of Appeals for the Sixth Circuit. He mostly represents insurers or their insureds, but also represents individuals and businesses in non-tort litigation.

Has *Robinson v. Bates* changed the experience of your policyholders when facing a personal injury lawsuit?

Robinson v. Bates has changed the evaluation process more than any other case in the last decade. The amount accepted for payment has become the healthcare specials. I don't see the original amount charged playing a role in settlement or trials.

How do you determine what is an acceptable settlement amount considering the difference between negotiated medical expense reimbursements and the value of the medical care given?

Speaking for only myself, I look at the charges and then the injury. I don't base the general damages on the amount of the *Robinson v. Bates* number. I look at both independently.

What is your process for determining the amount of non-economic damages when working toward a settlement?

Picking up where I left off on the last answer, I factor in the type of injury, the trial venue, the quality of the plaintiff, and whether I think a jury will believe the injury is permanent. Obviously, comparative negligence is a factor that comes into play as well, but only after I determine the range of value.

Are there specific strategies that help plaintiffs and defendants find common ground to compensate an injured party?

I'm not going out on a limb by stating mediation can be a helpful tool in settling a case. Oftentimes it comes down to whether the plaintiff counsel has good client control. I often get a call from a plaintiff attorney who says he or she wants to mediate because the client has high expectations and needs to hear "the truth" from an independent party.

Unless mediation is requested or I see a specific need for it - for example, if I think the plaintiff attorney is the one who is not reading the case correctly - I will want to get the medical records, depose the plaintiff and get the *Robinson v. Bates* number. If I have those, I usually can evaluate the claim and begin negotiations.

Is there a relationship between the lien amount and pain and suffering, and how do you define it?

When I started more than 30 years ago, multiplying the medical specials by

two or three was common. I stopped seeing that at least 20 years ago. I have found that insurers look at the injury independently of the specials for the most part. If someone has a fracture that requires little treatment but is painful and alters their lifestyle, the amount of specials really won't matter. Conversely, someone who runs up a large chiropractic bill for a soft tissue injury won't receive a general damages commensurate with the amount of bills. Your readers already knew that, though!

What circumstances indicate a settlement negotiation being dead in the water before starting or during the deal?

I usually get that cue from the mediator, as he or she will know more than I based on the conversations the mediator had with both sides. I don't get overly concerned with high initial demands or threats to walk from the mediation. Unless the court has ordered the mediation, the parties are there because they both want to mediate. Every lawyer has his or her own way of getting to yes. It is up to opposing counsel to recognize there is more than one way to settle a case and sometimes you have to change your style to meet what is coming from the other side.

What cases are best served by using mediation to solving a dispute without going to trial?



Doug Holthus, Cleveland, OH.

Doug has tried and arbitrated nearly one hundred cases before arbitration panels and civil juries throughout Ohio, in both the state and federal courts, on matters ranging from claims of personal injury and wrongful death, professional negligence, product liability, improper employment termination and discriminatory practices, business disputes, alleged violations of civil rights, and various land use and zoning disputes.

How do you determine what is an acceptable settlement amount considering the difference between negotiated medical expense reimbursements and the value of the medical care given?

Considering economic losses, the amount of the subrogated party's loss and the plaintiff's actual out-of-pocket/unreimbursed medical expenses, plus the plaintiff's actual wage loss are the bottom line. That said one must consider present value calculations and evidence of mitigation.

What is your process for determining the amount of non-economic damages when working toward a settlement?

The discovery depositions of the Plaintiff and his or her

I try to make the decision as to whether to trade offers and demands with plaintiff counsel or mediate before I do one or the other. I usually ask opposing counsel what they want to do. I tell them if we negotiate settlement between us, mediation would likely be worthless because I would have expended most if not all of my authority if we get far into the process. If I get the impression at deposition that the plaintiff may not listen to his or her attorney, I may suggest mediation rather than direct settlement negotiations. I'm open about it to the other side. It isn't a secret strategy.

What cases are most difficult to settle and why?

Within motor vehicle cases, the hardest cases for me to evaluate are scar cases. In my experience, juries are all over the place on their verdicts. Of course, I'm talking about a scar to a child or younger person. I don't want to be chauvinistic, but my experience shows that a jury will award more for a scar to the face of a young lady than they will for an older man.

Cases involving two motor vehicles or joint tortfeasors are hard to settle because one defendant doesn't see the case the same way as the other defendant, and the plaintiff can't or won't settle with just one defendant.

the best way is generally following discovery and perhaps even following dispositive motion practice, ferreting out the true parameters of any demand and then advising the client if the demand parameters are reasonable or not, and whether mediation is likely to be successful.

spouse or significant other, friends, co-workers, and employer are often key. This tends to create objectivity when assessing the proposed non-economic loss suffered. Jury verdict research can be informative but certainly is not dispositive as every case rises and falls on its own facts.

What are the best strategies to help plaintiffs and defendants find common ground to compensate an injured party?

Mediation is a valuable tool ... provided all parties and the insurance claims professionals enter the process with a focused goal of actual resolution, armed with reasonable expectations, reasonable assessments of

both liability and damage risk potentials, as well as a meaningful willingness to compromise.

What do you wish the plaintiff understood before you walk into negotiations?

That in instances where liability is contested, there are meritorious defenses, whether legal or factual. Further, when only damages are at issue, whether economic, non-economic or both, the plaintiff's first demand and defendants first offer are just that ... firsts. Otherwise, mediation is a process. Finally, the plaintiff can no more place out a hand and expect to be paid any more than a defending party can expect to make some offer and have it be accepted.

What is involved in effectively using write-offs as evidence in a trial? Do you use this in negotiations?

Absent a stipulation, this generally falls to expert testimony. In our experience, most plaintiff attorneys will avoid a cross examination on the issue of write-offs because it might otherwise weaken other, stronger arguments in plaintiff's case. In other words, focus on the war and not petty battles.

What are the ways you would approach finding common ground with a plaintiff in a suit?

These are varied and somewhat dependent upon such things as the identity of and past experience with the plaintiff's advocate, the nature of the claim, causes of action and alleged loss, the jurisdiction and venue, and the experts retained by either or all parties.

Regardless, the best way is generally following discovery and perhaps even following dispositive motion practice, ferreting out the true parameters of any demand and then advising the client if the demand parameters are reasonable or not, and whether mediation is likely to be successful.

Also, reach any stipulations as to liability or damages that can be reasonably accommodated. That way, once again, the war is "fought" and the petty battles can largely be avoided.

What cases are most difficult to settle and why?

In my view, employment termination matters are most difficult. This is because most plaintiffs want return to work, while most employers are reluctant to return the litigating employee to the former place of employment.

Can you give us your elevator speech for how to quickly and easily get to yes?

This is a long elevator! I have never approached a

mediation believing that I was going to prove a point. In other words, that my liability assessment is better than yours, or that my damages assessment is better than yours. I try to recognize as objectively as I can that the plaintiff is going to have good arguments on the liability analysis assessments. There has to be an effort for the attorneys to recognize that mediation is not an opportunity to win a battle. It's a chance to resolve a difference and avoid the unknown risk of a verdict and of going to trial. Without these recognitions, mediation will go nowhere. People need to avoid becoming entrenched on the front end so they don't defeat the entire purpose of the mediation.

As a practical matter I prefer to submit to the mediator confidential position statements as opposed to sharing our position statements with each other. If I receive plaintiff's position statement, I'm ethically obligated to send that to my client. This can create a mental and emotional roadblock and is counter-productive. Then, as far as mediation strategies, agreeing to waive opening statements is helpful. Imagine we are representing opposing parties, and the mediator says, "Give us a brief opening statement." The plaintiff gives the statement and the defense is listening. Then it doesn't matter at that point what I'm saying at my opening because we have created a roadblock to compromise. People become entrenched when intuitively, but wrongly, they are thinking the plaintiff's demand is ridiculous.

In Closing

A common thread existing with all three interviewees was the hope for both sides to effectively manage client expectations on the front end so that there is always room for negotiations. Being willing to communicate with the other side helps move the process along more quickly so that backlogs can be avoided, as well as the risk of unnecessary trials. Recognizing that each case is unique and that there is no cookie cutter approach to negotiations and settlements is the first step in keeping an open mind and properly managing your client. With open communication, clients will know that if negotiation settlements fail, mediation is a helpful tool for getting all the evidence on the table in a formal way so that the fairest amount can be agreed upon.

And if all of this doesn't work, we'll take it up before a jury.

OAJ Firm Spotlight



Arthur, O'Neil, Mertz, Michel & Brown Co., LPA

Firm Partners: Joseph O'Neil, Eric Mertz, Dan Michel, & Jennifer Brown

Location: Defiance, Ohio

With more than 100 years of combined trial experience, the law firm of Arthur, O'Neil, Mertz, Michel & Brown has represented injured and wronged individuals throughout the State of Ohio. A Northwest Ohio based law firm with a state-wide and federal practice, Arthur, O'Neil, Mertz, Michel & Brown is a true general practice firm focusing on all types of litigation.

What is a challenging aspect of being a trial lawyer?

Everything is always against us – tort reform legislation, unfavorable court rulings, and juror sentiment. It is a constant battle to help our injured clients to recover fully for their injuries.

Name one or two of your firm's biggest accomplishments.

Our firm's attorneys are actively involved in our local community and in the state trial bar. This includes volunteering countless hours to the OAJ through board and committee service (including two Past Presidents), OSBA committees, and local charities (Defiance Red Cross, Voter Protection, YMCA Board, Boy Scouts, Soccer/Tennis Coaches, etc.).

What does OAJ mean to you and your firm?

OAJ is a means to level the playing field in an arena that is heavily tilted in favor of our adversaries. Through unselfish cooperation among competitors, the trial lawyer members of OAJ give volume and force to otherwise muted and muffled voices.

American Association for Justice
www.justice.org

SPECIALTY LAW REPORTERS

WHAT YOU NEED TO KNOW—NOW

\$150/YEAR
FOR AAJ MEMBERS
\$195/YEAR
FOR NONMEMBERS

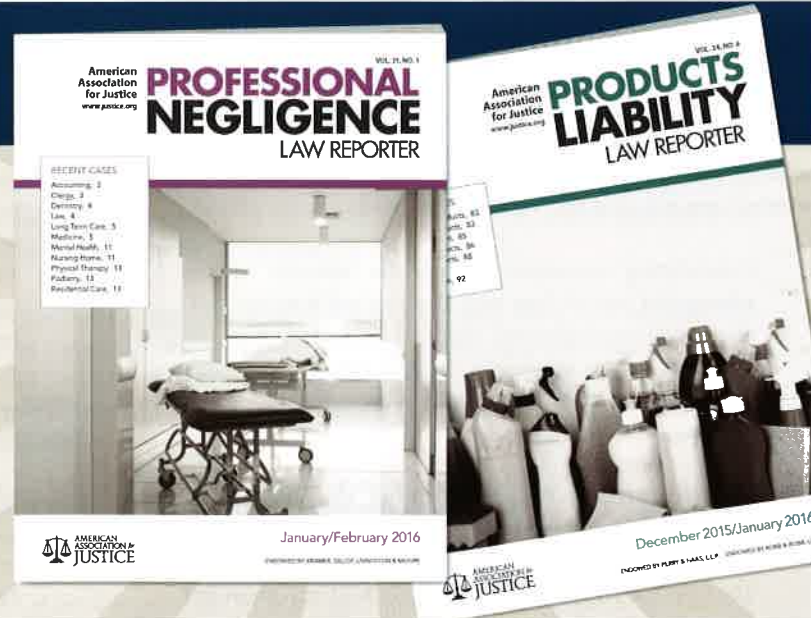
SUBSCRIBE NOW AT

www.justice.org/LawReporters or call 800-424-2727, or 202-965-3500, ext. 8611.

The American Association for Justice's *Products Liability Law Reporter* and *Professional Negligence Law Reporter* deliver a wide variety of recent settlements, verdicts, court decisions, and more to help you stay ahead of the competition. Don't miss out—subscribe today!

AAJ members who subscribe receive membership in the Products Liability or Professional Negligence Section. Section members have access to a secure list server and document library.

The American Association for Justice, formerly the Association of Trial Lawyers of America (ATLA)



ABOUT THE COMPANY:

Quality Rehabilitation offers clients the highest quality work in a timely and professional manner. We are highly skilled, certified, and ready to work for you.

WE OFFER:

- Life Care Plans
- Legal Nurse Consulting
- Medicare Set-Aside Allocations
- Medical Case Management
- Vocational Case Management

Contact us today and discover how we can help you!



“highly professional, reliable and accomplished in their field. I would recommend them to anyone in need of an expert nurse consultant.”
ANTHONY SAMBUCINI
ANG REHAB CONSULTING

ADDRESS:

391 Saddle Path Lane,
Pataskala, OH 43062-8028

PHONE: 740-964-9366

FAX: 740-927-2766

EMAIL: rzang@qualityrehabcp.com

WEB: www.qualityrehabcp.com

