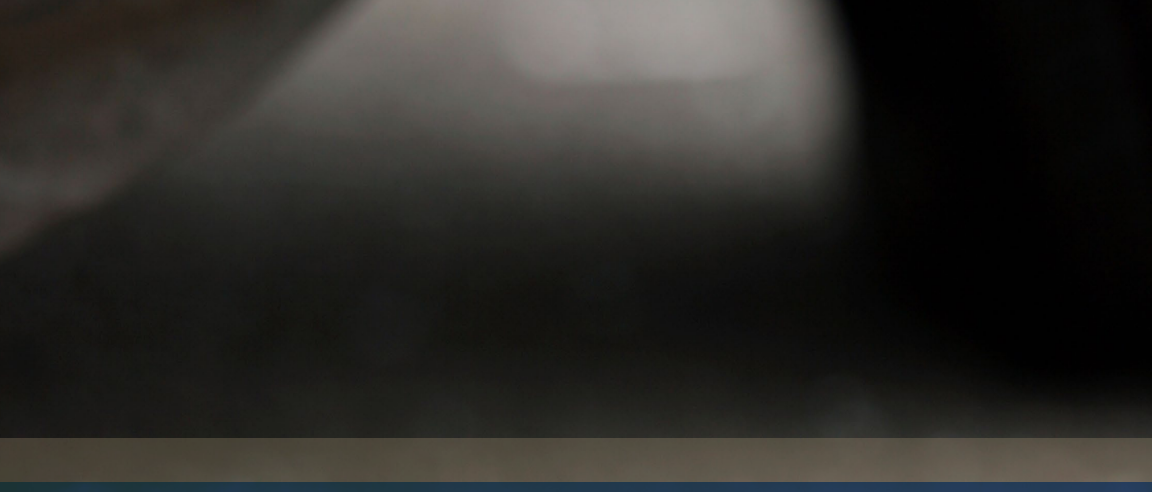

I WAS INJURED IN AN ACCIDENT

WHAT DO I DO NOW?

FROM DELDAR LEGAL

I WAS INJURED IN AN ACCIDENT.
WHAT DO I DO NOW?

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Summary table of contents

"If the insurance carrier you are dealing with is fair, and some of them are, you can count on a few more dollars in the settlement offer. If the carrier is conservative (perhaps we can even use the word 'cheap'), you and your lawyer will have to take this into consideration in evaluating your case." *§1:08*

Chapter 1

Do I Have A Case?

I. Overview

§1:01 What Is a "Personal Injury" Claim?

If you have been injured due to the carelessness of another person or entity, you may be entitled to reasonable compensation for the harm you have suffered. In legal terms, you may have a personal injury claim based on "negligence." Negligence is a failure to act the way a reasonably prudent person would act under similar circumstances. Regardless of how you were injured — whether in an auto accident, a medical accident, a slip or fall, or a dog attack, or by a defective product — you will have to prove some type of negligence in order to obtain fair compensation for your injuries.

§1:02 Elements of Negligence

In order to establish negligence, you must establish these four elements:

Duty

As a threshold matter, you must establish that the "defendant" (the person you claim is responsible for your injuries) owed you a legal duty of care. A duty of care may arise out of the relationship between the parties (e.g., doctor/patient); or the foreseeability and likelihood of harm to the injured party; or other factors. For example, a person who gets behind the wheel of a car owes a duty of care to the other drivers and pedestrians with whom he shares the road. Similarly, a storeowner has a responsibility to keep the premises safe and clean for his customers. If the defendant has no legal responsibility toward you, then he cannot be held accountable for your injuries.

Breach

A "breach" of duty is a failure of duty. When the defendant acts with unreasonable carelessness or fails to act in a way that a reasonably careful person would, that is a breach of duty.

Causation

The defendant's breach of the duty of care must have caused your injuries. In other words, "but for" the defendant's negligence, you would not have been injured.

Damages

If you suffered no harm, then you do not have a claim for negligence, *even if* the defendant's conduct was unreasonably careless. If you were injured, you may be able to recover compensation (or, in legal terms, "damages") for the harm you have suffered. Your damages might include:

- Past and future medical expenses;
- Lost wages and benefits;
- Loss of future earning capacity;
- Miscellaneous expenses (e.g., childcare, transportation, medical devices or appliances, etc.); and
- Mental, emotional and physical pain and suffering.

II. What to Expect at Your First Meeting With a Personal Injury Lawyer

§1:03 Before the Meeting

Once you have contacted a personal injury attorney and provided some basic information, over the phone, about the incident and your injuries, the attorney may agree to meet with you in person, to learn more about your situation. Here are some things you can do to prepare for that first meeting:

- If you are in pain or having physical difficulties, and you have not yet seen a doctor or been evaluated at a medical facility, seek medical help. It's best that you see a doctor of your own choosing. Do not expect the attorney to refer you to one.
- Ask your doctor about staying out of work temporarily. If the doctor leaves the decision up to you, you should not work if working causes pain or substantial discomfort.
- Take photographs of the automobile or the product or the defective stair (or other premises defect) involved in the incident.
- If you were involved in an auto accident, have the damage to your vehicle appraised as soon as possible after the photos have been taken.

- Try to obtain the names, addresses and telephone numbers of any witnesses to the incident, but do not discuss the details of the incident with witnesses.
- Make a list of all the doctors you have seen as a result of the injury incident.
- Do not discuss the case in detail with anyone.
- Do not give statements to anyone from an insurance company. If you are contacted by an insurance company, obtain the name of the adjuster and the telephone number. Inform the adjuster that you will be consulting with an attorney and that your attorney will contact adjuster shortly.

Caution: *The adjuster is not your friend.*
Before you hire an attorney, the adjuster may ask permission to record his interview with you or ask you to give a recorded statement. Don't do it. The adjuster's job is to settle your claim for as little as possible; if you give a recorded statement, the adjuster will gladly look for ways to use your words against you.

- Gather up all documents related to the case, such as medical bills, doctor's instructions, prescriptions, and accident reports filed with the Secretary of State or the Department of Motor Vehicles. Bring these documents with you to your first meeting with your attorney.

§1:04 At the Meeting

This first meeting with your personal injury attorney will be an in-depth and detailed conversation about the "who, what, when, where, why and how" of your situation, including:

- How the incident occurred;
- The nature and extent of your injuries;
- Your past medical history and accidents;
- Your employment;
- How the incident has affected you and your immediate family; and
- Possible insurance coverage.

Your lawyer will ask specific questions about your injuries and will take detailed notes during the meeting. It is your job to be honest and

forthcoming during this interview. Be sure that you cover each and every problem you are having, regardless of how slight the pain may be. You and your attorney are contemplating entering into a partnership that likely will continue for many months or years. That partnership must be built on a foundation of trust.

> ***Caution***: *Meet with the lawyer who will be handling your case, not an assistant.*
> This initial, face-to-face interview should be conducted by the attorney who will be handling your case, not by his or her secretary, clerk or paralegal. This first meeting is your opportunity to establish a rapport with the attorney and evaluate whether you are willing to trust him or her with such an important matter. If the attorney is not willing or able to take the time to get all the facts personally, this should weigh heavily in your decision to retain him or her to represent you.

Here is an example of the types of specific questions you may be asked during your initial consultation with your personal injury lawyer:

The Basics

- When did this incident occur? [Date and time]
- Where did the incident occur?
- Were other parties involved?
- Providing as much detail as you can, tell me what happened.

Statements

- Have you given any statements to anyone regarding your injuries? This includes the police, insurance adjusters, doctors, nurses, ambulance drivers, paramedics, etc.

Employment

The amount of your damages will be affected by your loss of earnings and earning capacity. Accordingly, you may be asked:

- Were you employed at the time of the incident?
- What was your job title, or the type of work you were doing?
- What was your rate of pay at the time of the incident, and how was this amount calculated?

- How many hours per week were you working regularly, immediately prior to the incident?
- What did you earn in the last year prior to the incident?
- Where are you employed now?
- Have you lost time from work?
- Are you working now?

Your injuries

- Tell me about your injuries.
- Did you strike your head?
- Are you suffering with headaches?
- Did you suffer a head injury?
- Are you having any problems with dizziness?
- Does any part of your body (especially legs, fingers, hands, feet) go numb since the accident?
- Are you experiencing any tingling, numbness or feelings of pins and needles down either one your arms?
- Do you feel any back pain?
- Do you feel any neck pain?
- Where is the pain in your back/neck localized?
- Are you experiencing pain, tingling, numbness or radiation of pain down either one of your legs?
- Are you having any pain in your knees?
- Are you having any pains in your feet?
- Are your muscles stiff or sore due to the accident?
- Have you experienced ulcers, stomach pain, indigestion, heartburn, nausea, vomiting, bloating or other gastrointestinal problems since the accident?
- Do you have "fainting spells" or "black outs" following the accident?
- Were you required to rent or purchase braces, neck supports, traction devices, oxygen units, special clothing, crutches, special glasses?
- Did you have to make any modifications to your home (e.g., handrails installed in the bathroom or kitchen; a ramp)?

Medical treatment

- What medical facilities or physicians have you consulted?
- Have you seen an orthopedic surgeon or a chiropractor? Did you go to a walk-in medical clinic or a hospital?
- Were x-rays taken or did the doctor make a diagnosis based upon your report of your medical history and a clinical examination?
- When was the last time you saw a doctor prior to the accident? When and how was that medical condition resolved?
- When is the last time you had a physical, either for work-related employment or otherwise?

Preexisting injuries

It is surprising how often clients think they can fool the system, not to mention their own lawyer, by hiding a prior injury. They think that if they were to reveal the prior injury, particularly if it is similar to the current injury, then the lawyer will not take the case. However, there is always a way to differentiate the two injuries, *if your attorney knows about it early enough in the case*. Don't let a prior undisclosed injury sabotage your case.

- Were you suffering from any injuries prior to this accident?
- Did any of your pre-existing injuries impact upon the current injury?
- Have you ever had high blood pressure or a heart condition? Has the emotional stress from an accident aggravated this pre-existing condition?
- Have you been involved in any other injury accidents in the past three years?
- At any time before the incident, did you have complaints or injuries that involved the same part of your body claimed to have been injured in the incident?

Mental and emotional injuries

- Have you experienced thoughts of suicide since the accident?
- Do you have trouble sleeping? Nightmares?
- Has the accident caused you to withdraw or become aggressive?
- What was your outlook on life prior to the accident as compared to today?
- Have you ever been seen by a psychiatrist or psychologist, prior to or following the accident?

- If post-accident, was the treatment accident-related?
- Have you gained or lost weight since the accident? [Depression, pain and suffering can cause a person to lose or gain significant weight after a traumatic accident.]

Pain

- Describe your pain.
- Does the pain "come and go"?
- What do you do when the pain "comes"? Do you go to a doctor? Take pain pills? Just live with the pain?
- What type of pain medication are you taking?
- Is it a required prescription? Does the prescription prevent you from driving/earning a living?
- What, if anything, intensifies the pain (activities or non-activities)?
- Does your pain cause you to be unable to move your arms or legs, or cause headaches, nausea or irritability?

Before and after

- Paint me a "before and after" picture of you daily life. What activities could you do before that you can't do now, after this accident? This should include social activities, sports and household chores.
- Has your social life been impaired?
- Did the accident cause a significant increase in your consumption of alcohol or tobacco?

Medication

- Were you taking any type of prescribed medication prior to or at the time of the accident?
- Were you using any non-prescribed medicine prior to the accident?
- What medications – prescription and over-the-counter – have you taken since the accident?

Impact on loved ones

- How has your spouse react to your injuries?
- How have your children reacted?
- How have your friends and co-workers reacted?

Prior lawsuits

- Have you filed suit for a personal injury before?

§1:05 Records Release Form

At the conclusion of the interview, you may be asked to sign a records release form. Your signature on this form allows your medical providers and other entities to release your records, billing information and other pertinent information directly to your lawyer. The release form will look something like this:

[Attorney's Letterhead]

Individual:_____ AKA: _____

Social Security No.:_____ Date of Birth: _____

At the request of the individual, you are hereby authorized to release the protected health information as described below.

Description of Information: This release applies to all documents, records, reports, X-Rays or other films, photographs, billings, studies, or correspondence relating to the treatment, examination, or hospitalization, including, but not limited to, all physical or psychiatric conditions.

I also give my approval for any and all employment, payroll, educational, or job training records as may be deemed necessary by my legal representatives.

As well, I approve the release of all police reports/records, arrest records, jail/prison records, and probation reports/records.

This authorization applies to all records both prior to and after the date of signature. Nothing shall be removed, deleted, altered or withheld.

Disclosing Entity/Facility:_____

_____

Recipient of Information:
Individual's legal representative designates _____

as his or her agent to pursue any and all information as described above.

Purpose: At the request of the individual, the information sought is for the specific use of said person or law firm in representing the individual authorizing this release for the claim relating to his or her injuries, benefits of other related matters.

This document covers information or material whose disclosure would otherwise be prohibited by state or federal statutes or regulation, including, but not limited to, all HIPAA rules and regulations.

Expiration Date: This authorization is in force for three years from the date of signature herein due to the nature, duration and extent of this case.

Right to Revoke: The individual has the right to revoke this authorization at any time during which this Authorization is in force by giving written notice of revocation to the Republic Document Management. The person signing this authorization has a right to receive a copy hereof, and a reproduced copy of this authorization shall be as valid as the original.

No Conditions: I understand that I may refuse to sign this authorization and that my refusal to sign will not affect my ability to obtain treatment or payment, or my eligibility for benefits.

Re-disclosure: I understand that the information used or disclosed may be subject to re-disclosure by the person(s) or class of person(s) receiving it and is no longer protected by the federal privacy regulations pursuant to the Evidence Code, Code of Civil Procedures, Labor Code or any other state law relative to the issues regarding the copying of my records.

Photostatic and telefax copies of this Authorization will be considered as valid as the original.

SIGNATURE:_____

DATE:_____

Caution: *Do not sign a medical authorization provided by an insurance adjuster.*

If you are not represented by a personal injury attorney, the insurance claims adjuster might ask you to sign a medical records release form. Even though it might sound like a generous offer – just sign the form and the adjuster will do all the work in gathering your medical records – it is not that

simple. The language of medical authorizations can be very broad. You do not want to inadvertently allow the insurance company to go on a fishing expedition through your entire medical history. Allow your attorney to gather your medical records and present them to the adjuster.

§1:06 Your Homework

Before you leave the interview, your lawyer may give you some "homework" to do. These tasks will help your lawyer in gathering the evidence needed to prove your case, and may be of great help to you down the road, if a lawsuit has to be filed. Your homework may include:

- Making a list of the names, addresses and phone numbers of **friends who knew you before your injury**. These people will be valuable in documenting your pain and suffering.
- Keeping a separate **medical trips list**. List the date of each trip to a doctor, hospital, therapy session, pharmacy, or any other place for medical care or supplies. Just use a few sheets of paper or a small notebook, and write down the date, where you went, and the purpose of your trip. For example, your entries might look like this: "Dr. Smith for three month checkup," or "Safeway Pharmacy for bandages and prescription pickup," or "Arizona Spine for PT."
- Keeping a separate **medical expenses list**. Again, just use a few sheets of paper or a small notebook, and write down each time you have a medical-related expense (e.g., Dr. Smith's bill; pain killers; heating rubs; bandages). **Save your receipts and bills**, along with your list.
- Keeping an **injury diary** to document how you are feeling. How are your injuries impacting your daily life? What are you unable to do now (or able to do only with pain), that you were able to do with ease before your injuries? Keep the diary current by making entries on a daily (or, at the very least, a weekly) basis.

All of these lists and your diary may be shown to the defense team (the defendant, his attorney and the insurance adjuster) and/or to the jury at trial. Therefore, it is important to keep these materials free of extraneous information or notes. If you have a question for your attorney, jot it down on a separate piece of paper and talk to your attorney about it over the phone or at your next meeting.

III. How a Personal Injury Lawyer Will Evaluate Your Case

§1:07 Ongoing Process

Case evaluation is an ongoing process for a personal injury lawyer. Your lawyer will weigh the factors listed below in deciding whether to accept your case initially, in evaluating settlement offers, in preparing for trial, and during the trial itself.

§1:08 Factors Considered

Liability

Liability — that is, a breach of the duty to use reasonable care — is the first and biggest hurdle a personal injury lawyer will consider. This is especially true in smaller personal injury cases. Insurance companies have no fear whatsoever about rejecting claims in small cases in which there are serious questions as to liability. To put it another way, if the defendant's liability (i.e., fault or responsibility) is unclear, then so is your chance of achieving a favorable outcome in your case.

Damages

What is the potential value of your case? Liability can be clear, but if there are no damages, then you have no case. For example, imagine you are forced off the road by another driver who crosses the center line. The driver is charged with operating under the influence and is arrested on the scene. You are shaken, but have no physical injuries. Clear case? No. The liability is absolute, but you have virtually no damages.

The damages factor generally cannot be adequately assessed at your initial interview with the attorney because the full extent of you injuries is still unknown. However, even in the earliest stages of your case, you probably have some idea as to the potential severity of your injuries. Cases involving broken extremities are easy, but soft tissue cases, such as neck and back strains, are more difficult.

Defendant with assets or ability to pay

Does the potential defendant have the ability to pay a judgment? If not, you and your attorney may invest a good deal of time, money,

effort and emotional energy in the case, but never see a penny in return. You may have a viable case if:

- The defendant has personal assets (e.g., property) to satisfy a judgment; or
- Insurance is available to satisfy a judgment. Depending on the facts of your case, this might include the defendant's auto or home insurance; the defendant's employer's insurance; the car owner's insurance; or the property owner's insurance.
- If the defendant is uninsured, your uninsured or underinsured motorist policy may pay any judgment.

Jury appeal

What kind of person are you? Will the jury like you? Will jurors empathize with your situation? What kind of person is the defendant? Will the jury like the defendant? There are some "bad defendants" — the drunk driver, the tire squealer, the bully or the bar owners who were too busy pushing drinks to notice who was getting drunk. If you have a bad defendant, your settlement range goes up. There are also some "good" defendants — e.g., the little old man who rear-ends you because he is distracted, looking for his doctor's office. A "good" defendant will lower the settlement value of your case because a jury will sympathize with him or her. Generally, though, you will be dealing with an average defendant who was negligent for only a few seconds — e.g., the neighbor who neglected to put enough sand on his sidewalk after a snowstorm or the owners of a small bookshop who did not repair one of the steps leading in to the store soon enough.

Quality of potential witnesses

Your case is only as good as your evidence, and usually your evidence is only as good as your witnesses. If, for example, your only witness to support liability is a relative or friend, your case is weaker than if you had several impartial witnesses. If the doctor involved has never testified, doesn't want to testify or cannot testify well, this also weakens your case and lowers its settlement value.

Insurance company

Some insurance companies are far more conservative (i.e., tight-fisted) than others. Their settlement practices will not change, even if they lose 100 lawsuits. It doesn't bother this type of insurance company

to pay several thousand dollars to defend a $25,000 case, even if they lose to a verdict of $35,000. It's part of doing business. If the carrier is fair, and some of them are, you can count on a few more dollars in the settlement offer. If the carrier is conservative (perhaps we can even use the word "cheap"), you and your lawyer have to take this into consideration in evaluating your case.

Venue

Where will a lawsuit be filed? Jurors in some states are receptive to personal injury cases, while jurors in other states are not. In some counties, and some municipalities, very low verdicts are common. In others, verdicts in excess of one million dollars are not uncommon. You must consider your particular county or jurisdiction when evaluating a settlement offer.

Legal issues

Is there a state law or court ruling that applies to your case? If there is strong supporting law that your injury attorney can cite in your favor, the settlement value of your case is enhanced.

Time since the injury occurred

How much time has passed since the incident that caused your injuries? As a general rule, the longer it takes a case to get to a jury, the less sympathetic the jurors will be. This is particularly true if you experienced pain or other symptoms for a limited time after the accident, but you have fully recovered by the time of trial.

In an auto accident case, collision damage

In many automobile cases, the actual damage to the automobile may be minimal. Car bumpers are made to absorb more impact now than they could years ago. Jurors are impressed by evidence, or lack thereof, of substantial collision damage. If the car in which you were injured looks like an accordion, it will be easier to convince a jury that you sustained fairly serious injuries. On the other hand, if there was only a bumper scratch or minor fender damage, the jury will question the extent of the impact and, therefore, the extent of your injuries. However, significant collision damage to the defendant's vehicle may be help convince an insurance adjuster, or a jury, that you sustained more than minimal injuries.

"Remember, the adjuster is not your friend. The adjuster's goal in the early stages of the investigation is to gain your trust *before* you file a lawsuit and officially become an adversary. Once a plaintiff's attorney becomes involved, the claim's value can increase by anywhere from 10% to 1,000%; hence, the adjuster's incentive for gaining the trust of, and control over, the claimant." §2:05

Chapter 2

Dealing With The Insurance Company

I. How Insurance Companies Work

To understand how the insurance company will review and respond to your injury claim, you have to understand how insurance companies work.

A. Overview of Insurance Business and Company Structure

§2:01 Basic Insurance Company Activities

The business of an insurance company generally involves five basic activities:

- **Underwriting.** Underwriters assess the risks of a particular insured or client to decide whether that risk is worth insuring.
- **Marketing (Agency).** It is the job of the insurance agent to sell the insurance product for the premium that the insurance carrier has established for a particular line of business or risk.
- **Investing.** The investing arm of the insurance carrier has the job of investing surplus funds in order to generate more profits.
- **Actuarial.** Actuaries are highly trained mathematicians who calculate policy premiums based on risk factors and actual claims experience.
- **Claims.** The claims department processes and pays claims when events occur that are insured under a policy.

The first four activities are all geared toward generating profit and income. The fifth activity, processing claims, requires spending money, which cuts into the insurance company's profits. Consequently, insurance carriers are constantly trying to find ways to turn the claims department into a "profit center," even though this is contrary to the claims department's inherent purpose and function.

§2:02 Business Model of a Large National Insurance Carrier

Most large, national insurance carriers operate with a military-style hierarchy, in which any decision of any consequence must be reported upon and approved up the chain of command. "Local" offices report to "regional" offices. Regional offices report to the "home" office. This rigid reporting structure can be frustrating for claimants because of the delays often generated by this type of bureaucracy.

The home office, with a general claims manager or vice president in charge of claims, usually holds the ultimate authority of the company with respect to coverage, policy limit cases and other important questions. The home office is where decisions on such things as internal company policy, training classes, claims manuals and other policies are made. If there is a coverage question in your case — non-payment of premium, driver with no permission from the owner, or other coverage question — the home office will likely decide the issue. The local adjuster usually does not have authority to decide coverage questions.

If the question is money, your adjuster will usually get authority in increments of a few to several thousand dollars from the claims supervisor, claims manager or regional office. In a large policy-limits case, the authority usually comes from the home office. Asking for policy limits

is a big thing. When your accident attorney is seriously asking for policy limits in your case, the local adjuster will need time to pass the demand up the chain of command. A period of 30 days is usually the minimum amount necessary to proceed through the bureaucracy.

§2:03 Claims Department Hierarchy

Following an injury accident, your attorney will be dealing with the claims department. Therefore it is important to understand how a claims department operates, and what happens to a claim as it travels through the claims department from the day it is first set up to the day the file is closed.

Although there may be slight differences from carrier to carrier, in general, the claims department will be structured as follows:

Claims Manager

The local office of a large, national carrier is usually run by a claims manager. This person, typically, is a long-term, loyal employee. The claims manager is responsible for overseeing settlements, general claims practices and lawsuits, and has significant authority in resolving small-to-medium-sized cases.

Claims Supervisors

Claims supervisors report directly to the claims manager. These individuals typically are responsible for supervising a dozen or more claims adjusters.

Claims Adjusters

At the bottom of the claims department hierarchy are the claims adjusters. An adjuster in the local office of a large national carrier may be responsible for 150-200 open claims files at any given time. It is his job to negotiate settlements and close files as efficiently and inexpensively as possible.

B. How the Claims Department Works

§2:04 Setting the Initial Reserves

When an insurance company first receives a notice of claim, it is usually given to the claims supervisor, who assigns the claim to an adjuster to perform a preliminary investigation. However, before a claim can be set up and assigned, the supervisor must set an initial "reserve."

What is a reserve? It is simply an amount of money the insurance company earmarks to settle a claim, including the anticipated costs involved in

handling the claim. When the insurance company first receives a claim, it generally has little information other than the name and contact information of the insured; possibly a brief description of how the accident occurred; and, possibly, an even briefer explanation of the injuries involved. Given the limited information available, the claims supervisor can only make an arbitrary guess as to what the reserve should be at this initial stage of the claim. The reserve will be adjusted, though, as new information becomes available. In general, insurance companies like to have their reserves "set in concrete" within six months after the onset of the claim.

§2:05 Adjuster's Initial Investigation and Subsequent Reports

The adjuster to whom the claim is assigned has the task of conducting a preliminary investigation into the facts giving rise to the claim. Most insurance companies require an initial report by the adjuster to the claims supervisor within 15 days. The purpose of this initial investigation and report is to give the claims supervisor information about what kind of coverage is involved; whether the facts of the accident fall within the coverage provisions of the policy; the nature of the claimant's injuries; and the potential liabilities (fault) of the parties involved.

After receiving the initial report, the supervisor is generally required to reset the reserve to conform to the known facts of the case.

Depending upon the seriousness of the claim, the adjuster then will have anywhere from 30 to 90 additional days in which to complete further investigation. Thereafter, the adjuster will prepare a more extensive report to the supervisor, triggering yet another review and resetting of the reserves.

> ***Caution: Remember, the adjuster is not your friend.***
> The adjuster's goal in the early stages of the investigation is to gain your trust *before* you file a lawsuit and officially become an adversary. It is the objective of the claims representative to contact the claimant promptly and to make friends with him. The incentive for the insurance company is to be able to deal with a lay person rather than an attorney. Once a plaintiff's attorney becomes involved, the claim's value can increase by anywhere from 10% to 1,000%, hence the adjuster's incentive for gaining trust and control over the claimant.

§2:06 Why Is the Reserve Important?

When it comes time for an adjuster or claims supervisor to request settlement authority, the authority is generally limited by the reserve on the file. A reserve that has not been properly set causes delays in resolving the claim because the adjuster has additional reporting requirements to satisfy when there is a great disparity between the real value of the claim and the reserve.

The last thing an adjuster or claims supervisor wants to do is to carry a $10,000 reserve for a year or more, and then all of a sudden jump that reserve to $500,000. It's embarrassing for an adjuster to have to file a report with that kind of jump in the reserve. More importantly, it requires a great deal of explaining and results in much closer scrutiny of the file up the chain of command, by many more people than might otherwise be involved. As you might expect, all of this reviewing and explaining can cause considerable delay internally.

§2:07 How Your Attorney Can Help

The reserve has to be reevaluated as new information becomes available and known to the insurance company. Consequently, every time a claim file gets picked up, it's the adjuster's (or supervisor's) job to make sure the reserves are in order. This presents your personal injury attorney with a golden opportunity to help the adjuster and/or claims supervisor set the reserve as high as reasonably possible. The way to achieve that goal is to provide the adjuster with a steady stream of information about your claim and the nature of your injuries, along with records that would support an upward movement in the reserve. In addition to medical records and bills, your attorney also might provide the adjuster information about your occupation and wage loss; legal decisions that support your position; and recent jury verdicts in cases with similar facts. A steady flow of information about your claim will help to ensure that the reserve is set high enough to allow an adjuster to settle the claim for a sum you are willing to accept.

II. Negotiating a Settlement

A. Making a Formal Settlement Demand

When your case is ripe for settlement (typically, when your attorney has completed his investigation and you have recovered from your injuries) your personal injury lawyer will send the adjuster a formal

settlement demand. Whether your demand is packaged as a letter, a lengthier brochure or a DVD, the goal is the same: Make it easy for the adjuster to say "yes."

§2:08 Demand Letter

In most cases, your demand will take the form of a settlement proposal letter. The best settlement proposal letters are well organized, succinct and easy for the adjuster to comprehend at a glance. The very first page of letter should tell the adjuster how much you want and why you want it. Following that, the letter may go into some detail about your injuries and how your life has been affected by your injuries. All of this information will be supported by copies of your medical records and bills, and other evidence of your damages. The letter will end with a request for a response, by a specific date.

§2:09 Brochures, DVDs

A settlement brochure is a longer, more elaborate form of settlement proposal that is typically used in cases involving catastrophic injury or death. A brochure typically includes a longer and more detailed analysis of both liability (fault) and damages.

In some cases, an audio/video proposal, on a DVD, may be appropriate. This may be advisable, for example, in cases involving multi-million dollar damages. These large exposure cases typically are reviewed by the insurance company's upper claims management personnel. A well-put-together DVD settlement proposal can bring your case to life for these "ivory tower types" much more vividly than anything written in a claims file.

B. Factors Insurance Companies Consider in Evaluating Injury Claims

Adjusters do not evaluate claims on the honor system. It's not a matter of whether they trust you or your attorney; it's their job to question everything and view personal injury claims with a healthy dose of skepticism. Depending upon the adjuster's experience, training and judgment, the adjuster may question anything he or she cannot explain or understand, and anything that seems suspicious. By knowing in advance the valuation soft spots where adjusters are more likely to probe, you and your attorney can better prepare for the settlement negotiation process and increase the odds of a favorable settlement.

§2:10 Red Flags in Your Medical Records

Your medical bills will serve as the best indication of your injuries. The insurance company will consider the amount of your medical bills as the primary factor in valuing your case for settlement. Consequently, the adjuster will closely scrutinize your medical records, looking for ways to reduce the value of your claim. In particular, adjusters will look for these "red flags" in your medical records:

Are your medical bills proportionate to your claimed injuries?

Insurance adjusters look for a sense of proportionality between the injuries claimed and the extent of the medical bills incurred. Adjusters develop a "sixth sense" as to when the medical bills are out of alignment with the nature and severity of the injury. Soft tissue injury claims (e.g., whiplash or low back pain), in particular, are prime candidates for "build up," a term of art among adjusters, which refers to the act of artificially inflating the amount of medical bills incurred, in order to artificially inflate the perceived settlement value of the claim. Physiotherapy treatments that continue on and on, with no decrease in visits and no appreciable improvement, are always suspect.

Where were you treated?

In addition to the amount of your medical bills, the source of those bills will be important to the adjuster. Do your medical bills reflect a hospital stay, physical therapy, medical and osteopathic treatment, chiropractic treatment, diagnostic tests, orthopedic devices, prescriptions or over-the-counter medicine? In the eyes of an adjuster, a two-week hospital stay and three months of physical therapy is much stronger evidence of an injury than a few thousand dollars' worth of negative diagnostic tests and adjustments by a chiropractor.

> ***Tip**: Don't rely solely on chiropractic treatment*
> There is no question that adjusters are less impressed by chiropractors than by board certified orthopedic surgeons. After you have received a minimal amount of chiropractic treatment, it's a good idea for you to see a board certified medical doctor to confirm the amount of treatment, the appropriateness of the charges to that point, and their necessity.

Do your medical records contain evidence suggesting a lack of "causation"?

Do your records include a notation about prior claims or injuries? Is there any mention of a pre-existing condition or an injury to the same body part? Is there any reference to intoxication, alcohol or drugs?

Does anything in your medical records deviate from the "official" account of the accident that has been represented to the adjuster?

Is there a correlation between the medical records and treatment received?

Adjusters become suspicious if the medical bills submitted by your personal injury attorney lack the necessary corresponding medical reports. The reports validate the diagnosis made, treatment given and future prognosis. If your personal injury attorney does not include a medical report for each bill, the adjuster may discount — or even disregard — those particular charges. In medical malpractice litigation, it is often said, "If it's not in the chart, it didn't happen." Some insurance adjusters take the same approach to evaluating medical expenses: If there's not a medical report to go along with the bill, it isn't worthy of consideration.

Does your treatment seem appropriate for your claimed injuries?

Treatment that is not typically indicated by the type of injury being claimed, such as a psychiatric referral for a low-impact accident or soft-tissue injuries, will be questioned.

What is the quality of the medical information you have provided?

Computer-generated medical reports, in which only the patient's name has been changed, raise eyebrows. Fill-in-the-blank medical reports also will be viewed with skepticism. Narrative reports from well-respected doctors explaining the nature of your injuries are preferable to hen-scratched office notes that fail to document much of anything. Reports that are detailed, descriptive and factual are best. On the other hand, reports that use terms such as "slightly possible," "maybe" or "dubious" can hurt the value of your case. Hospital records with detailed nurses' notes are also excellent sources of information on your injuries.

What did you tell the first doctor you saw after the incident?

Expect the adjuster to scrutinize the medical records of the first caregiver, focusing on the history given. If that history says nothing about an accident or attributes the injury to a pre-existing condition, expect adjuster resistance.

§2:11 Other Factors Commonly Considered

In addition to your medical records, these nine factors are commonly considered by claims adjusters in evaluating an injury claim for settlement. Depending on the specifics of your situation, other factors also may apply:

Anticipated future medical bills

For some injuries, future treatments are foreseeable. If you anticipate future medical expenses, your injury attorney should include, with your demand letter, a doctor's opinion to this effect and an estimate of the costs of this future treatment.

Evidence of liability

The ultimate question is: How strong is your case that the defendant's negligence (unreasonable carelessness under the circumstances) caused your injuries? It doesn't matter whether you were injured in an auto accident or a slip-and-fall, or by a defective product. The bottom line depends on the strength of your case against the defendant's, with respect to the primary issue of negligence. If the defendant's liability (fault) is absolutely clear, the value of your settlement is correspondingly increased. If the liability is on the weak side, the value of your case is correspondingly reduced. Likewise, comparative negligence refers to the role your own negligence may have played in causing your injuries. As your negligence approaches 50% of that of the defendant, the value of your case decreases significantly. If there are soft spots in your liability case, expect the adjuster to probe them and use these as "discount points" in whittling down any offer.

The nature and severity of your injuries

By their very nature, some injuries are worth more to insurance companies than others. Broken limbs, permanent scarring or impairment, rupture of internal organs and other well documented, objective injuries are worth more to insurance companies than soft tissue injuries, emotional suffering and other injuries where the symptoms are completely subjective. Even though most broken legs heal faster than many so-called "whiplash" injuries, insurance companies will almost always pay more for a broken leg than for a strained neck. The insurance company assumes that if you have a compound fracture, for example, a jury will award you a large verdict because the jurors can see your injury and almost feel your pain; on the other hand, it will be far more difficult for a jury to identify with a low back injury or neck injury that has no supporting objective evidence.

Conversely, if your doctor has indicated any amount of permanent impairment, scarring or disfigurement, this factor will increase the value of any settlement by a fairly substantial amount. Scars (especially on the face, and especially on women), burns, dog bite marks and other permanent disfiguring aspects are constant reminders of the injury. Jurors can see such injuries and are more likely to award higher damages than in cases involving "mere" pain and suffering. Your medical

bills can be low, your loss of income can be low and your injuries may be fairly minimal. However, if you have some permanent scarring or disfigurement, the settlement value will increase. These types of evaluations may be unfair, but they are a fact of life.

Evidence of lost wages

Suppose you were out of work for three months with a soft tissue injury sustained in a slip and fall accident. Your personal injury attorney must present verifiable proof of your wage loss, including:

- A written report from your doctor stating that you unable to work for a specified period of time; and
- A statement from your employer, verifying your hourly wage or salary, and your absence from work for the same period of time noted in the doctor's report.

Without that documentation, expect the adjuster to haggle over this aspect of the settlement demand and discount most (if not all) of your claimed lost wages.

Evidence of anticipated future wage loss

Future wage loss might result from a diminished earning capacity as a result of a permanent disability, or from time off work due to hospitalizations, therapy or ongoing treatment. A written medical opinion supporting your anticipated wage loss may help to persuade the adjuster to account for this element of damages in any settlement offer.

Your injury attorney's track record

How many cases of this type has your personal injury attorney handled before? Did he or she win, lose or leverage a big settlement? The adjuster will know and will factor this into his or her negotiating strategy.

Time-lag between accident and report of injury

The longer the time-lag between an accident and a report of an injury, the greater the skepticism with which the adjuster will view the claim. Be ready to explain why you denied any injuries at the accident scene, but visited the emergency room three days later. Be prepared to explain why the "History" section of a medical report makes no mention of the accident.

Your prior claims history

If you have a long history of prior insurance claims, do not expect a quick or generous settlement offer. In fact, the adjuster may suspect he is dealing with a "professional claimant" and arrange surveillance on you or flag your file for a fraud investigation.

The identity and local reputation of your treating doctor

Does your doctor have a reputation for running a local "plaintiff's mill" that specializes in treating patients with insurance claims? Does the doctor advertise on TV for personal injury "victims"? If so, the doctor's credibility will be suspect, as will the validity of your claim.

C. Insurer Negotiation Tactics, Tricks and Ploys

Insurance adjusters are well trained in the art of negotiation and will employ any number of "tactics," tricks and ploys in an effort to settle your claim for as little as possible. An experienced personal injury attorney will be aware of these tactics and prepared to fight back. Some of the more commonly used insurer negotiation tactics are described below.

1. How Low Will You Go?

§2:12 *The Lowball Offer*

Assume your personal injury attorney evaluates your case to be worth $15,000 to $20,000. Your bottom line is $12,000, and your goal is $15,000 or better. Your attorney sends a letter of demand for settlement in the amount of $27,500. The adjuster phones your attorney, states that he has reviewed the demand and is prepared to make an offer of . . . $3,000. Usually, there is little or no explanation for the ridiculously low offer.

Depending on your situation, the insurance company you are dealing with, and your attorney's prior experience with the adjuster, your attorney may have several options for dealing with a lowball offer, including:

- Filing your lawsuit and preparing to litigate. This may be the best option if the carrier is a conservative one that will not pay top dollar until it is facing a trial.
- Asking the adjuster if he has room to move up. If the answer is yes, your attorney can make a demand in the medium range and see where the adjuster goes with the next offer. If the adjuster jumps considerably closer to your bottom line, your attorney can work with him to get the settlement to a comfortable and acceptable range.
- Asking why the offer is so low. If the adjuster responds with any useful information, your attorney can attempt to work toward settlement. If not, your attorney can ask to negotiate with the adjuster's supervisor or claims manager. If that request is refused, the next step is to file suit and prepare to take the case to trial.

§2:13 The "Bounce-Back Double Lowball" Offer

Let's say your personal injury attorney makes a demand of $25,000, with the goal of settling your case for approximately $15,000. The insurance company's first offer is $6,000. Your attorney reduces the demand from $25,000 to $19,000, hoping for a reasonable response. The carrier responds with a $500 increase, to $6,500 — hence, the "bounce-back double lowball." The message from the carrier is obvious: It has no intention of settling your claim at this time. The claims manager has already established a take-it-or-leave-it attitude, and expects your attorney either to accept the low offer or take your case to court. In most cases, the best way to deal with this tactic is to file suit.

§2:14 Asking You to Bid Against Yourself

It is not uncommon for an adjuster (or a defense attorney) to respond to your settlement demand with, "What will you take?"

The adjuster will call your injury attorney after receiving your demand and, in a friendly, non-adversarial manner, will indicate a desire to cut through the formalities of negotiation. He will acknowledge your demand and then ask what it will take to settle the claim. The goal is to get your attorney to reveal your bottom line or an amount close to it.

A sincere response to this question rarely leads to a reasonable settlement. The best way for your injury attorney to respond to this technique is to reply along the lines of, "My client will accept what we demanded in our request for settlement – or more, if you are willing to offer it." This lets the adjuster know that your settlement demand letter was serious, and that will not bid against yourself.

§2:15 My "Preliminary Evaluation" Suggests . . .

The "preliminary evaluation" technique is similar to the "bid against yourself" technique, with an interesting twist. With this tactic, the adjuster runs a non-binding settlement range up the flagpole to see if the attorney will salute it. When she does, the flag gets lowered to half-mast. Here's how it works:

Assume that a personal injury attorney has evaluated a case as being worth $40,000 to $50,000. The defendant's liability is clear, and the primary issue is value. The attorney's goal is to settle the case for as close to $50,000 as possible, and with good luck even as high as $52,000 or $53,000.

In the demand letter, the attorney has requested a settlement of $85,000. After stalling for several months, the adjuster responds as follows: "I have been working on the file and I am trying to work up a preliminary evaluation of the case before I take it to the claims committee (or claims supervisor). There is no way that I can meet your figure of $85,000, and I have placed an initial evaluation on this case at between $45,000 and $55,000. How does that meet with your expectations?"

The adjuster has indicated a settlement well within the hoped for range, with a high point even greater than the attorney's expectations and a mid-point at close to the top of the ultimate goal. The attorney assumes that, even if the adjuster comes back with a mid-point of $50,000, she will have achieved close to an "A" settlement. If the attorney can talk the adjuster up to $55,000, she is $15,000 above the low point and $5,000 above the top of the range. Therefore, she responds with any one of several positive comments, ranging from "That sounds pretty good to me" to "If you come back with $55,000, we'll take it."

Several days later she receives a telephone call from the adjuster who now wants to make a firm offer. The adjuster tells her that the case went to the claims committee and that his preliminary evaluation was shot down to $35,000. However, the adjuster continues, with strenuous "arm pulling" he convinced the claims committee to increase their evaluation to a firm $40,000 final offer.

The result is that the attorney is stuck with the low point of $40,000. When the adjuster threw the $45,000 to $55,000 curve ball, it sounded so good that she responded positively. The adjuster then realized that the attorney was so happy with that range that she would be willing to take lower; therefore, the adjuster came back with a significantly reduced offer. The very best the attorney will be able to do is to get the adjuster to move perhaps $1,000 or $2,000, which means the case will settle near the lowest end of the range rather than the highest. The adjuster knows that the attorney will probably not go to trial over a difference of $3,000 to $5,000 and, therefore, she will be forced to settle for a "B" or "C" settlement, rather than an "A" settlement.

The best way for your personal injury attorney to deal with this tactic is to tell the adjuster she will respond only to a "real offer" that can be taken to her client — that is, a firm offer of settlement for a specific figure.

§2:16 This Is My "Best and Only" Offer

Another technique employed by adjusters is to call your injury attorney after receiving your letter of demand and state, "I do not like to waste time negotiating back and forth. Therefore, this offer will be my best and only offer."

Don't believe it. A savvy personal injury attorney won't be intimidated by this tactic. Before the offer is even made, an experienced personal injury attorney might respond by stating that if the offer is going to be the equivalent of the demand figure (or higher), then the prompt settlement of the claim is appreciated. Otherwise, the attorney can remind the adjuster that settlement of personal injury claims requires a give and take, and that a "first and only" offer is not negotiating in good faith.

§2:17 Using Your Prior Statement Against You

One of the most used and abused tactics of insurance carriers is to take your statement before you are represented by an attorney and to write it up in a way that is detrimental to your case. This ploy works like this: The adjuster asks questions and then paraphrases the answers in the adjuster's own words and handwriting. The injured person is then asked to review the entire statement, and, if it is "essentially correct," to sign it. The statement usually includes language similar to: "I have read the above statement, and it is true and correct to the best of my knowledge and belief." The insurance company then uses that statement against you, in settlement negotiations and litigation. Here is an example:

> A husband and wife were riding a tandem bike in a rural camping area. A pickup truck took a tight turn on a corner at an intersection and struck them, forcing them and their bike into a ditch. Both the wife and the husband received moderate to serious injuries with medical bills of several thousand dollars.
>
> Within one week after the incident, an adjuster for the truck driver went to the couple's home to obtain statements from each of them. They were still recovering from the incident and the insurance adjuster did not make it crystal clear which party she actually represented in the case. More importantly, the insurance adjuster did not inform the couple that the statements could be used against them later in the claim.

During his deposition, the husband stated that he was about two or three feet from the side of the road. The defense lawyer pulled out the signed statement and pointed to a sentence that read: "I am not exactly sure how far we were from the side of the road before the collision occurred." The husband replied that he remembered telling the adjuster that he believed he was approximately two or three feet from the side of the road. When the adjuster asked if he was exactly sure, he replied that he was not exactly sure. The adjuster simply wrote down that the husband was not sure how close he was to the side of the road before the impact.

2. How Long Will You Wait?

Some adjuster tactics are designed for one purpose: to stall. The essence of stonewalling is to drag out a claim for a period of months or years before paying a reasonable settlement. The adjuster's hope is that you will grow so weary of this process and so frustrated by these tactics that you will knuckle under and accept a lower settlement just to be done with it. Some of the more common stonewalling tactics are discussed below.

§2:18 Getting Authority

Every adjuster has to get some authority from someone, but some adjusters will repeatedly claim the need to get authority as a delaying tactic. If the adjuster constantly raises the need for authority as an obstacle to settlement, your injury lawyer can respond in kind, telling the adjuster that he has not been granted the authority by his client to accept such a low settlement offer.

§2:19 Refusal to Respond [aka The Disappearing Adjuster]

The adjuster may simply refuse to respond to your personal injury attorney's letter of demand and follow-up letter and phone call. Before deciding what to do, it is appropriate to consider the possible reasons for the adjuster's failure to respond. It may be that the adjuster is legitimately overworked, is busy handling too many files, and just hasn't had the time to respond. It may be that your demand letter and other documents were lost or misplaced because of an innocent mistake. It is just as likely, however, if not more likely that the adjuster is purposely stalling to preclude a fair and early settlement.

§2:20 The "Carrot" of an Early Settlement

One of the more frustrating and unfair techniques used by claims adjusters is stalling with the "carrot tactic." When a month or two has passed without any settlement offer from the adjuster, the adjuster may tell your attorney that your claim is "still in committee" or is "being evaluated at the home office," or "has to be retrieved from the supervisor's desk." The adjuster is stalling, dangling the "carrot" of an early settlement, and hoping that you and your attorney will continue to wait.

§2:21 The Request for More Documentation

Another adjuster delaying tactic is to constantly request more documentation. A response to your demand is never forthcoming, just requests for more documentation. At some point, you will have to draw a line in the sand. If your personal injury attorney has already supplied the necessary medical bills, medical reports and lost wage information, and the carrier continues to ask for more detailed documentation, your attorney can (a) demand an offer before sending additional materials; or (b) ask what the offer would be when the information is received; or (c) tell the adjuster that he can obtain any additional information during the discovery process, after you file your lawsuit.

§2:22 Unfair Leveraging

If you have two or more parts to your claim, the adjuster may refuse to pay any part of the claim until or unless you agree to settle all parts of the claim. For example, if you have an automobile damage claim and a bodily injury claim, the adjuster may refuse to pay the damages on the auto claim until you settle your injury claim. This may put you in an untenable situation, forcing you to prematurely settle the bodily injury claim in order to get your car repaired.

§2:23 Economic Pressure

An adjuster may refuse to offer to advance payment for food, rent or living expenses. The idea is to put economic pressure on you – at a time when the adjuster knows you are financially vulnerable – and force an early and low settlement.

§2:24 Musical Chairs Claims Adjusters

Another stonewalling technique is to bounce a claimant from one claims representative to another until he is willing to take any settlement in order to get off the merry-go-round. Some insurers intentionally move files on a monthly or bimonthly basis to new claims adjusters. Others just have a very high turnover rate, which also results in multiple claims adjusters on a file. Whatever the cause, the effect is the same: claims are not promptly handled because each new adjuster has to get up to speed.

"Your deposition is arguably the most important event in your lawsuit, prior to trial. Accordingly, your personal injury attorney will spend a good deal of time preparing you for the deposition process. The goal is to make sure you know what to expect from the deposition, so that you can relax and give your best testimony." §3:06

Chapter 3

When a Lawsuit Is Filed

Introduction

If the insurance company refuses to settle your claim for a reasonable and fair amount, it may be necessary to file a lawsuit to obtain just compensation for your injuries. The process of resolving your claim through the court system is called "litigation." If negotiations stall and litigation becomes necessary, your personal injury lawyer will:

- File a lawsuit (a "complaint"), naming all potentially responsible parties ("defendants") and raising all viable legal claims.
- Send and respond to written discovery. During a lawsuit, the parties engage in a formal fact-finding process called "discovery." As part of this process, your personal injury attorney will send written interrogatories (questions), requests for documents, and requests for admissions to the defendant. The defendant will serve these same discovery documents on you.
- Take depositions of defense witnesses. A deposition is an interview of sorts. Your personal injury lawyer will ask the questions and the defendant (or other defense witness) will answer under oath. The testimony will be recorded by a court reporter and transcribed.
- Defend your deposition. The defendant will take your deposition. Your personal injury lawyer will attend the deposition with you to protect your rights.
- Retain expert witnesses, as necessary.
- File motions (formal written requests) with the court to try to resolve some issues before trial.
- Discuss settlement. Settlement negotiations may continue during the litigation process and likely will take on greater urgency as the trial date approaches. These discussions may be informal, between the attorneys, or more formal in nature, with a mediator present.
- If the case does not settle, the litigation will culminate with a trial.

The litigation process is explained in more detail in this chapter.

I. Before Trial

A. Complaint

§3:01 Initiating a Lawsuit

A lawsuit begins with the filing of a "complaint" with the court. The complaint will identify the parties. You will be the "plaintiff"; the person or entity allegedly responsible for your injuries will be the "defendant." The complaint will describe the facts that support your claim that the defendants were negligent (unreasonably careless), resulting in damages to you. Your personal injury lawyer will file the complaint with the court on your behalf, and have it served on the named defendants.

§3:02 Sample Complaint

In general, the complaint must provide enough detail so that defendant will know the allegations against him and be able to respond. It must include facts to establish the jurisdiction of the court and the elements of your claim of negligence. Typically, it will not include much more than that. Additional details will come out in discovery. (See §§3:03-3:10 for a discussion of discovery.)

B. Discovery

"Discovery" is the formal, fact-finding phase of a lawsuit. In a personal injury case, discovery generally includes: written discovery; depositions; and a defense medical examination.

1. Written Discovery

Your attorney will send written discovery to the defendants, and the defendants will send written discovery to you. Generally, you will have 30 days to respond to these written requests for information and documents. Your personal injury attorney will draft the responses, but you will be expected to help in providing information and gathering responsive documents. Written discovery consists of the following:

§3:03 Interrogatories

Interrogatories are written questions that must be answered in writing, under oath. As a discovery tool, interrogatories are best used to identify parties and potential witnesses; the sources and identity of documents; and other basic information about critical issues in the lawsuit. The purpose of interrogatories is to limit surprises by the defendant and to make the defendant commit to its position.

For example, in a medical malpractice case, your attorney might serve the following interrogatories on the defendants, in an effort to discover the identity of potential witnesses to the surgery at issue in the case:

INTERROGATORIES TO DEFENDANT

I. Please list the name of each and every person present in the operating room during the surgery performed on plaintiff on or about [date].

2. Please list the last known work address of each and every person present in the operating room during the surgery performed on plaintiff on or about [date].

3. Please list the last known home address of each and every person present in the operating room during the surgery performed on plaintiff on or about [date].

4. Please list the job title of each and every person present in the operating room during the surgery performed on plaintiff on or about [date].

5. Please list the job responsibilities of each and every person present in the operating room during the surgery performed on plaintiff on or about [date].

6. Please list the name of the last known employer of each and every person present in the operating room during the surgery performed on plaintiff on or about [date].

7. Please list the last known address of the employer of each and every person present in the operating room during the surgery performed on plaintiff on or about [date].

8. Please list the name of each and every person present in the operating room during the surgery performed on plaintiff on or about [date], who was employed by a nursing registry.

9. For each person identified in your response to Interrogatory No. 8 above, please list the name of the nursing registry that employed such person.

10. Please list the last known address of each and every nursing registry identified in your response to Interrogatory No. 9 above.

11. Please list the name of the employer of each and every person present in the operating room, other than plaintiff, during the surgery performed on Plaintiff on or about [date].

12. Please list the last known address of each and every employer listed in response to Interrogatory No. 11 above.

13. Please list the last known telephone number of each employer listed in response to Interrogatory No. 11 above.

14. With regard to the name of each employer listed in response to Interrogatory No. 11 above, please list the inclusive dates of employment of its employee who was present in the operating room during the surgery performed on plaintiff on or about [date].

Here is an example of interrogatories that might be served on you in a medical malpractice case:

DEFENDANT'S INTERROGATORIES TO PLAINTIFF

1. Give your name, residence address, business address, and all other names by which you have been known.

2. Describe in detail all injuries you claim have incurred as a result of the alleged incident.

3. Identify all health care providers who have treated you since the alleged incident and specify those who treated you for any injuries you claim resulted from the alleged incident. Specify:

   (a) all dates when the provider treated you,

   (b) the nature of the treatment rendered,

   (c) whether the provider continues to treat you, and

   (d) what condition you are still being treated for.

4. Describe in detail the medical condition you were being treated for at the time of the alleged incident, specifying:

   (a) the date of the first onset of symptoms,

   (b) the date when you first sought medical treatment,

   (c) the identity of any person or persons who referred you to or recommended the defendant, and

   (d) all medications and injections which you have taken for treatment of such condition and the identity of each physician who prescribed such medication.

5. Describe all conversations you had with the defendant, or any person on behalf of the defendant, which in any way concerned the treatment you were receiving at the time of the incident.

6. Describe all documents concerning the treatment you were receiving at the time of the incident and which were provided to you before or after the incident.

7. Describe all documents which concern the treatment you were receiving at the time of the incident and which you signed before or after the incident.

8. Specify the name and address of all health care providers (doctors, nurses, hospitals, technicians or other hospital or medical personnel) who you believe were in any way involved in the incident.

9. Identify all persons you have spoken to about the incident and specify the nature of such conversations.

10. Describe any offers of settlement you have received from any other defendants (or their insurance carriers) and, if so, whether such offer was oral or written, who made it, when it was made and in what amount.

11. Were any photographs, pictures or films taken of you after the incident? If so, who took them, when and where were they taken, and who are the persons having care, custody, or control over these photographs, pictures or films?

12. List all other accidents or injuries you have had in the last five (5) years.

13. List all illnesses, disabilities and diseases you have suffered from during the five (5) years immediately preceding the incident to the present.

14. Describe in detail all activities (recreational, social or occupational) which you claim you have been prevented from performing or which you can now perform only with difficulty as a result of the incident.

15. With respect to each defendant you have named in this lawsuit, describe in detail every act or omission you attribute to each and which you claim to have been negligent or in deviation from acceptable medical standards including, but not limited to, acts or omissions associated with:

    (a) diagnosis,

    (b) treatment rendered,

    (c) procedures performed,

    (d) drugs or medications prescribed, and

    (e) obtaining informed consent.

16. State whether you were unable to engage in your usual and customary employment as a result of injuries which you claim in this action to have sustained and if so, state:

    (a) the specific job duties that you were unable to perform;

    (b) the length of time that you were unable to perform any such job duties;

    (c) your weekly earnings immediately prior to the incident complained of;

    (d) the amount of earnings you claim to have lost as a result of your injuries.

Every interrogatory answer you provide must be clear, truthful and complete. The most critical answers you provide will be those that apply to prior injuries; the facts of the incident giving rise to your injuries; the nature of your injuries; and your loss of earnings. A flat denial of a prior accident or injury when the records show otherwise can kill your case. Accordingly, your attorney will not rely on your memory, or even your honesty, in answering interrogatories, but will, instead, try to get all the records first.

§3:04 Requests for Production of Documents

Upon request, a party must produce documents, photographs, electronically stored information and similar items demanded by the opposing party. For example, in an auto accident case, your attorney might serve the defendant with a request for production of documents that looks something like this:

DOCUMENTS REQUESTED

1. Any and all photographs, videotapes and/or diagrams of the scene of the accident referred to in the Complaint on file herein.

2. Any and all statements, whether or not signed, in any form whatsoever, whether tape recorded, handwritten or typed, of persons who witnessed or claimed to have witnessed the accident and/or events immediately prior to the accident referred to in the Complaint on file herein. Plaintiffs request copies of actual tapes, as well as transcripts.

3. Any and all statements made by plaintiff, in any form whatsoever, whether tape recorded, handwritten or typewritten.

4. Any and all photographs of defendant's vehicle involved in the accident referred to in the Complaint on file herein.

5. A full and complete copy of each and every liability insurance policy in which defendant is listed as an insured, or additional insured.

6. A full and complete copy of each and every umbrella policy in which defendant is listed as an insured or additional insured.

7. A full and complete copy of liability insurance policy number _____, identified in defendant's answers to plaintiff's interrogatory No. ____.

8. A full and complete copy of the umbrella insurance policy number _____, identified in defendant's answers to plaintiff's interrogatory No. ____.

9. According to defendant's answer to Interrogatory ____, defendant has 39 digital photos of the defendant's car, 15 of the plaintiff's car, and 8 scene photos. Plaintiff requests original reproductions of these 52 photographs. Laser prints, color copies, Xerox copies and copies of any sort will not be acceptable. Plaintiff will reimburse defendant for all reasonable costs related to the reproduction of said photos.

10. With regard to the defendant's vehicle driven at the time of the subject accident, identified in defendant's Answers to Interrogatory ___ as a 2002 white Major Esplanade, please provide plaintiff with a legible copy of each and every property damage report relating to any and all damages to said vehicle as a result of the subject accident.

11. A copy of all cell phone invoices for every cell phone owned by the defendant at the time of the accident and a download of any messages recorded on such phones either incoming or outgoing within 15 minutes before or after the accident.

12. All records identifying any professional whom the defendant has ever consulted concerning vision issues.

The defendant in an auto accident case, likewise, will request that you produce documents, including, for example:

DOCUMENT REQUEST TO PLAINTIFF

1. All estimates, invoices or other documents pertaining to the value of the damage sustained to your vehicle.
2. The bill of sale you received when you purchased your vehicle.
3. Any and all invoices pertaining to repairs made to your vehicle between the date you purchased it and the date of the accident.
4. Any and all documents which in any way reflect transportation costs you have incurred due to the unavailability of your vehicle as a result of the accident.
5. Any and all documents which reflect any other costs which you incurred as a result of the damages sustained to your vehicle.
6. Any and all medical records including, but not limited to, hospital records (admission summary, histories, progress notes, nurse's notes, physician's orders, laboratory reports, pharmacy receipts, diagnostic studies and reports, and discharge summaries), physician's records (office notes, forms completed by the physician on your behalf for submission to any third party, diagnostic studies and reports, prescription records and any correspondence from you, your attorney, or any person on your behalf to your physician), and all statements of charges, invoices or receipts for medical services you received as a result of the accident, whether or not you or a third party (insurance company) paid such costs.
7. Any documents which in any way substantiate your claim for lost earning capacity or wages, including, but not limited to:

   (a) medical disability forms,

   (b) W-2 statements,

   (c) tax returns,

   (d) payroll records, and

   (e) any licenses, certificates or degrees qualifying you to engage in any particular employment.

2. Depositions

§3:05 What Is a Deposition?

A deposition is the taking of sworn testimony from a party or witness. Your attorney will depose the defendant and the defense witnesses; likewise, the defendant's attorney will depose you and your witnesses.

The setting is informal — often, a conference room at the defense attorney's office — but the testimony you give will be treated just like testimony given in court. At the outset of the deposition, you will be asked to raise your right hand and swear to tell the truth. Everything that is said at the deposition will be recorded by a court reporter, who will prepare a verbatim transcript of the deposition. Your deposition testimony is evidence in your case that can be used for or against you.

§3:06 Before Your Deposition

Your deposition is arguably the most important event in your lawsuit, prior to trial. Accordingly, your personal injury attorney will spend a good deal of time preparing you for the deposition process. The goal is to make sure you know what to expect from the deposition, so that you can relax and give your best testimony. Your personal injury attorney will meet with you, perhaps more than once, to review these general rules and instructions:

Understand the purpose of the deposition. One of the defense attorney's main purposes in taking your deposition is to size you up before trial. Defense counsel wants to know what kind of witness you will be, how credible you will be, and how attractive you will be to the jury. If you are unprepared or evasive, the value of your case will be reduced substantially. Your deposition is an adversarial proceeding, not a friendly conversation. Keep in mind that the defense attorney's goal in taking your deposition is to construct a defense, not to gather information or help you.

Think of your deposition as a dress rehearsal for the trial. You should dress as if you were going to court, and behave as if you were testifying in front of a judge or jury.

Speak clearly and answer the questions audibly. Remember that a court reporter is recording your testimony. It is difficult to record a shoulder shrug or an indefinite "uh huh."

Answer each question truthfully and accurately. Even if you believe your answer may work against you, tell the truth. Even a minor lie or untruth can come back to haunt you. Once you lose your credibility, it is very difficult to reach a favorable conclusion to the lawsuit.

Do not exaggerate, under any circumstances, either the facts of the case or your injuries. Any exaggeration about your injuries or pain will be used against you. If there are times that you have felt better, say so.

Answer the question as it has been asked. Answer only that question.

Do not interrupt the defense attorney while he is asking a question. Even if you think you know how he is going to finish his question, wait for him to do so and think about your answer before you start talking.

If you do not understand a question, ask that it be repeated or rephrased. Do not answer a question that you do not understand.

If you do not recall an event or other fact accurately, say so. Make it clear that your memory may be weak on certain details.

Do not argue with defense counsel. You may be asked questions which you believe are irrelevant or inappropriate. It is your attorney's job to object if, in fact, a question is improper. It is not your place to object or argue with defense counsel. Answer the question as best you can, even if it involves information that you do not really want to disclose, unless your attorney specifically instructs you not to answer.

Be alert for questions that assume facts. You may be asked questions in which the defense attorney makes certain assumptions of fact. For example, "How fast were going when you went through the red light?" If the defense attorney makes a statement or assertion in his question that is not accurate, be certain to clarify or correct that assumption.

Be alert for questions asked in the alternative. This includes questions like, "Were the weather conditions dry or wet?" It is possible that the conditions may have been somewhat in between. If the answer is somewhere in between, be certain to clarify.

Be alert for the "So, what you are saying is . . . " question. At some point, the defense attorney will ask a question that repeats or paraphrases your testimony. Listen carefully. If the defense attorney has changed some aspect of your original answer, speak up. Plainly state that the attorney has not accurately rephrased your testimony.

Be cautious about estimating time, distance, speed, etc. You will be asked a number of questions about the specifics of the incident that resulted in your injuries (e.g., distance, time, speed, measurements, lighting conditions, etc.). Very few people can make accurate estimates about these types of things. Therefore, you should never guess on a matter of time, speed, distance, or measurement. Such a guess could destroy your case. For example, the defense attorney may ask how long it was between the time you first saw the defendant and the time in which the collision occurred. If you were to answer, "ten seconds," this might allow the defense attorney to argue that you had ample opportunity to avoid the collision. A better, more accurate answer would be, "I can't say exactly how long it was, but it was very, very short."

Do not look to your attorney for assistance in answering a question. You are only required to answer the defense attorney's questions to the best of your ability. If your attorney thinks an objection is warranted, he will make one.

§3:07 Personal Injury Deposition Checklist

Here is an example of the topics the defense attorney may ask you about during your deposition in a personal injury case:

Personal background

- ☐ All names ever used
- ☐ Present and past residences for 10 years
- ☐ Social Security number
- ☐ Complete marital history
- ☐ Military history
  - ☐ When
  - ☐ Where
  - ☐ Rank and military occupation

- ☐ Military serial number
- ☐ What type of discharge
- ☐ Hospitalized in the military

☐ For any medical insurance coverage

☐ Medical provider(s) paid by insurer

☐ Name(s) and address(es) of medical insurer(s)

- ☐ ID number(s)
- ☐ Medical insurer(s) having any lien(s) in this case

☐ Have you ever

- ☐ Made claim for personal injury
- ☐ Been party to lawsuit
- ☐ Received disability benefits
- ☐ Applied for life or accident insurance since accident
- ☐ Applied for worker's compensation or received it
- ☐ Applied for unemployment compensation or received it
- ☐ Been convicted of any criminal offense

☐ Birth date

☐ School and education history

☐ Complete history regarding children

- ☐ Name(s)
- ☐ Age(s)
- ☐ Living in plaintiff's home
- ☐ Address(es)

Remedial information

☐ Employment before accident

- ☐ When
- ☐ Position and duties
- ☐ Wages received
- ☐ When qut and why

- ☐ Employment at injury date and since then
  - ☐ Employer name and city
  - ☐ Position and duties
  - ☐ Exactly what physical work is done
  - ☐ Any change in work or position since accident
  - ☐ Any time lost from work
- ☐ Is loss of income claimed?
- ☐ Has your income gone up or down since being injured. Can you explain why?
- ☐ Who prepares your income tax returns?
- ☐ If you were still in school when injured
  - ☐ Loss of time
  - ☐ Athletics, dancing and social activities
- ☐ Special damages
  - ☐ Medical and hospital
  - ☐ Services rendered by others
  - ☐ Property damage
  - ☐ Anything else not covered

Medical history

- ☐ Bodily defects before accident
  - ☐ Last exam before accident
  - ☐ Family doctor
  - ☐ Any disability
  - ☐ Condition of each area of body injured in the incident
- ☐ Previous incidents causing injuries, with medical treatment
  - ☐ When and circumstances
  - ☐ Injuries and recovery
  - ☐ Doctors and hospitals
  - ☐ Suit or claim
- ☐ Previous serious sickness or disease before incident

- ☐ What
- ☐ When
- ☐ Where
- ☐ Who involved
- ☐ Treating doctors
- ☐ Injuries and recoveries

☐ Any other incident or injury after the incident in question

- ☐ What
- ☐ When
- ☐ Where
- ☐ Who involved
- ☐ Treating doctors
- ☐ Injuries and recoveries

☐ Any other sickness or disease after the incident

- ☐ What
- ☐ When
- ☐ Where
- ☐ Who involved
- ☐ Treating doctors
- ☐ Effect of sickness and recovery

The incident

☐ When you left the scene

- ☐ How
- ☐ With whom

☐ Your injuries

- ☐ Description of force and where applied
- ☐ List each injury received
- ☐ Eliminate portions of body not injured
- ☐ "Is that all of the injuries you received from this incident?"

- ☐ Objective evidence of each listed injury
- ☐ Subjective complaints
- ☐ "What problems did you have from [each listed injury]?"

☐ General description of the recovery from the incident now in litigation

- ☐ Affirm the previous list of injuries
- ☐ Repeat the list of each part of body injured
- ☐ Recovery from each injury
- ☐ Present complaints and disabilities

Treatment after incident

The defendant will be getting medical records from most or all of your medical providers. The purpose of these questions is not to get the exact dates and facts, as shown in the medical records, but to get your version of what your injuries are; to see how you will present your injuries at trial; and to uncover testimony that could minimize the injuries (for later use by the defendant at trial).

☐ First doctor

- ☐ Who suggested seeing this doctor
- ☐ All first-visit complaints made to this doctor
- ☐ Treatment given or prescribed by this doctor on first visit
- ☐ All complaints made to this doctor on later visit(s)
- ☐ Treatment given or prescribed by this doctor on later visit(s)

☐ Each other doctor

- ☐ When first seen
- ☐ Who suggested seeing this doctor
- ☐ All first-visit complaints made to this doctor
- ☐ Treatment given or prescribed by this doctor on first visit
- ☐ Treatment given or prescribed by this doctor on later visit(s)

☐ ER or urgent care treatment

☐ First hospital admission

- ☐ When admitted
- ☐ What done in hospital
- ☐ Condition on discharge

- ☐ Each later hospitalization
  - ☐ When admitted
  - ☐ What done in hospital
  - ☐ Condition on discharge
- ☐ Casts, bandages, technical aids for sleep or to avoid pain, or other appliances
- ☐ Ever confined to bed or home
  - ☐ When
  - ☐ How long
  - ☐ Why

Activities before injury

- ☐ Vehicle activities
  - ☐ Drive own vehicle
  - ☐ Maintain or repair vehicles in the household
- ☐ Home activities
  - ☐ Cooking
  - ☐ Sweeping and dusting
  - ☐ Making beds
  - ☐ Laundry
  - ☐ Shopping
  - ☐ Outdoor landscaping or gardening
  - ☐ Building repairs
- ☐ Social activities
  - ☐ Dancing
  - ☐ Clubs
  - ☐ Attending dinners or luncheons
- ☐ Church activities
- ☐ Sports activities
  - ☐ Play
  - ☐ Watch other than by TV
- ☐ Vacation and trip activities

- ☐ To where
- ☐ What
- ☐ When
- ☐ Activities during the trip or vacation

Activities since injury

- ☐ Vehicle activities
  - ☐ Drive own vehicle
  - ☐ Maintain or repair vehicles in the household
- ☐ Home activities
  - ☐ Cooking
  - ☐ Sweeping and dusting
  - ☐ Making beds
  - ☐ Laundry
  - ☐ Shopping
  - ☐ Outdoor landscaping or gardening
  - ☐ Building repairs
- ☐ Social activities
  - ☐ Dancing
  - ☐ Clubs
  - ☐ Attending dinners or luncheons
- ☐ Church activities
- ☐ Sports activities
  - ☐ Play
  - ☐ Watch other than by TV
- ☐ Vacation and trip activities
  - ☐ To where
  - ☐ What
  - ☐ When
  - ☐ Activities during the trip or vacation

3. Defense Medical Examination

§3:08 Purpose

As part of its discovery, the defendant may demand that you submit to a medical examination by a doctor hired by the defendant's insurance company. The defense will characterize this as an "independent" medical examination. However, let's be clear: The doctor who performs this examination is not "independent"; he is paid by the insurance company to uncover medical evidence in support of the defendant's case against you. The purpose of the examination is not to help you, or treat you, or to provide you with an unbiased second opinion.

§3:09 Who Will Be Present

Given the nature and purpose of this examination, your attorney may go with you. A court reporter and/or videographer also may accompany you. It is important to understand that most defense doctors are professional witnesses hired to undermine the plaintiff's case. They are advocates, and should be treated as such. Having the attorney and a court reporter present will keep them as honest as possible.

The videographer (or court reporter, if one is present) should record the beginning and ending time the examination. It is usually short, which undermines the credibility of the defense doctor when compared to the many hours your treating doctors will have spent with you.

§3:10 Your Rights and Responsibilities

Your attorney will explain your rights and responsibilities with regard to the defense medical examination. Here is a brief overview of what you need to know:

Always keep in mind the purpose of this examination. Do not expect the doctor to take your side or make any attempts to help you.

Answer only the questions you are asked. Do not volunteer information to the doctor. Do not discuss the liability issues of your case. This is a medical examination, not a second deposition.

Do not exaggerate your symptoms. If the doctor asks if you can perform an activity, resist the urge to tell him you cannot, if, in fact, you can. If you tell the doctor what you are capable of doing, he will be more

likely to believe you when you tell him what you have difficulty doing. Likewise, complaining of pain in areas that don't really hurt diminishes the credibility of your complaints about areas that do hurt. Exaggerating can only hurt your case and may even result in criminal charges being filed against you. Consider this example:

> John Smith suffered a low back injury. He was forced to see Dr. James, who asked Mr. Smith if he had problems driving. Mr. Smith said he did. Dr. James then asked Mr. Smith if he was capable of driving, and Mr. Smith said he was not. Unknown to Mr. Smith, just before the examination the doctor had been given a videotape of Mr. Smith driving on several different occasions. Dr. James concluded that Mr. Smith was dishonest and indicated he was exaggerating his symptoms. Mr. Smith's workers' compensation carrier turned over his deposition and the surveillance tape to the State's Attorney to prosecute him for insurance fraud.

Do not sign anything provided to you by the doctor. Be particularly careful of any releases put in front of you. Defense doctors can be sly (and, sometimes, even unethical). You may be asked to sign a release that allows the doctor to tape-record the examination and destroy the tape at will; or requires you to actually pay the doctor's charges if the defendant's insurance carrier is late or fails to pay; or allows the defense medical doctor to talk to your treating doctor and anyone else he may so desire.

Do not provide the doctor with any documents, unless your attorney has reviewed and approved them.

You have the right to be treated with decency and respect. This includes, for example, the right to be gowned during the examination.

You have the right to say "No," if you are uncomfortable at any time during the examination. Specifically, you have the right to refuse:

- To be x-rayed.
- To have a CT scan, MRI, fMRI or blood work.
- To be injected.
- To have a rectal examination performed.
- To be examined without a gown.
- To be poked with a needle or pin such that it draws blood.

The doctor will not send you a copy of his report. However, if the defense plans on calling the doctor as a witness, they must provide your lawyer with a copy. Your lawyer will send it to you and ask that you review it and indicate where and how the doctor's conclusions may be incorrect. You won't be expected to review it like a doctor. You can help if you indicate, for example, that the doctor quoted you incorrectly when he said you had left-leg pain because you told the doctor you had right-leg pain.

C. Pretrial Motions and Settlement Negotiations

1. Motions

As discovery winds down and the trial date approaches, your attorney and the defense attorney will file motions (formal written requests) with the court to try to limit the issues for trial. Two types of motions commonly filed in personal injury cases are motions to bifurcate and motions in limine.

§3:11 Motion to Bifurcate

It is common for the defendant in a large injury case to file a motion to bifurcate liability from damages. Basically, this is a request to try the case in two phases — first, liability, then damages. The theory is that by eliminating the damages evidence during the liability phase, the jury will be less likely to impose liability out of sympathy for the suffering that the plaintiff has experienced.

Bifurcation can work to your advantage if your injuries are severe and obvious. In a bifurcated trial, the jurors are not distracted by large, intimidating damages numbers when assessing liability. Once they get to the second phase, their task is simply to decide on the numbers, without worrying about the defendant's fault. If, however, your injuries are severe, but not plainly obvious (e.g., a serious, but not readily apparent, brain injury), then your attorney will oppose the motion to bifurcate. You do not want the jury determining liability under the false impression that your injuries are minor. You want the jury to understand that there were serious consequences from the defendant's negligence.

§3:12 Motions in Limine

Motions in limine (pronounced "LIM-i-knee") are filed prior to trial. The purpose of a motion in limine is to keep evidence from the jury that may hurt your case and that can be excluded under some rule of evidence. Typical grounds for motions in limine in a personal injury case include requests to keep from the jurors:

- Statements that any judgment rendered in the case might adversely affect the members of the jury and any other appeals to the self-interest of the jury.
- Evidence of any prior settlements with other defendants or settlement negotiations with this defendant.
- Evidence of your receipt of workers' compensation benefits or other benefits.
- Testimony from defense experts regarding facts or opinions not disclosed in their depositions or expert reports.
- Evidence or mention of a pre-existing condition not related to injuries received in the accident.
- Irrelevant, inflammatory, untrustworthy or prejudicial statements attributed to you in medical records.
- Opinions or conclusions expressed by medical personnel in the medical records about how the accident occurred or how you were injured.
- The police report and opinions of police officers on the cause or circumstances of the accident or who was at fault in the accident.
- Any mention of prior lawsuits, settlements or claims for injuries, including workers' compensation claims, to any area of your body other than the areas injured in the accident.
- Evidence of prior bad acts of witnesses.

2. Mediation

As your trial date approaches, settlement negotiations likely will intensify. Two main reasons for the renewed interest in settlement negotiations are: (1) your condition has stabilized, so the nature and severity of your injuries is clearer; and (2) depositions have been completed, so the defense has had its opportunity to size up you and your witnesses, including your experts.

At this juncture of the case, mediation may be suggested.

§3:13 What Is Mediation?

Mediation is a confidential, voluntary, and non-binding process in which a neutral third party attempts to facilitate settlement discussions between the parties.

§3:14 How Does Mediation Work?

Typically, after a brief opening session in which each side presents its case via an "opening statement" by the lawyers, the mediator engages in "shuttle diplomacy," going back and forth with proposals and counter-proposals between the parties, who are located in separate conference rooms.

§3:15 Who Will Be Present?

Generally, the mediation will be attended by you and your attorney; the defendant and his attorney; and a representative from the insurance company who has authority to settle the case.

§3:16 What Are the Advantages of Mediation?

The main advantage of mediation over settlement negotiations between counsel for the parties is that the parties are directly involved in the process. This personal involvement allows you to hear the other side's claims without any filtering or distortion. As a result of your personal involvement, you will have more control over the process and are likely to be more satisfied with any proposed resolution. Another advantage of mediation is that the presence of a third party tends to eliminate many of the behaviors that commonly are responsible for failed negotiations — posturing, false bravado, aggressiveness, and stubbornness. Finally, because mediation often is scheduled for an entire day, it contains a built in "cooling off" period in case any improper interpersonal behavior manages to seep into the mediation and taint the settlement process.

II. TRIAL

A. Overview

Generally speaking, the trial of your personal injury case will proceed in phases, as follows:

- Jury selection (also called "voir dire").
- Opening statements — first by your attorney, then by the defense attorney.

- Your "case in chief" — Your case will be presented through the testimony of witnesses. Your attorney will guide each witness through his or her testimony. This is called "direct examination." The direct examination of each witness is followed by "cross-examination" by the defense lawyer.
- The defendant's "case-in-chief." Your lawyer will have the opportunity to cross-examine each defense witness.
- Closing arguments. As with the opening statements, your lawyer will go first, followed by the defense attorney.
- Deliberations. After closing arguments, the judge will instruct the jury on the governing law, and the jury then will go to a private room to deliberate and reach a verdict.

Let's examine these key phases of the trial in more detail: jury selection, opening statement, your direct examination, and cross-examination.

B. Jury Selection

§3:17 Why Is Jury Selection Important?

In a personal injury case, jury selection is of critical importance because most jurors today simply accept that there are too many lawsuits, that many of them are frivolous, and that a plaintiff's lawyer will try to talk them into a "McDonald's coffee" verdict. You can bet on the fact that jurors will discuss where your case fits into the spectrum of "frivolous lawsuits" brought by "greedy trial lawyers." The only real question is whether that discussion will start at the end of the trial, during jury deliberations, or at the beginning of trial, during jury selection, when your lawyer has the opportunity to actually participate in that discussion.

Jury selection is your lawyer's opportunity to directly address the most important biases and challenges likely to affect the jury's understanding and acceptance of your case.

C. Opening Statement

§3:18 Why Is the Opening Statement Important?

The opening statement provides the first full opportunity for the jury to hear about your case and form early beliefs about the case, the parties and the lawyers. As human beings, we generally find it uncom-

fortable to remain in a state of indecision because it means we have to continue evaluating and weighing the full extent of new information as it comes to us. It is more comfortable to adopt a viewpoint, even if only tentatively, because that allows us to filter and simplify the processing of new information. Then, as long as new information is not so powerful that it causes us to change our viewpoint, it doesn't have to be fully analyzed. Moreover, the longer we persist with our tentative viewpoint, the more entrenched it becomes. Thus, if a high percentage of jurors will tend to persist in the beliefs they form during opening statements, then a persuasive opening statement is of crucial importance.

§3:19 What Do Jurors Need to Hear?

A persuasive opening statement will answer these fundamental questions for the jurors:

What is this case about?

A juror who concludes at the outset that the case is about a whining plaintiff sees the entire case through that filter. On the other hand, a juror who initially concludes that the case is about a company that cut corners at every turn sees the case through a very different filter.

Who has – and hasn't – acted responsibly in this case?

Jurors are evaluating the responsibility shown by the defendant, as well as the level of personal responsibility exhibited by everyone else involved, including you.

Is this case important for people other than these parties?

We all constantly scan our environment for anything that matters, whether because of the threat it poses or because of the opportunity it offers. We all innately desire significance — to do that which matters. For both of these related reasons, jurors are subconsciously asking the question, "So what?"

Consequently, your lawyer must tell a story that is about more than just you and the defendant. The story needs to communicate the danger to families and the community at large of permitting this kind of conduct by the defendant (and others like the defendant), and the story needs to offer the jury the opportunity to stand up for values that really matter.

What is the right thing to do?

"Justice" is an abstract concept, but "injustice" is emotional. Almost all of us react viscerally (from the gut) when we confront an injustice. We love to see the offenders "get theirs." Anger, not sympathy, is a much more powerful driver of damages verdicts, but even anger is transient. Thus, your lawyer's opening remarks should appeal to the jurors' desire to protect values that really matter to them, their families, and their community.

What is the specific question or controversy to be resolved?

Jurors need clarification of the core issues in the case. They want to know, specifically, what is the controversy or question they need to decide.

What is the story of this case?

We think in pictures, not in abstract concepts. A story is simply a moving picture, where we can visualize the setting, the characters, the conflict and the action. If provided with the right details, jurors will naturally reach the right conclusion without being told to do so. For example, here are two possible ways a personal injury lawyer might describe his client's damages. Which do you find more persuasive?

A conclusory approach

"Because of the defendant's negligence, Mrs. Jones has suffered grievous injuries. She is permanently impaired. She has disfigurement, constant pain and suffering, and a permanent loss of earning capacity."

A descriptive picture approach

"The front grill of Mr. Smith's truck crushes the engine compartment of Mrs. Jones' car back onto the feet and legs of Mrs. Jones. Fourteen bones in Mrs. Jones' feet are broken; both of her feet are crushed. Shock saves her from some of the pain at first, but the pain takes over in the hospital. There's not enough morphine. Seven surgeries follow over the next twelve weeks. The doctors save Mrs. Jones' feet, but we will show you the pins and rods that she'll always have to live with now. She has fought to overcome an addiction to the narcotics they gave her day and night in the hospital. Her feet are mangled. She knows she has to live with the pain in these bones from now on, and she's determined to do it, but

it's hard. She can't walk normally, and she can't stand for very long. She's lost her job as a waitress. She still works, but she's been forced to start over in a job where she can sit, as a toll-booth worker. It means she only makes $7.20 an hour, less than half of what she made as a waitress."

D. Direct Examination

§3:20 Why Is Your Direct Examination Important?

Your direct examination is your chance to have your day in court and tell your side of the story. It is a significant moment in the trial because it is the jurors' first and only opportunity to hear directly from you. Accordingly, your lawyer will meet with you ahead of time, to ensure you are well prepared to be your own best advocate. In addition to reviewing the facts of your case, you lawyer will offer general advice and tips for testifying in court. Here are some of the points you might discuss:

- ***Do your homework***. Review your deposition transcript and interrogatory answers. It is important for your trial testimony to be consistent with your discovery. You also should review your medical history, so that you will be able to clearly recall the injuries you have had, the doctors you have seen, the hospitals that have treated you, etc.
- ***Tell the truth***. The defense lawyer would love to catch you in a lie because one lie can destroy your credibility with the jury. Once your credibility is lost, so is your case.
- ***Never exaggerate***. Do not exaggerate about how the incident happened or about your injuries. Jurors can spot a theatrical or phony gesture, just like adults know when children are faking an illness. An exaggeration will almost always hurt you and never help you.
- ***Take it seriously.*** The witness stand is not the place for being coy, witty or funny. If something happens in the courtroom that is humorous, it is fine to laugh along with the jury, but do not try to be a comedian.
- ***Be courteous and respectful*** to everyone in the courtroom, including the defense attorney and court personnel, at all times.

- ***Never lose your temper***. Defense attorneys know that one way to win a case is to get the witness to lose his or her temper. Jurors are impressed by witnesses who can remain calm under the pressure of cross-examination.
- ***Take your time.*** Listen carefully to each question. Wait for your lawyer (or the defense attorney) to finish the question. Take a deep breath before you speak.
- ***Look at the jurors when you testify***, just as if you were talking to your best friend or closest relative. Jurors tend to believe witnesses who can look them straight in the eye.
- ***Do not look to your lawyer for answers***. You are the witness -- not your lawyer. If you look to your lawyer for answers, the jury may become suspicious.
- ***Try to be yourself***. You are likely to be nervous, but jurors expect that people who testify in court will be nervous. After a brief period of time on the witness stand, your initial anxiety will subside.

§3:21 Sample Direct Examination Questions

With these tips in mind, you will take the witness stand to testify in your personal injury case. Your lawyer will ask you questions like these on direct examination, to help you present your strongest case to the jury. Notice how the questions are open-ended (e.g., "Tell us about . . . ," "Please describe for the jurors . . . ."). This gives you a full opportunity to talk to the jurors, to explain your situation, and to tell your story in your own words.

Background information

Q: Please introduce yourself to the jury.

Q: Tell us where you live and how long you have lived there.

Q: What do you do for a living?

Q: How long have you been doing this sort of work?

Q: What are your duties in your job?

Q: Please tell us your age.

Q: What is your spouse's name? Is that [her/him] sitting in the front row of the courtroom?

Q: Please tell us about your schooling and education background.

Q. Do you have any children? Please tell us their names and ages. Do they know that you are in a trial today?

Q: Have you ever been involved in a lawsuit of this nature before?

Testimony regarding incident

These questions are designed to elicit the details surrounding the incident that caused your injuries, including: where the incident took place; why you were there; the activities of everyone there whom you had the opportunity to observe; the existence of any warnings, signals or danger signs; your ability to see, hear, or perceive the incident; and your mental and physical condition just prior to the incident.

Q: Turning your attention to the date of (date of incident), could you tell us what you did that morning (afternoon, evening), leading up to the incident?

Q: Where had you been prior to the (collision, attendance at incident, use of product, etc.)?

Q: Please tell the jury how the incident happened.

Q: Tell us who was with you when this incident occurred. Where were they when the (crash, fall, injury) took place?

Q: Please tell us if there was anything that obscured your vision or ability to see (the occurrence, other automobile, defective condition of the product, defective condition of the premises, etc.).

Q: Please describe the area in which the incident happened (roadway, premises, location of injury by product, etc.).

Q: Had you had anything to drink of an alcoholic nature at any period before the incident? Please tell us what it was and how much you had to drink.

Q: Did you have any conversations with the defendant, before, during or after (the crash, the fall, the incident, etc.)?

Q: What did the defendant say to you and what did you say to the defendant, if anything?

Q: Had you ever been to (scene of occurrence) before the (crash, fall, incident, etc.)? Under what circumstances?

Q: Describe to the jury the condition of your (vehicle, if an automobile crash, or other item if involved with injury) before the incident occurred.

Q: What was the condition of your (item) after the incident?

Q: Is this a photograph of your (automobile, etc.) before the occurrence? Is it an accurate representation of what your (vehicle, etc.) looked like on the day previous to the incident?

Q: Is this a photograph of your (vehicle, item, etc.) after the incident? Is it an accurate representation of what your (vehicle, item, etc.) looked like after the incident?

Q: Would you please (draw a diagram of the area of the incident, approach the diagram, etc.) and explain what occurred on the evening of (date of incident).

Testimony regarding circumstances after the incident

Q: Please tell us what you remember after the (crash, the fall, the injury) incident.

Q: What was your physical condition after the incident?

Q: Describe any pain or other feelings that you had immediately after the incident.

Q: What was happening around you after the incident? Describe the activities of other people that were present.

Q: Where were you taken or where did you go after the incident? What do you remember about that?

Q: Who treated you right after the accident (for example, ambulance attendants, person with knowledge of first aid)?

Q: What were you thinking about after the incident?

Q: Have you had the opportunity to visit the scene of the (crash, fall, injury, incident, etc.) recently? If so, have there been any changes that you can tell us about?

Injuries

Your lawyer will ask you about prior injuries. It is crucial that you disclose any preexisting injury of any consequence that has any relationship whatsoever to the incident at trial. Do not let this information be disclosed for the first time by the defense.

Q: Please tell us which parts of your body were injured as a result of this incident.

Q: Have you ever had an injury to or problem with any of those particular portions of your body before this incident? If so, please tell us about that.

Q: Please tell us how the injury to your (most important parts of the body) affected you the first several weeks [months] after the incident.

Q: Did the injuries to your (portions of the body most seriously affected) get better or worse with time?

Q: Tell the jury how the injuries affected your ability to work.

Q: Tell us how the injuries affected any leisure activities, such as sports or hobbies.

Q: Did you have to take any medication? What effect did the medication have on you?

Q: Did your injuries have any effect upon your ability to sleep or rest?

Q: Did the injuries have any effect upon your relationship with family, friends or coworkers?

Q: Is the condition of your (important body part injured) improving or is it about the same? [***Note***: If your condition has improved substantially, say so. Your honesty about this fact will enhance your credibility with regard to any lingering aspects of the injury that are not improving.]

Q: Do you have any limitations resulting from this incident? What are they?

Q: Did your doctor place any limitations upon your activities?

Medical proof

Q: Please tell the jury the name of the (hospital, clinic, doctor, etc.) that you saw after the incident.

Q: When did you first visit (the doctor, hospital, etc.)?

Q: Did you have to engage in any physical therapy? If so, who performed the physical therapy?

Q: What were your medical bills from Dr. _____? _____ Hospital? _____, physical therapist?

Q: I want to show you what has been marked as plaintiff's exhibit #_. Is this a summary of your medical bills and prescription bills with copies of your medical and prescription bills attached?

Q: Please tell the jury what it felt like to have (certain tests, surgery, physical therapy or other treatment that may have resulted in pain).

Q: Do you believe that the treatment of (doctor, facility, therapist, etc.) helped you to improve?

Q: Will you have to have further treatment from (doctor, therapist, etc.)?

Effect on employment and lost income

Q: Where were you working prior to the incident?

Q: Please describe your duties in that occupation.

Q: What were your actual earnings one year before the incident?

Q: Did you lose any time from work? If so, how long?

Q: Why did you lose time from work?

Q: Please tell the jury what your total loss of income was as a result of this incident.

Q: When did you return to work?

Q: How are you doing at work now?

Q: Do you have any specific limitations that affect the quality of your work?

Q: Have you lost any opportunities for promotions or advances as a result of this injury?

Q: What was the status of your work record prior to the injury?

Effect of incident on your life

Q: Please tell the jury some of the important things about how this incident has affected your life, such as your relationship with your family.

Q: Has this incident changed any of your daily activities? How so?

E. Cross-Examination

§3:22 Why Is Cross-Examination Important?

Cross-examination is important because it allows your lawyer to validate your story through your opponent's key witnesses.

A popular misconception of cross-examination comes from television, where witnesses are routinely crushed and humiliated with a few brief questions. That does happen, but rarely. In the real world, the power of cross-examination comes from walking the opposing witness

through the truth of your position step by step, in such a way that the jury can follow along and the witness ultimately has to agree or be completely discredited.

§3:23 Goals of Cross-Examination

Your lawyer may have several different objectives in mind when cross-examining a defense witness, depending on the witness' role in the trial (i.e., is the witness the defendant, a company executive, an expert witness?). Common goals of cross-examination include:

- Proving your case (more specifically, proving your damages) by telling your damages story and getting the witness to validate the truth of that story (because the witness has said it; a reputable document or witness says it; or the jury knows it).
- Disproving your opponent's defenses by proving the truth is to the contrary.
- Attacking the credibility of the testimony by attacking the inconsistency or general untruthfulness of the witness.
- Attacking the credibility of the testimony by showing bias. Attacking the credibility of the testimony by showing lack of foundation (inadequate information or methodology).
- Limiting the extent of the negative testimony.
- Exposing attitudes that are dangerous to other people and that oppose values that jurors consider important.

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"Anti-plaintiff bias is real and continues to be fed by 'lawsuit reform' marketing. As a result, in virtually every case in which significant personal injury damages are being sought, the defense works to make the plaintiff a target. With hard work and meticulous preparation, an experienced personal injury lawyer can powerfully refute common defense themes, often with a few carefully chosen words during closing argument." §4:07

Chapter 4

Overcoming Common Defense Themes

I. Malingering

Of all the specious and damaging claims a defense doctor can make, the allegation that you are exaggerating or "malingering" (that is, faking your injury in the hope of obtaining a large settlement) is the most mean-spirited of all. This assault on your credibility will be aggressively challenged by your personal injury lawyer.

§4:01 Identify Problems With Malingering "Tests"

As part of the defense medical examination (see §3:08), you may be given psychological or physical malingering "tests." There are many problems with these so-called "tests," including:

Malingering tests are not scientific.

None of the popular malingering tests used was created using actual verified and confirmed malingerers. Moreover, in many instances, we don't know enough about a particular test to rely upon it. For example:

- Was this test confirmed by blind peer review?
- Was the data supporting this review saved?
- How was bias accounted for in the administration of this test?
- What were the testing conditions like? Was the test administered to you under the same conditions as the test subjects?
- How many in the sample took this test? If you are dealing with a few dozen people, that's probably not enough to draw a conclusion.

No malingering test explains why you performed poorly.

To conclude the only reason for your poor performance on a particular test must be malingering is to exclude multiple other potential reasons, none of which the defense medical expert asked you about or discussed with you. These other potential reasons include:

- The effects of medication;
- The effects of pain;
- The effects of depression;
- The effects of anxiety (e.g., at being sent to a doctor you know does not have your best interests at heart);

- The stress of litigation;
- The effects of a brain injury (e.g., lack of motivation and cooperation is a classic sign of some types of brain injuries);
- The effects of any of the above in combination.

The tests are used selectively.

Rarely will a defense medical expert claim that a person who is obviously impaired, or a child, or a very elderly person, or a minister, or any other sympathetic plaintiff, is malingering, even when they flunk these types of tests. Why? Because it makes the defense medical expert look like a jerk. If these tests are valid, then they should apply to everyone.

§4:02 Take Defense Medical Expert to Task at Deposition

Your personal injury attorney will reserve plenty of time at the defense medical expert's deposition to challenge his conclusions on malingering. By asking pointed questions at the deposition, your lawyer can expose the games the defense medical expert is playing with malingering tests, including:

- Calling a passing score on a malingering test "borderline passing," thus making it appear as though you barely squeaked by.
- Calling a test a malingering test when it is not.
- Failing to administer malingering tests (because you probably would pass), but then boldly proclaiming you to be a malingerer anyway.
- Reporting your scores on the malingering tests you failed, but omitting entirely to report your scores on the malingering tests you passed.
- Claiming "studies show" that pain, depression, etc., do not account for the poor score you earned on a particular test, when no such "studies" exist at all. Until that data is produced, it is inappropriate, at best, to classify you as a malingerer.

If your attorney has done his homework, he will be able to undermine the defense doctor's opinion and his credibility to such an extent that the court may not allow the doctor to testify in front of the jury at all.

II. Preexisting Injury

It is a common defense tactic to bring in a radiologist or other medical "expert" to testify that the plaintiff's "alleged" injuries pre-dated the accident. Your lawyer can attack this defense argument first on cross-examination, and again during closing argument.

§4:03 Challenge on Cross-Examination

Consider, for example, an auto accident case, in which the plaintiff suffers a disc injury. Most defense radiologists don't review the plaintiff's medical records or the depositions in the case, nor do they know the specifics of the case or the accident. In most cases, they never even meet the plaintiff. When he reviews the scan, the defense radiologist knows nothing about the symptoms the patient was experiencing at the time of the MRI and nothing about the patient's medical history. Consequently, the radiologist cannot tell the jury (or anyone else) when, exactly, an abnormality found in a scan first occurred. To conclude that the accident did not cause an abnormal finding on a scan without taking the clinical picture into consideration, i.e., the onset of symptoms, location, duration and type of symptoms etc., is arrogant at best. At worst, it may rise to the level of a lie.

§4:04 Confront the Myth of Preexisting Injury in Closing Argument

To many jurors, at least at first, it seems logical to discount damages if the plaintiff had a preexisting condition, even if that preexisting condition was causing no problems before the defendant-caused injury. Your attorney will challenge this notion on cross-examination, and then confront it head-on during closing argument. Consider this example:

> You heard me go through Joe's full medical history. Then you heard [defense counsel] come back to the back surgery that Joe had had before this injury. Remember how he kept asking questions about it, like it was important? I don't want you to be misled, so I want to talk about that for a minute. I'm had the feeling that defense counsel was trying to suggest that his client isn't really responsible because Joe had already had his back fixed before. If so, it's like he's saying, "Joe doesn't have any right to blame us for hurting him if his back wasn't fully capable of withstanding our injury. We should only be blamed if we hurt someone whose back was perfect. Never mind that Joe had already had his surgery and done his rehab and gotten back

to living without pain, until we hurt him. He doesn't deserve much from us, because he was a poor specimen to start with."

Thank goodness that's not right, and it's not the law. I want you to look at the judge's instructions, where the judge basically says that if there was a preexisting condition that was not causing a problem for Joe before this injury, and the injury aggravated the preexisting condition, then the defendant is responsible for the full injury, including aggravation of the preexisting condition. If that weren't the law, then a defendant could always say, "You weren't in perfect condition, so I don't have to pay for hurting you." That's not right, that's not the law, and don't let anyone mislead you.

III. Counter-Arguments to Other Common Defense Themes

Your personal injury lawyer can powerfully refute many common defense themes with a few carefully chosen words during closing argument.

§4:05 No Verdict Based on Sympathy

Defense lawyers invariably will seize on the court's instruction not to base a verdict on sympathy. They will bludgeon plaintiff-leaning jurors with it, unless your attorney addresses it first:

The judge will instruct you that "You may not reach a verdict based on sympathy." Let me tell you why that is absolutely right. Sympathy is feeling sorry for somebody, wanting to give charity to somebody. As nice as sympathy is, my clients aren't here for sympathy. They're not here for charity or for a handout. Please don't let defense counsel or anyone else demean them by suggesting that they are.

My clients have received lots of sympathy cards, but sympathy doesn't make things right. Only justice can make things right. They hope and pray for your empathy; that is, they simply want you to understand what they've gone through and what they'll be going through. They do not want a handout; they want you to understand that they're looking for justice, not sympathy. Only you have the power to do justice here.

§4:06 Apologies and Regrets

There are several defense versions of this tactic:

- Apologize for something that is "safe" (because it is not what caused the injury), in order to show contrition without admitting fault.
- Show how the defendant has gone to great lengths after the injury to correct the problem that caused the injury.
- Point out that the defendant admitted the problem in this case only to get sued for it, so a verdict in this case would only prove that people get punished for doing the right thing.

Each of these versions of the *mea culpa* tactic is an effort to deflect the jury's justified anger. When the defense uses one or a combination of these versions of "I'm sorry," in an effort to deny you any recovery, it is manipulative and needs to be addressed:

> They say they're sorry. That's good and fine, and I would appreciate their admission if they really meant it. Are they being genuine with us? How do we know if they really mean it? Have they admitted to you the true extent of injury to these folks? Have they agreed in front of you to fully balance the books with these folks fairly and honestly, or have they continued to deny liability? If they're trying to have it both ways, then their "apology" is nothing but an attempt to manipulate all of us. The truth is, they have continued to say they're really not responsible. That ought to tell you everything you need to know about their truthfulness when they say, "We're sorry."

§4:07 Lottery and Greed vs. Reasonableness and Fairness

Anti-plaintiff bias is real and continues to be fed by "lawsuit reform" marketing. As a result, in virtually every case in which significant personal injury damages are being sought, the defense works to make the plaintiff a target. If there are issues of personal responsibility on the part of the plaintiff, that will become a focal point. If not, then the attack may be more subtle, but still obvious. The suggestion will be that you are driven by greed or the hope of winning the personal injury lottery. Of course, the defense wants to portray itself as reasonable and fair. Here is one way your attorney can respond:

You've heard defense counsel talk about the need to be "reasonable" with the verdict. Without quite saying it, she seems to be suggesting that we're being unreasonable. Does that mean greedy? Is that what she's saying? If anyone suggests that to you, ask this question: Where are the people lining up to go through what the defendant has forced my clients to go through? If there were an ad posted, "Sign up here for $15 million. All you have to do is barely survive a head-on crash in your lane, spend three months in the hospital, carry 43 metal pins and screws in your body, give up an active life, endure a lifetime of pain, put your family through hell, and be the pity of your friends and neighbors," how long do you think that waiting line would be? I wouldn't be in that line. If anybody suggests to you that these folks are being greedy, ask them if they want to get in line. I don't think so. I don't really think anyone will suggest that to you because in this case, that suggestion is not reasonable and it's not fair.

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Whether you are injured in a car accident or by a slip and fall, a medical error or a defective product, you must establish and prove negligence – that is, that the defendant acted with unreasonable carelessness, which resulted in harm to you.

Chapter 5

Special Considerations in Specific Types of Cases

I. Auto Accident Cases

There is no more common type of personal injury case than one arising out of an automobile accident.

Some auto accident cases are quite simple and can be effectively handled with a minimum expenditure of time and money (and, sometimes, without even having to file suit). Many others, particularly those involving severe injuries or death, require a much more sophisticated approach. Moderate impact, soft-tissue injury (MIST) cases present unique challenges, which are discussed in more detail in this chapter (§5:03).

A. Elements and Defenses – Generally

§5:01 Negligence Action Against Driver

Motor vehicle cases are usually actions for negligence (unreasonable carelessness) against the driver and/or owner of the vehicle. In order to establish negligence, your lawyer must allege and prove these four legal elements:

The defendant had a duty to use reasonable care.

The duty of care arises when someone gets behind the wheel of a car and engages in the affirmative act of driving the vehicle. The duty can also arise when a potential defendant is deemed to be legally responsible for the acts of another. For example:

- If the defendant-driver was working, the driver's employer may be a responsible party.
- If the accident was caused by a malfunctioning traffic signal, or the absence of a traffic signal, the private party who controlled the signals or the city may be a potential defendant.

- If the roadway was under construction, the contractor had certain duties of care.
- If the driver's view was obstructed, the party responsible for the obstruction (e.g., the landowner) may be a potential defendant.
- The manufacturer of the motor vehicle may be responsible for defects in the vehicle.
- If the defendant-driver was intoxicated at the time of the accident, the person or entity who provided alcohol to the driver may have violated a duty of care.

The defendant breached the duty of care.

The duty of care is breached when the driver fails to act as a reasonably prudent person would under similar circumstances or fails to obey the laws pertaining to motor vehicle or pedestrian safety. Sometimes an accident is just that – an accident. If, however, the accident is the result of unreasonable carelessness on the part of the driver, that is negligence. Common examples of driver negligence include:

- Speeding (driving faster than the posted limit) or driving too fast for the weather or roadway conditions.
- Failure to follow another at a safe distance. In a rear-end collision, a party who collides with a stopped vehicle is typically guilty of negligence as a matter of law.
- Failure to obey traffic signs and signals.
- Failure to yield the right-of-way to vehicles on the right in uncontrolled intersections.
- Failure to yield the right-of-way to pedestrians.
- Failure to maintain a proper look out for other vehicles or pedestrians.
- Failure to maintain control of the vehicle.
- Driving the wrong way.
- Turning from an improper lane.
- Failure to maintain or turn on headlights.
- Failure to maintain or properly use brakes.
- Failure to properly signal turns or stops.
- Failure to properly maintain the vehicle or driving it with a defective condition that makes operation unsafe.
- Driving under the influence of alcohol or drugs.

You suffered damages.

The legal damages arising out of a motor vehicle accident usually will encompass past and future medical expenses; past and future lost wages and income; and other losses that may be harder to calculate, including, for example, pain and suffering, and mental and emotional injuries.

The defendant's breach of duty caused your damages.

To prove this element, you must establish that your injuries and damages would not have occurred but for the defendant's negligence (i.e., breach of the duty of care).

§5:02 Common Defenses

The most common defense to a vehicular-liability case is contributory or comparative negligence. The defendant will claim that your conduct (i.e., your failure to exercise reasonable care) caused or contributed to causing the collision and, therefore, your damages should be reduced. One specific and common example is the seatbelt defense. Failure to use this simple safety device will almost always be considered negligent. The pertinent question, though, is whether use of the seatbelt would have made any difference with regard to the severity of your injuries. The defendant must prove that your failure to wear a seatbelt exacerbated your injuries. Meeting this burden will require expert testimony, in particular the testimony of a biomechanical expert. To overcome this defense, your attorney also will have to retain a biomechanical expert and/or accident reconstructionist to address the seatbelt issue and counter the defendant's expert's testimony. The goal will be to demonstrate that even if you had been wearing a seatbelt, your injuries would have been the same or perhaps even worse than they actually were.

In addition to contributory negligence, the defendant might rely on other defenses, including:

- His or her car sustained a **mechanical defect or failure**.
- He or she suffered a sudden physical illness or other **emergency**.
- The accident was **unavoidable**.
- The accident did not cause the injuries you claim; rather, these are **preexisting injuries**.

B. Moderate Impact, Soft Tissue (MIST) Cases

MIST is an acronym for a class of auto accident cases in which the impact upon collision is not severe; the plaintiff's vehicle sustains minimal damage; and the plaintiff sustains soft-tissue injuries (e.g., "whiplash"). These cases present unique challenges because the minimal damage to the vehicle often does not correlate with the significant, painful and long-lasting injuries suffered by the plaintiff.

1. Challenges of a MIST Case

§5:03 Colossus Lowers the Value of MIST Claims

MIST cases are plagued by insurance companies' reliance on a computer program called Colossus. This program is used by more than half of the insurance companies in the United States to determine the value of bodily injury claims. It works like this: The claims adjuster inserts "relevant" data into the program, and the program spits out a report predicting the settlement value of the case. Unfortunately, despite insurance carriers' protestations to the contrary, the program is replete with flaws and biases. It is a virtual certainty that the value of a claim is lowered when Colossus is used.

Simply put, Colossus has a built-in bias against soft-tissue injuries. The program classifies injuries as "objective" or "subjective." A broken arm is "objective." A whiplash injury (that is, an injury to the soft tissues in the neck) is a "subjective" injury, as is a herniated disc; "pain" also is subjective. On top of this built-in bias, the adjuster determines which data is "relevant" and can input the data in such a way as to ensure an even worse result for the injured claimant. For example, the adjuster is required to determine which medical expenses are necessary and/or reasonable. Chiropractors usually have the largest billings in soft-tissue cases. Guess what type of bill Colossus values the least? Moreover, insurance company claims adjusters have varying degrees of knowledge and experience, which can lead to varying judgments in the valuation of claims.

Colossus ostensibly provides consistent estimates of injury costs. Insurance companies rely on it because it tends to provide consistently low values for injury claims. This is so because Colossus does not take into consideration the X-factors: stress, pain, inconvenience, loss of enjoyment of life, inability to participate in the things that the injured person enjoys most, or any number of other things that a jury, and even a judge, will consider. Essentially, the problem with Colossus is that it cannot take the place of human beings' understanding of human suffering.

Accordingly, your accident attorney must be able to articulate why your case is different from the "average" MIST case, or be prepared to file a lawsuit and get your case to a jury. A jury will consider many of the factors that Colossus ignores. Jurors will make distinctions based upon whether or not they think you are a good and honest person who has suffered as a result of her injuries. In fact, juries are in many ways the antithesis of Colossus. A jury might not award damages for a disc herniation because the terminology and the treating doctor's explanation of the injury did not resonate with them. Nevertheless, that jury, comprised of human beings, will award money damages because the injury victim's back hurts so much that she cannot hold her 18-month-old daughter without pain.

§5:04 Limited Settlement Prospects

Using computer programs, such as Colossus, the insurance company will make an unreasonably low settlement offer, allegedly related to the property damage figures. This will be presented as a "one and only" settlement offer, with a warning that the offer will not be increased – and it won't be. You can count on this offer being the only offer the insurance company and defense counsel will make. Be prepared to take your case to a jury.

§5:05 Unique at Trial

MIST cases are unique at trial. Several things make this so. First, the defendant will concede "liability." Second, unlike most cases, the trial is a battle of the experts. Third, most jurors come to court with a preconceived, negative impression of whiplash injuries. Fourth, the defense will paint you and your attorney as fraudulent and dishonest.

§5:05.1 Undisputed Liability

Near the time of trial, defense counsel will concede liability (fault in the collision). Don't be misled. This offer will not simplify trial because the defense is not offering to limit the case to damages. The defense still intends to dispute "causation" and damages. At trial, the defense will dispute how the collision happened and how fast the cars were traveling at the time of the collision. The defense will do so on the premise that this evidence relates to whether your injuries were even possible in this collision. This leads to the second unique feature in this kind of trial: the battle of the experts.

§5:05.2 Junk Science and the Battle of the Experts

The defense, relying on an "ends justify the means" philosophy to "fight the plaintiff's fraud," will call three fraudulent experts. The first is an accident reconstructionist. The second is a biomechanical expert. The third expert is an orthopedist. These seemingly qualified and professional experts will base their opinions on junk science and become "co-counsel at trial" for the defense.

Accident Reconstructionist

The defendant will call an expert to "reconstruct" the accident. The reconstruction will understate the speeds, calculate Delta V (the change of velocity) from the "bumper crush" shown in photographs, spout the conclusions of "scientific studies" (funded and conducted by the insurance industry) and offer other groundless opinions to support his conclusion that the collision generated a Delta V of less than 5 miles per hour.

Biomechanical Expert

The centerpiece of the defense will be the testimony of the biomechanical expert who will testify, "This accident could not possibly have caused the injuries the Plaintiff complains of. This is just another frivolous lawsuit." The biomechanical expert will parade out scientific testing with cadavers, injury indexes, and Delta V forces to show that defendant is the victim of a fraudulent plaintiff and a shyster attorney.

Orthopedic Doctor

Finally, the Defense will call the "Independent Medical Examiner" to testify that there are no injuries shown by orthopedic examination, but even assuming the plaintiff was injured, any injuries are minor and temporary. The orthopedic doctor will also state that there is disc degeneration and herniation shown on MRI, but that this is normal for the plaintiff's age and was just asymptomatic before the collision. Of course, the defendant was not responsible for the condition.

The best way to deal with these experts is to get to them before they get to the jury. Your attorney will aggressively attack the underlying "science" at the experts' depositions, and then file a motion (a formal written request) with the court to have the experts' testimony excluded from the trial on the grounds that the experts are not qualified to testify and, moreover, their opinions are based on "junk" science.

§5:05.3 Negative Connotation of "Whiplash"

For many jurors, the word "whiplash" conjures up images of an "ambulance chasing" lawyer and a greedy plaintiff who is faking an injury in the hope of winning a big jury award. This negative image is compounded by the subjective nature of pain.

To combat this perception, your attorney will describe your injury more precisely, as a "soft tissue" or "connective tissue" injury. Connective tissue injuries can at times seem invisible, since they do not show up on objective diagnostic tests like an MRI or X-ray. Nevertheless, the pain is real. A visual display (e.g., a diagram or a video demonstration) of the severe hyperextension/hyperflexion of the neck – the whiplash effect – can go a long way toward helping the jury understand the very real and very painful nature of this type of injury.

§5:05.4 Personal Attack at Trial

Rather than focus on the legal issues, the defense will put you and your attorney on trial. Your character and your credibility will be attacked; you will be accused, directly or indirectly, of malingering or even fraud.

2. Building Your Case

§5:06 First Meeting With Your Attorney

At your first meeting, your lawyer will ask lots of questions about the facts surrounding the accident: Where did the crash happen? What time of day? How did the crash happen? How did you feel immediately afterwards? Were there any witnesses? Your attorney also will ask about your medical history and your current physical condition. Your job is to be honest and forthright, and provide as much detail as you can remember. In addition, because the nature and severity of your injuries will be a major focus of the trial, you lawyer will spend some time looking for evidence of the hidden injury — traumatic brain injury — that so often accompanies a whiplash injury. To determine whether a TBI is present, your lawyer may ask you a series of questions similar to the following:

Q: What is the highest degree of education you completed?

Q: Do you know what your IQ was before the crash? What was it? Have you been tested since?

Q: Have you had headaches — if so:
- At what time of day?
- Left side, right side or both?
- Front or back?
- What gives you relief from the headache?
- Does anything make the headaches worse?

Q: Have you experienced any changes in your sleep patterns in the past year?

Q: Have you gained or lost weight without diet?

Q: Do you drink alcohol? How much alcohol do you consume in a day?

Q: Do you smoke? How many a day?

Q: Have you ever taken illicit drugs? What were/are they?

Q: Has a doctor diagnosed you as having any diseases? If so, what are they?

Q: Have you experienced dizzy spells?

Q: Have you passed out, no matter how briefly?

Q: Has the way you walk changed?

Q: Has your vision changed?

Q: Have you accidently dropped things?

Q: Do you have difficulty sometimes understanding what you are reading?

Q: Do people seem to mumble when they talk to you?

Q: Has your speech slurred during conversation?

Q: Have you forgotten what you were saying while speaking?

Q: Have you had difficulty remembering the names of common things?

Q: Has your memory changed?

Q: Do your hands ever tremble?

Q: Do any of your muscles jump or twitch?

Q: Has your sense of direction changed?

Q: Have you experienced blindness in one or both of your eyes?

Q: Can you see or hear things others cannot?

Q: Can you smell things no one else notices?

Q: Has your handwriting or signature changed?

Q: Do you drink more water than you did before the crash?

Q: Do you talk differently since the accident?

Q: Do you now easily lose your balance, or do you feel less stable than before the crash?

Q: Do you work or live around any chemicals?

Q: Have you had a thought you could not stop – one that goes on and on?

Q: Have you reached for something and missed it?

Q: Have people changed their attitude toward you?

Q: Do you often feel anxious, or worried?

Q: Have you had difficulty moving your head?

Q: Can you move your head as easily as you did before the crash?

Q: Do your ears ring? Did they ring before the crash?

Q: Have you ever had a stroke?

Q: Have you had ischemic attacks?

Q: Has anyone in your family had neurological disease?

Q: Has anyone in your family had epilepsy?

Q: Have you ever consulted a psychiatrist? When? For what?

Q: Have you ever consulted a neuropsychologist? When? For what?

§5:07 Gathering Records

From the outset, your lawyer will take steps to accumulate the following materials and records, which will be necessary to prove your MIST case:

- Medical records from all doctors and facilities relating to the injuries the crash caused. Notes of medical staff, especially nurses who note seemingly minor complaints, signal the possible presence of TBI that is not manifesting in physical injury.
- Certified copies of medical bills.
- All available past medical records.
- All vital records (birth, marriage, divorce).
- Current employment records.

- All past employment records.
- All Social Security records.
- All military records.
- All veteran's administration records.
- All school transcripts and records.
- Results of any standardized tests.
- Records from any unions the plaintiff was, or is a member of.
- Federal tax records for the past 5 years.
- State tax records for the past 5 years.
- Check registers for the past 5 years.
- All health insurance records.
- All prior lawsuits or claims.
- All workers' compensation records, including complete claims files and opinions.
- All arrest and conviction records.

§5:08 Assembling Witnesses and Consultants/ Experts

In order to prevail, you must establish the elements of negligence – duty, breach of duty, causation and damages. When you present your claim to the insurance claims adjuster, you do so on paper, with a written settlement demand, supported by medical records and other documents. At trial, you make your case through the testimony of witnesses. As the trial date approaches, your lawyer will be identifying potential witnesses, including expert witnesses, who will be essential to establishing your case. Potential witnesses include:

- You.
- Your family members.
- Police officers who investigated the crash scene.
- Your treating physicians.
- Life care planner.
- Vocational rehabilitation specialist.
- Accident reconstructionist.
- Biomechanical expert.

- Orthopedic expert.
- Neurologist.
- Economist.

If your injuries include TBI, additional witnesses likely will be necessary, including:

- Neuropsychologist and/or neuropsychiatrist.
- Speech and language pathologist.

II. Premises Liability Cases

A. What is a Premises Liability Case?

§5:09 Overview

A premises liability case is one in which the injured party claims that the owner or occupier of a place is liable (i.e., responsible) for his injuries. Premises liability cases can arise out of almost any circumstance and at almost any place. They can occur at supermarkets, mall parking lots, apartment complexes, amusement parks, sports arenas, a neighbor's sidewalk, restaurants, or just about any other place where negligence may occur. However, regardless of where the injury occurs, there is one major challenge associated with virtually every premises liability case: liability is almost always difficult to prove.

§5:10 Common Fact Patterns

Here are just a few examples of "typical" premises liability cases. Notice how, in most of these cases, liability is not perfectly clear and indisputable:

1. A young child incurs a fracture to a finger while accompanying her mother to a mall department store. While the mother has been looking at a display adjacent to the escalator, the child places her hand on the bottom of the handrail as it enters into the body of the escalator. The handrail fractures her finger, and a claim is made against both the store and the escalator company for the injuries sustained by the child.

2. A man exits his automobile in a large mall parking lot and slips on an oil spot next to his automobile. The fall causes a herniated disc, and a claim is made against the mall owners.

3. A postal worker is attacked by a large German Shepherd dog as he attempts to deliver a package to a business. As a result of the attack, the postal worker sustains a knee injury, and a claim is brought against the owner of the store.

4. A young girl is watching her uncle hit baseballs in a batting cage at an amusement park. The pitching machine begins to pitch the balls in an uncontrolled fashion and one of the balls strikes the single layer fence and causes a facial injury to the child who is approximately six inches away from the fence at the time. A claim is brought against the amusement park owner for failure to have a protective fence and because of the malfunction of the pitching machine which threw the uncontrolled balls.

5. A young woman enters a church to attend a church service and sees a sign on a door which states "Restrooms." She enters the door to a darkened stairway not realizing that the restrooms are actually down a stairway she is at the top of. She takes one step into darkness, falls down the entire flight of stairs, and sustains injuries from the fall. A claim is brought against the church for the negligence of having a misleading sign on the stairway door.

6. A plumber is injured while working as a sub-contractor at a building site. The plumber is injured after tripping on loose wire and cable which had been negligently left by the electrical subcontractor. A claim is brought against the electrical subcontractor for failure to properly clear the premises after the job.

7. A man slips and falls while bowling in a bowling alley and a claim is brought against the owner of the bowling alley for renting extremely old and slippery shoes which are alleged to have caused the fall of the patron.

8. A postal worker is hit by falling ice from a franchise restaurant while delivering mail to the restaurant. A claim is brought against the owner of the restaurant for failing to remove the ice which had accumulated on the roof of the restaurant.

9. An elderly woman trips and falls in a major department store because of shelves that have been improperly stocked with merchandise. A claim is brought against the owner of the department store.

10. A woman trips over a carpet which has been negligently placed in the middle of an aisle by a store employee. A claim is brought against the owner of the carpet store for injuries sustained by the patron.

B. Slip and Fall Cases

§5:11 Elements

Slip and fall cases require proof of a hazard, plus the other elements essential to any personal injury action arising from a theory of negligence, i.e., duty, breach, causation and damages:

Hazard

In most cases, some physical feature or condition of the premises is a major contributing factor in the plaintiff's fall. The hazard may be as simple as water on the floor of a supermarket or as complex as a subtle variation in the riser height of a stairway.

A "hazard" exists when the condition of the premises presents an unreasonable risk of harm. The mere fact that an accident occurred does not establish that a hazard existed. Moreover, the mere existence of a defect in the premises does not fully establish an unreasonable risk of harm. The magnitude of the defect, its location and appearance, and its probable effect on the ability of the pedestrian to safely negotiate the walkway must be taken into consideration. A good rule of thumb is that if a hazard could have been reasonably prevented by the use of ordinary care or by following common or customary practice, then the hazard and inherent risk of injury are unreasonable.

Duty

The owner or occupant of a premises has a duty – a legal responsibility – to exercise ordinary care in the use, maintenance or management of the premises in order to avoid exposing persons to an unreasonable risk of harm. Ordinary care means the level of care which a person of ordinary prudence would use in order to avoid injury to himself or others under circumstances similar to those existing at the time of the accident.

In some cases, duty is established by statute (e.g., by building codes). A duty also may arise out of a person's conduct or by virtue of a contract. For example, depending on the facts of your situation, your lawyer may be able to establish that one or more of the following persons or entities owed you a duty of care:

- Persons performing legal (or illegal) acts on the premises, whose activity contributed to your injury, and anyone with control over those activities;
- Persons operating equipment or utilities on the property, which contributed to the injury, and anyone in charge of those persons;
- A maintenance service company or individual;
- The architect or designer of the property;
- The general contractor and/or a subcontractor who constructed property; or
- The engineer or architect who oversaw construction.

Breach

In slip and fall cases, the breach of duty usually arises out of an act of omission – that is, a failure to act. Occasionally, the defendant will timely perform a necessary act, but do so in an incompetent or negligent manner. Common examples of a defendant's breach of the duty of care include:

- Failure to maintain the premises in a safe manner.
- Failure to inspect for foreseeable hazards.
- Failure to adequately warn.
- Failing to discover and correct unsafe conditions.
- Failure to protect consumers from known risks associated with using the premises.
- Failure to adequately train and supervise employees and other operators of equipment on the premises.
- Failure to follow the law, building codes or other governmental regulations in regard to construction, warnings and maintenance of the premises.
- Failure to have the premises repaired and maintained so that they remain in a reasonably safe condition and were not likely to cause injury.

Causation

All of the defendant's acts of omission or commission are of no import unless you can directly connect the defendant's negligent behavior to the cause of your injury. No matter how bad the behavior of the defendant or how serious the injuries, there must be a link between the two. Furthermore, there must be a link between the defendant's act or failure to act and the existence of the hazard that caused the injury.

When a person slips on the wet floor and breaks a hip on impact, the issue of the hazard (water on the floor) causing injury (broken hip) is relatively simple to prove. To prove that the hazard was the result of some negligent act of the defendant is more difficult.

Damages

If you have not been harmed by the slip and fall incident, then you have no basis for a premises liability claim. Generally, though, it is not difficult to establish that the fall resulted in an injury, with consequent medical expenses and other economic losses, to say nothing of related pain and suffering.

§5:12 Evidence to Establish Your Claim

In a premises liability case, the injured plaintiff has the burden of proving the facts necessary to establish each element of his or her claim; the nature and extent of the injuries suffered; and the amount of damages arising out of the accident. Your attorney may rely on some or all of the following types of evidence to establish your claim:

Witnesses

Relatively few slip and fall accidents are witnessed by third parties. However, eyewitness testimony can be very effective in establishing the physical condition of the premises; the mechanics of the fall; the existence of the hazard; and your behavior prior to the fall. Your lawyer will want to identify potential witnesses and take their statements or depositions as soon as possible to ensure that the witnesses' recollection of the facts is accurate. As time passes, the details may grow fuzzy, and a witness may attempt to reconstruct the accident based on the opinions of others or information learned long after the accident. When that happens, the testimony is based on "what must have happened because...," rather than on the witness' personal knowledge and recollection.

Photographs

The photographs should accurately depict the conditions of the accident site. They should include views of the defect or hazard. Ideally, you would like photos showing a long view of the site; a middle view (showing the relationship of the various features); and close-up views of the specific area where the accident occurred. There should be at least a couple of photographs depicting the view of a pedestrian as he approaches the accident site. Views of the area from the perspective of the various witnesses are also helpful and are sometimes determinative in establishing the credibility of witnesses.

Police or Incident Reports

A police report is not usually made in a slip and fall case unless the fall occurs on public property. However, an incident report is often made by the defendant's employees or by independent security personnel.

Emergency Medical Treatment Reports

Paramedics or emergency medical response teams, whether public or private, keep incident logs which record the time of notification; the time of response; details regarding the type and severity of the injury; and details of the treatment administered.

Hospital Records

Hospital and other medical records are invaluable for establishing damages. These records will establish the type and severity of the injury; a medical diagnosis and prognosis; and a timeline of events from the time of accident to the date of last treatment.

Newspapers and Public Records

Rarely are the facts of a slip and fall accident reported in a newspaper, but it does happen. On occasion, the newspaper article discusses other accidents or describes the condition of the premises. Local television news may cover the removal of the plaintiff from the accident scene by ambulance. Often the broadcast tapes — or, sometimes, the raw footage — is available. When available, the tapes establish the occurrence of the accident and a timeline that can be compared with other evidence.

§5:13 Significant Issues for Jurors

Regardless of where or how the slip, trip or fall occurred – whether in a supermarket, or on a flight of stairs, or on a tree-lined sidewalk – jurors in slip and fall cases tend to focus on the following:

1. Jurors want to know all of the ambient details (e.g., the weather conditions, the lighting) around the fall in order to understand contributing factors, if any.

2. Even if the jurors themselves might not have used every "balancing aid" (e.g., the handrail on the stairs), they often will expect the injured plaintiff to have done so.

3. If the plaintiff was familiar with the area where the slip and fall occurred, and it was a known hazard, that fact hurts the plaintiff. If, on the other hand, the plaintiff did not know the area well, then jurors often hold the plaintiff to a higher standard to have taken better care in traversing the area.

4. Jurors want to know that the plaintiff was focused on taking careful steps. Otherwise, they are ready to blame the plaintiff for allowing himself to be distracted.

5. Jurors want to understand the conditions within the plaintiff's control (for example, use of drugs or alcohol; medication; fatigue) and will discuss those conditions during deliberations.

6. Jurors want to evaluate the surface for themselves whenever possible, whether through photographs, a "jury view" (onsite), or seeing a sample brought into the courtroom.

7. Despite the fact that corrective action taken after the incident can seem to be (at least a partial) admission of responsibility, jurors want to know that the property owner is safety-minded, first and foremost. The jury may view quick remedial action as a property owner taking appropriate responsibility.

8. Jurors want to understand the "before" and "after" of a plaintiff's condition to fairly ascertain fault attributable to the fall.

9. Jurors want to know the plaintiff's current condition. Because slip and fall cases can carry a negative perception with them, jurors look to the speed and degree of the plaintiff's recovery to determine if the plaintiff's injuries are real.

10. Jurors are easily driven to despair. If there is some degree of hope for the plaintiff's recovery, this can motivate jurors to award damages.

C. Example: Supermarket Slip and Fall

Let's examine one common type of slip and fall case in more detail: the supermarket slip and fall.

§5:14 Your Testimony Will Be Key

Because there are no eyewitnesses to most slip and fall accidents, your testimony at your deposition (and, if necessary, at trial) will be crucial. Without clear and precise testimony from you, there may be no case at all, simply because it cannot be proven.

There are some common hurdles that the injured party must overcome in a supermarket slip and fall case. Your attorney will review the following points with you prior to your deposition:

If you know what you slipped on, why didn't you avoid it?

Your testimony will be critical to proving liability (fault), so you will want to paint a detailed picture of exactly how the slip and fall occurred. Here's the rub: If you can describe the defect or debris and how it caused your injury, why were you not able to avoid it? The defense may accuse you of contributing to your injuries by failing to look where you were going. Usually, this dichotomy can be resolved by pointing out that you only recognized the debris or defect *after* you slipped and fell. Still, you will have to have a credible explanation for not seeing the danger (e.g., were you distracted by a store display? pushing a shopping cart?).

Why is the incident report you filled out at the time of the fall inconsistent with your current version of events?

If you filled out any forms about the incident, you will be asked the contents of those forms. In supermarket slip and falls, it is commonplace for the store manager on the scene or the employee in charge of the initial investigation to ask the injured person to complete an incident report or other forms. You must be able to deal with inconsistencies or other problems in those forms. Possible explanations include:

- The store manager told you the forms were "preliminary." He said, "Don't worry about being precise or providing a lot of detail."
- You did a sloppy job with the forms because the manager said that filling out the forms was "just a routine matter, a formality," and reassured you that the store would "take care of everything."
- You were in pain and/or shock when you completed the forms.
- You had just been given pain medication, which impaired your ability to think clearly.
- The forms do not provide adequate space for a full explanation of what happened.
- You were rushed through the forms and not allowed adequate time to complete them.

§5:15 Store Employee Testimony

The key purpose of deposing the defendant's employees is to establish notice of the hazard through evidence of prior incidents, prior accidents, prior concerns over safety in the particular area in question, and the like. Low-level store employees can be much more helpful in this regard than managers. They will usually tell the truth about spills,

frequency of spills, frequency of accidents, the fact that the sweeping schedules may be cosmetic, and myriad other subjects.

The issue of protocol after an accident is of special significance. Often the manager of the store or some other official will reassure the victim that "everything" will be taken care of. It is important for you lawyer to establish that this is a bold-faced lie. Likewise, your lawyer will want to elicit testimony to demonstrate that any statements you made or forms you completed at management's request do not tell the whole story.

Below is a checklist of topics your attorney will cover at the deposition of the store employee or manager:

Inspection and Cleanup Protocols

- Description of specific procedures
- Are they in writing
- Any procedures not in writing
- Training of employees in how to perform inspections or cleanup
- How is compliance with protocols monitored
- Written records of inspections
- Were inspection procedures followed on day of fall
- Gaps or irregularities in written records of inspections on day of fall
- Name and title of employee responsible for inspections or cleanup on day of injury
- Training received by that employee

Condition of Premises

- Type of flooring in area of fall
- Condition
    - Dry or wet
    - Nonstick surface
    - Even or uneven
    - Mopped or waxed on day of injury
    - Type of wax used
- Lighting
- Visual obstructions or marketing displays

Facts About Spill or Debris

- Did employee/manager see it
- How did employee/manager learn of it
- What was it
- Area of spill or debris cordoned off

The Fall or Injury

- Did employee/manager see fall
- Hear it
- How did employee/manager learn of it
- Actions taken to aid plaintiff
- Condition or appearance of plaintiff
    - Moaning
    - In pain
    - Able to stand
    - Able to walk
- Any other witnesses

Protocol for Dealing With Injuries

- Existence of specific procedures
- What are they
- Are they written down
- Followed on day of plaintiff's injury

Statements or Behavior of Plaintiff

- Did plaintiff fill out a written form or give a statement
- How much time given to fill out form
- Plaintiff's condition at time
    - In shock
    - In pain
    - On medication
- Instructions given to plaintiff
- Representations that form was only a formality
- Representations that defendant would "take care of everything"
- Did plaintiff do anything to contribute to the injury

Defendant's Response or Remedial Measures

- Changes in employee training
- Changes in inspection and mopping schedules
- Changes in procedures to verify compliance
- Changes or repairs in flooring
- Changes in waxes
- Changes in lighting
- Changes in location of marketing displays
- Any employees disciplined after plaintiff's injury

Similar Incidents

- Any other customers injured on premises
- Location of incident
- Cause of injury

§5:16 "Notice" Will Be Main Point of Contention

Notice will be a main point of contention in nearly every retail store slip and fall case. "Notice" falls into two main categories: actual notice and constructive notice. Actual notice is established if the defendant knew of the defect and failed to remove it or failed to use other reasonable safeguards to protect the public. Since most people are responsible and will correct obvious hazards, this type of case is rare. Constructive notice is established if the defect *should have been* discovered through the defendant's use of ordinary care.

The defendant has a duty to keep the supermarket premises reasonably safe and to inspect for defects and potential hazards. While the storekeeper is not the insurer of customers' safety, he or she owes an affirmative duty to exercise reasonable care to keep the aisles, passageways and floors in a safe condition, so that they do not create an unreasonable risk of harm to the store's patrons. The storekeeper also has a twofold duty to discover and correct reasonably anticipated dangerous conditions. In effect, a defendant cannot hide his head in the sand to escape liability, claiming lack of knowledge of the hazardous condition.

The retail store industry has adopted inspection and maintenance procedures, which are designed to minimize these hazards. To be effective, the inspections must be frequent enough to reasonably identify hazards so that corrective action can be promptly taken. The test will be whether the market met these industry standards. Hourly sweeping

and intermediate inspections of the sales area are generally recognized as adequate to maintain a reasonably safe floor. Most accidents occur when this inspection system breaks down. The sweeping records, sheets or logs are the only practical means of determining that inspections have occurred according to the company's safety policy. These logs can be very effective in establishing constructive notice.

Often, expert testimony is required to establish constructive notice. The expert can explain the industry standards governing inspection of the premises, and then demonstrate how the defendant failed to meet these standards.

III. Defective Product Cases

A. Theories of Liability

§5:17 In General

A products liability case can rely on three possible theories: strict products liability; negligence; and/or breach of warranty.

Strict products liability requires the injured party (the "plaintiff") to prove that the product was defective and that the defect caused the plaintiff's injuries.

Negligence requires the plaintiff to prove that the product was defective, that a reasonable person would foresee that the product created an unreasonable risk of harm, and that the product caused the plaintiff's injuries.

Breach of warranty is often alleged in the formal complaint that is filed with the court, but rarely relied upon. It involves antiquated principles of contract and notice of breach that largely have been abandoned in favor of the strict liability theory. Your lawyer might plead this cause of action initially, but then drop it when discovery is completed.

§5:18 What Makes a Product Defective?

A defective product can be one that is poorly made, so that it does not achieve the quality of other products of the same design made by the same manufacturer. For example, a product is defective if a necessary bolt is missing, and the product falls apart during use.

In most cases, however, the product is defective because it was poorly designed. For example, a skill saw that does not have a safety

guard may be deemed "defective." In this type of case, the injured party's attorney will argue that the level of technology at the time the product was released into the stream of commerce called for a safer product that would have prevented the injury.

§5:19 Liability Without Fault

The rationale underlying a products liability claim is that the manufacturer is in the best position to know and understand the safety hazards, and to spread the cost of correcting them among hundreds or thousands of purchasers. The consumer often assumes that the product is as safe as technology can make it, or buys into flashy (and often misleading) advertising. Consumers are not privy to reports of other similar accidents; they do not employ design and safety engineers; and they do not receive industry literature that may discuss a particular hazard.

The courts have whittled away at this underlying rationale somewhat, by allowing for alleged negligence by the injured consumer or the injured party's employer to be somehow compared to the no-fault liability of the defendant. They also have introduced balancing tests, in which the defendant-manufacturer gets to weigh and balance the cost of making the product safe against the gravity or likelihood of injury. This opens the door for the plaintiff's attorney to argue that if a product is dangerous and can be made safer, it should be made safer. It is not a question of counting the number of victims. One is one too many.

§5:20 Failure to Warn – The Last Resort

A claim of "failure to warn" can be pleaded and argued under a theory of negligence (a failure to use reasonable care) or products liability. Either way, it is often the sign of a weak case, in which a more direct approach — claiming a design defect — is unlikely to succeed. On the other hand, juries often respond favorably to failure-to-warn arguments.

The best cases in which to raise a failure-to-warn argument are those in which the defendant has overstated the capabilities of the product in sales literature, print or television ads, or operating manuals. For example, the marketing campaign for the Jeep CJ5 (the kind used in World War II and the Korean War), showed heroic television ads that portrayed Jeeps flying down steep hills. This may have sold Jeeps, but it directly contradicted the warnings in the operating manual about using the vehicle on such steep terrain.

B. Common Defenses and Defense Strategies

§5:21 State of the Art

Defense attorneys will contend that the product is not defective because it is "state of the art." State of the art is not strictly a defense, but it is used so often that it must be understood. The true meaning of state of the art is the state of technological development at the time the product is introduced into the stream of commerce. Defense attorneys (and defense expert witnesses) use it to mean any product that is consistent with similar products actually being manufactured. Consider this example: A consumer is blinded in one eye when the power lawn mower he is using propels a rock into his eye. The defense expert claims that the mower is state of the art — no safer design is actually used by any manufacturer. The consumer's attorney can respond, persuasively, that all the mower needs is a shield — a device that has been used to deflect rocks since the time of Julius Caesar and clearly is within the current state of technology.

§5:22 Some Other Party is Responsible

Often, the defendant-manufacturer in a products liability case will try to avoid responsibility by pointing the finger at some other person or entity. For example, the manufacturer may try to shift some of the responsibility for the accident to a component part manufacturer, claiming that the accident was caused by a physical or design defect in the part.

The defendant-manufacturer may argue that you were negligent (failed to use reasonable care) in using the product. While your comparative fault may be a viable defense to a negligence claim, it should not be a defense to a products liability theory. Logically, it makes little sense to apportion fault between the injured party and a defendant when the defendant's liability is not based on fault. Nevertheless, some defense lawyers may try to make this argument. Often, it is framed as a "misuse" of the product. This defense will fall flat if your attorney can show that your alleged misuse of the product was reasonably foreseeable by the manufacturer.

If you were injured in an industrial setting, the defendant may try to point the finger at your employer, for failing to properly instruct you in the use of the product, or again at you for misusing the product. The best response to this defense is to point out manufacturer's vastly superior knowledge about the product, as compared to you or your

employer. The manufacturer may have had 100 prior similar injuries and a thousand prior similar complaints. None of this will be known to you or your employer.

III. Medical Malpractice Cases

A. Theories of Liability

1. Negligence

§5:23 Medical Negligence

Medical negligence is the act of providing medical services that fall below the accepted standard of practice. In past years, standards were different in different communities, but that is no longer true. As a result of peer literature, standard texts, national seminars and even the Internet, good practice in one community is the same as it is in any other community. Even rural communities have the same rules, albeit modified somewhat by the resources that are available. Most lawsuits allege that the doctor (or hospital) fell below the standard of practice for his or her type of practice. No one defends the argument that the standards in Omaha, for example, are any different from the standards in New York City.

To establish medical negligence, your lawyer must plead and prove:

- The defendant owed you a duty of care (i.e., that a doctor/patient relationship existed).
- The applicable standard of care.
- The care you received from the defendant fell below that standard (breach of duty).
- You suffered an injury.
- A causal connection exists between the defendant's deviation from the standard of care and your injury.

Common theories of liability that may support a legitimate claim of medical malpractice include:

- Injuries occurring in the birth process. These include brain injuries from taking the baby too late and orthopedic injuries (sometimes of a permanent nature) from removing the baby negligently.

- Failure to recognize a burgeoning crisis, such as a potential for a burst appendix, ruptured aorta, bowel obstruction, or the like.
- Failure to refer the patient to a specialist. In that situation, the general practitioner is held to the same standard as a specialist, even though he is not qualified as a specialist.
- Failure to diagnose a disease or condition, like cancer, until it has done irreversible damage or can no longer be cured.
- Poorly performed surgery or surgery that is performed on the wrong organ or limb (surprisingly, not that uncommon).

In many areas of practice, such as products liability, premises liability or even auto accidents, there is a great deal of gray area for arguing and fashioning theories of liability. This is not true in medical malpractice. If your case does not involve what honest doctors would agree is malpractice, then you probably don't have a case, regardless of your injuries. Medical malpractice insurance carriers are very sophisticated and will not settle a bogus claim.

§5:24 Hospital Negligence

The hospital or medical facility where you were treated may be liable for its own negligence and vicariously liable for the negligence of its employees (doctors, nurses and other licensed healthcare providers) who were acting within the scope of their employment. For example, in surgical cases, the hospital may be implicated if the injury is due to inadequate pre-operative or post-operative care (e.g., if a nurse fails to alert a physician about a change in the patient's condition).

The hospital can be held liable for its own negligence on the following theories:

- Negligent hiring, retention and supervision of staff.
- Negligent granting of hospital privileges to an unqualified physician.
- Failure to maintain adequate staffing to ensure quality patient care.
- Failure to properly perform laboratory tests and report the results accurately.
- Failure to keep accurate medical records.
- Failure to properly admit and discharge patients.

§5:25 The X-Factor: More Than Negligence

Experienced attorneys know that to win a medical malpractice case you often need more than a defendant-doctor who has a shoddy practice. Most jurors respect doctors and want to trust them (because we all, eventually, need them). To win one of these cases, you often need an X-factor that causes the jury to believe that the doctor is dishonest, greedy, careless or all three. If the case boils down to a medical mistake by an honorable doctor, your chances of prevailing in the lawsuit are not good.

Alteration of records as the X-factor

An alteration in the medical records can provide the X-factor. Obtaining your medical records is Trial Preparation 101 for your attorney, but it is often helpful to obtain the same records more than once. This can reveal record alteration. For example, assume a case in which the patient died of cardiac arrest during surgery. The first set of medical records reveals that the anesthesiologist failed to fill in the vital signs chart kept during the surgery; the chart is completely blank. When the medical records are requested a second time, they include a chart that has all the blood pressure and vital signs numbers filled in at specific intervals — obviously something that no one could commit to memory. Clearly, the anesthesiologist has fabricated the numbers and substituted a new chart to support his claim that the cardiac arrest was sudden and unexpected. This type of record alteration will make the case impossible for the defense to win and will result in a quick settlement.

Greed as the X-factor

The biggest X-factor in many cases is greed. If you can show that the doctor needlessly performed a marginal surgery or took on more patients than he could safely handle just to make more money, winning becomes a lot easier. For example, imagine a case in which a patient has heart surgery performed by two famous, well-respected heart surgeons. During post-op, he had a bleed, which is neglected and results in lower leg paralysis. If you can present evidence that these famous doctors performed one surgery after another, leaving them no time to manage post-op care, all in an effort to put more money in their pockets, the jury will have no trouble in overcoming their awe. The defendants' greed will be the turning point in the case.

Dishonesty as the X-factor

Any proof of dishonesty can derail the defense. Consider this egregious example:

> The patient died in the hospital from a burst aneurysm on his aorta. Routine chest X-rays taken on admission showed a shadow that suggested an aneurysm and should have been investigated. An X-ray report noting the shadow was done by the defendant radiologist and placed in the patient's file. That report was removed from records before the plaintiff's attorney was able to obtain them. However, a second copy was placed in the X-ray packet and was discovered by accident when the decedent's son asked to see the X-rays before anyone had the opportunity to remove the report.
>
> At the radiologist's deposition, the plaintiff's lawyer did not reveal right away that he had the X-ray report. Instead, he first asked the radiologist if it would be malpractice to fail to investigate if the X-ray findings were exactly what he had written in the report. He agreed that it would be. The plaintiff's lawyer then revealed the X-ray report, and the case settled soon afterwards.

Like politicians, sometimes doctors who commit malpractice do themselves a disservice by trying to cover up their negligence. Often, the cover-up is worse than the original neglect.

2. Lack of Informed Consent

§5:26 Battery

Lack of informed consent is a special cause of action that often is stated as committing a battery (an unlawful touching). The doctor fails to tell the patient all he or she needs to know to meaningfully consent to some treatment or surgery. As a result, the medical care is without consent and the touching is without consent.

§5:27 Difficult to Prevail

Lack of informed consent is a fallback position in most cases and very often not successful. It usually boils down to the doctor's word against the patient's, and the doctor usually prevails. Doctors typically have patients sign consent forms, which the patient almost never reads. In addition, the doctor or nurse will quickly explain the procedure and its pitfalls, and make an entry to that effect in the patient's chart. The real battle in informed consent cases concerns patients who suffer

the devastating side effects or risks that are statistically unlikely. The defense may admit this information was not given to the plaintiff, arguing it would have unnecessarily frightened him or her.

If your strongest (or only) theory of liability is lack of informed consent, then you should probably walk away. Of those informed consent cases that do go to trial, doctors win a huge percentage. Proceeding only on lack of informed consent can result in odds that are hopelessly low.

B. Common Defenses

§5:28 Patient's Negligence

Contributory or comparative negligence by the patient is a defense to medical malpractice. The defense may claim that:

- Your own negligence caused all or most of your injuries.
- You negligently failed to disclose relevant information to the doctor.
- You aggravated or failed to mitigate the injury by not seeking additional treatment.
- You aggravated or failed to mitigate the injury by not following the doctor's instructions.

Jurors are surprisingly willing to attribute some fault to the patient, even if the patient was unconscious on the operating table when the doctor committed malpractice. Experienced medical malpractice lawyers know to be careful about making any argument that might suggest the patient did anything wrong (such as failing to follow the doctor's orders), and will try vigorously to keep that issue from going to the jury.

§5:29 No Causation

The defense lawyer may claim that the defendant's negligence (assuming the doctor was negligent) did not cause the patient's injury because:

- The injury was an unavoidable known risk of the treatment that occurs without negligence.
- The negligence did not make the patient's condition any worse.
- The patient engaged in some intervening conduct following the negligence that broke the chain of causation.

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Chapter 6

Frequently Asked Questions

1. What if I can't pay medical bills?
2. Why won't the insurance company for the person or entity who caused my injuries automatically pay my medical bills as they occur?
3. Do I really need a personal injury lawyer?
4. What if I can't afford a lawyer?
5. What is the difference between "attorney's fees" and "costs"?
6. What can I do to help my case?
7. How long will it take to resolve my case?
8. What is the potential value of my case?

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1. What if I can't pay my medical bills?

Depending on the nature of your case, your medical bills may be covered by one or more of the following:

- Your health insurance.
- Health insurance obtained by your spouse (or your parents, if you are under age) for your benefit.
- If you were driving your car and involved in a collision, medical payments insurance coverage from your auto policy.

- Medical payments insurance coverage from the person you were riding with, if you were a passenger in an automobile that has auto insurance coverage.
- Your personal funds, if you were not insured and are able to pay medical bills as they are incurred.
- Workers' compensation insurance, if you were injured on the job and the injury occurred as a result of your employment.
- The liability insurance coverage for the person, persons or company who caused your injuries. This coverage likely will be paid at the time of settlement, rather than when you incur your medical bills.

If you have no insurance coverage, you and your lawyer will save your medical bills so that they can be paid at a later date, when and if your case settles. If you are unable to pay your bills as they are incurred, many doctors, hospitals and other medical facilities will wait to receive payment until your personal injury case is resolved by way of a settlement or a verdict in court. It is important to let your medical providers know, early in the process, if you have no insurance or financial means to pay your medical bills as they are incurred. Many doctors and medical facilities will require that you sign a form (usually called a "subrogation" or "lien" form), which allows your attorney to withhold enough money from any settlement or verdict to pay your medical bills directly from the insurance settlement proceeds.

2. Why won't the insurance company for the person or entity who caused my injuries automatically pay my medical bills as they occur?

Most insurance companies for the person, persons or company who caused your injuries (in legal terms, the "tortfeasor") will not automatically pay medical bills as they occur for two primary reasons. First, the insurance company does not want to spend a substantial amount of money for medical bills up front, only to be faced with an unreasonable or excessive demand at the time of final settlement. Put another way, the insurance company does not want to expend a substantial sum of money on medical bills and then be faced with the possibility of defending a lawsuit. Second, most insurance companies want to conclude or settle the claim with one sum of money. Therefore, most liability insurance companies will wait for the letter of demand from your attorney (see §2:08) and then try to conclude the case all at once with one payment.

3. Do I really need a personal injury lawyer?

You may choose to handle your personal injury claim on your own, but having an experienced personal injury lawyer on your side will improve your chances of obtaining a favorable outcome. An attorney is trained in the law, and understands the rules of evidence and procedure. Perhaps more importantly, an attorney can rely on the wisdom gained from hard-earned experience in dealing with adjusters and defense attorneys. Here are just some of the ways a personal injury lawyer can help you resolve your claim:

Conduct a thorough investigation into the facts surrounding the incident, including:

- Interviewing witnesses and taking statements.
- Visiting the scene of the incident to take photographs and notes, and make a diagram.
- Obtaining the police report, if one exists.
- Obtaining and reviewing your medical records and any statements made by you or witnesses.
- Analyzing the facts of your case in light of the law in your jurisdiction to answer the most basic question: Do you have a case?

Prepare a demand letter in a format that encourages the adjuster to negotiate a prompt, fair and reasonable settlement.

Quickly **recognize and deal with adjuster negotiation strategies**, tactics and tricks.

Guide your case through the litigation process, including:

- Timely filing a lawsuit that names all the potentially responsible parties as defendants and raises all viable legal claims.
- Serving written discovery on the defendants and take depositions.
- Helping you prepare for your deposition and attend the deposition with you to protect your rights.
- Retaining experts.
- Presenting your case to a jury at trial.

You may be able to do some or all of these tasks on your own, but a personal injury attorney will do them more efficiently and effectively.

4. What if I can't afford a lawyer?

Most personal injury cases are handled on a "contingency" basis, which means that you do not have to pay attorney's fees unless you receive a favorable settlement or verdict. In other words, your attorney's fee is "contingent upon" a settlement or successful court award. Your lawyer's fee will be calculated as a percentage of your recovery.

The contingency agreement between you and your personal injury lawyer may look similar to the following:

CONTINGENCY AGREEMENT

THIS AGREEMENT, made this __day of __, at _____, _____, between the _____, a professional association, hereinafter referred to as "Attorney," and _____, hereinafter called "Client," for injuries and/or damages sustained on or about _____, in the County of _____, State of _____.

1. **IT IS AGREED** that Attorney is to receive 33-1/3 percent of the gross amount of the recovery as his fee if the case settled before the suit is filed, and 40 percent of the gross amount of the recovery thereafter, against all defendants. Client agrees to the above fee after having been advised by Attorney that the above fee is not set by law and is negotiable between Attorney and Client.

2. Actions against insurance companies and others for **BAD FAITH** require a higher fee because of the extreme amount of time involved for the Attorney, and therefore the fees on such cases will be 40 percent of the gross amount of the recovery if the case is settled before suit is filed, and 50 percent of the gross amount of the recovery thereafter.

3. Attorney fees in actions that involve a person who is a minor at the time of the settlement or judgment may be subject to court approval.

4. **IT IS FURTHER AGREED** that Attorney may advance all legal costs in connection with this action. Examples include, among other things, investigators, experts, court reporter fees, medical records expenses, outside legal research, process servers and many other costs. In the event of recovery, either by way of suit, compromise or otherwise, Attorney is to be reimbursed from the recovery of the costs so advanced in addition to attorneys' fees. Attorney will also be reimbursed for any interest owing to costs funding organizations for any advanced costs that are financed by attorney. Costs involving postage, Xerox copies, telephone calls, facsimiles and similar items are not itemized, but a uniform charge of __ percent of the gross recovery will be charged as an additional cost to cover all such items.

5. In the event of recovery, Client agrees to pay any and all medical costs that are unpaid from Client's share of recovery. Should Client recover nothing, it is understood that Attorney is not bound to pay any of these medical bills.

6. Client agrees to keep Attorney advised of his whereabouts at all times, to cooperate in the preparation and trial of the case, to appear upon reasonable notice for depositions and court appearances, and to comply with all reasonable requests made by Attorney in connection with the preparation and prosecution of this case.

7. The above fees do not include fees and expenses in the event of an Appeal.

8. Attorney is hereby given a lien of any sum recovered by way of settlement or judgment of the amount of the advanced costs and his agreed fee. It is agreed that Attorney may retain the advanced costs and the agreed amount of his fee out of the settlement collected by way of settlement or judgment.

9. Attorney and Client both agree that neither shall make any settlement of this action without the knowledge and consent of the other. Whenever a verdict, judgment, award or settlement is obtained in this matter, the undersigned client(s) hereby authorizes, directs and orders the attorneys(s) to sign the client(s) name to any and all releases, dismissals, forms, checks, drafts

and other papers and to deposit the proceeds in the attorney(s) trust account, and to distribute the funds therefrom in accordance with this retainer agreement.

10. Attorney, in his absolute discretion, may withdraw at any time from the case if the investigation discloses no insurance coverage of the responsible parties liable to Client, or if in his or her opinion, the case cannot be economically pursued. Associate counsel may be employed at the discretion and at the expense of Attorney.

11. In the event of a settlement or judgment involving periodic payments or an annuity, the attorneys' fees shall be based on the total value of the verdict or settlement and shall be paid out of the cash portion thereof and not over the life of the periodic payments.

12. Attorney may elect to defer his or her compensation and receive his or her attorneys' fees through a structured settlement or annuity. The terms of such structured settlement or annuity shall be determined by Attorney in his or her sole discretion and shall not be affected in any way by the terms of any structured settlement or annuity obtained by client.

13. Client's spouse, if any, is not a party to this agreement and Attorney has not been engaged to file a claim for loss of consortium or any other claim on behalf of client's spouse.

14. **IT IS FURTHER AGREED** that Attorney has made no guarantees regarding the successful termination of the action, and that all expressions relative thereto are matters of his or her opinion only. This law firm maintains Professional Errors and Omissions insurance coverage within the statutory requirements for the services to be rendered on your behalf. The parties agree that any dispute whatsoever between the client and the attorneys, whether relating to the attorneys' performance, fees, expenses or any other subject, will be resolved by binding arbitration before a single arbitrator and may not be submitted to a court for resolution by a judge or jury. **IF NO RECOVERY IS OBTAINED, NO ATTORNEYS' FEES SHALL BE PAYABLE.**

15. A copy of this contract has been provided to Client.

[*Client's initials*]

Dated: _____ Dated: _____

[*Client's signature*] [*Firm name*]

[*Address*] By: _____

[*Telephone number*] Attorney's Signature

5. What is the difference between "attorney's fees" and "costs"?

It is important to distinguish between "attorney's fees" and "costs." Your attorney's fee is based upon his or her work, time, effort and expertise, as well as certain fixed expenses (e.g., secretarial time, rent). Other costs associated with handling a personal injury cases include:

- Fees that doctors and hospitals charge for medical reports.
- Photocopy charges for copies of medical bills, medical reports, police reports, witness statements, proof of wage loss, and other information demanded by the insurance company.
- Costs associated with obtaining and/or enlarging photographs of your injuries, your vehicle, the defective product, etc.
- Reports of experts.
- Litigation costs — the costs incurred as a result of the filing of a lawsuit.

These costs are your responsibility, regardless of the outcome of your case. Your attorney may ask you to pay these costs as they are incurred. As a general rule, it is not economically feasible for a law firm to "finance" personal injury cases. For this reason, the law provides that out-of-pocket expenses, like those itemized above, are the client's responsibility, even if the case does not settle.

6. What can I do to help my case?

One of the best ways to help your case is to be honest and forthright with your lawyer, from your very first meeting. A successful outcome to your case depends upon mutual confidence and cooperation between you and your attorney. A surprise during settlement negotiations or, worse, at trial can derail your case. That won't happen if you are truthful with your lawyer from the outset. Other ways you can help your case include:

- Being a good patient. Keep all your medical appointments. Follow your doctor's treatment orders.
- Being a good record-keeper. Maintain a file of your medical bills and your out-of-pocket expenses associated with your injury. Keep all your receipts. One easy way to keep track of your medications is to keep all your empty prescription bottles.
- Helping your lawyer gather your medical records by making a list of all doctors, hospitals and other medical providers/facilities that have treated you. Promptly sign authorizations to release medical records, as requested by your attorney. Be sure to let your attorney know if you are released from a doctor's care or you begin treating with a new doctor.
- Providing documentation of your medical bills, your out-of-pocket expenses and your wage loss (e.g., tax records) to your lawyer, upon request.
- Staying in touch with your lawyer – return phone calls promptly; read and respond to all correspondence; advise your lawyer immediately of any changes in your contact information.
- Advising your lawyer of any changes in your personal life, e.g., loss of employment; change of jobs; change in marital status.
- Letting your attorney know about any changes in your physical condition or the progress of your recovery.
- Keeping a personal injury diary. Your diary may take many forms, from a traditional handwritten journal to notes on your laptop to notes on a desk calendar. The important thing is to regularly record how you are feeling and how your symptoms are affecting your daily life.

7. How long will it take to resolve my case?

This question is impossible to answer with certainty because the facts of each case are unique. In general, though, it will take several months to settle a personal injury claim, and may take several years to resolve a case through the court system. This is so because:

- Your case will not be ripe for settlement until all the facts are known and the full nature and extent of your injuries is established. Your lawyer must have all of the medical reports and bills from all of your doctors, and must have thoroughly investigated all of the facts. When a liability case is settled, it is settled for one lump sum, and the settlement is final. Any increased expenses — additional lost wages or increased medical expenses as a result of a change in your physical condition — cannot be the subject of future claims once the case has been settled. For this reason, your lawyer will wait until he has all the facts before attempting to settle your claim.
- In general, insurance companies are in no rush to settle smaller personal injury claims. Adjusters will engage in a host of negotiating "tactics" designed to delay settlement of the claim in an effort to put pressure on you to settle for less.
- The litigation process — particularly the discovery phase of the litigation — takes time.
- Most court dockets are overcrowded with cases, resulting in unavoidable delays.

8. What is the potential value of my case?

In legal terms, the value of your case is measured in terms of "damages." If you have been injured by the negligence (that is, the unreasonable carelessness) of another person or entity, then you may be entitled to recover damages to compensate you for the losses you have suffered as a result of the defendant's negligence. Compensatory damages are meant to cover your economic losses, as well as non-economic losses, as the following chart illustrates:

Category of Recovery	Typical Elements	Evidence and Documentary Support
Medical Expenses	ambulance, emergency medical treatment, physicians' bills, diagnostic testing, hospital and health care provider bills, home health care, medical devices, prescription drugs and prosthetics	medical reports, records, invoices, receipts and statements
Lost Earnings/Lost Earning Capacity	time off from work, reduced income during recovery, reduced or diminished perquisites, reduced health benefits, impact on existing occupation, lost or diminished work expectancy	tax returns, W-2 and W-4 statements, 1099s, work and payroll records, company benefit, pension and health plans
Other Economic Loss	child/elder care, transportation expenses, property damage, vehicle towing, storage and rental charges, lodging expenses, disability and handicapped accommodation expenses, (e.g., major home remodeling projects to accommodate wheelchairs, etc.)	receipts, invoices, contracts, repair bills, credit card statements
Non-Economic Loss	pain and suffering, scarring, loss of consortium, companionship, reduced life expectancy, loss of enjoyment of life	personal injury diaries, electronic diaries, functional status tests, photographs, videotapes, day-in-the-life films and testimony

Afterword

I hope this book has given you a better understanding of how insurance companies work and what happens after an injury accident. As you have learned, regardless of how you were injured, the process of obtaining fair compensation for the harm you have suffered can be a long and complicated one, especially if you are forced to file a lawsuit.

At some point, you will have to make a choice: take on the insurance company and its lawyers on your own, or enlist the help of an experienced personal injury attorney. When that time comes, I hope you will contact me. I would be happy sit down with you to discuss your situation and your legal options.

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