

# THE CRASH COURSE

## ON CHILD INJURY CLAIMS



**HASTINGS, COHAN & WALSH, LLP**  
Attorneys at Law

**1.888.842.8466**  
[www.hcwlaw.com](http://www.hcwlaw.com)

# **THE CRASH COURSE**

## ***ON CHILD INJURY CLAIMS***



# **THE CRASH COURSE**

## **ON CHILD INJURY CLAIMS**

**HASTINGS, COHAN & WALSH, LLP**  
Attorneys at Law

**1.888.842.8466**  
**[www.hcwlaw.com](http://www.hcwlaw.com)**

WORD ASSOCIATION PUBLISHERS  
[www.wordassociation.com](http://www.wordassociation.com)  
1.800.827.7903

Copyright © 2010 by Richard P. Hastings

All rights reserved. No part of this book may be used or reproduced in any manner whatsoever without written permission of the author. Published 2010.

Printed in the United States of America.

ISBN: 978-1-59571-581-4

*Designed and published by*

Word Association Publishers  
205 Fifth Avenue  
Tarentum, Pennsylvania 15084

[www.wordassociation.com](http://www.wordassociation.com)  
1.800.827.7903

## *Author's Note*

Thank you for considering our firm to represent you and your child in your child's personal injury case. We have prepared the following information to give you a better understanding of your child's personal injury case and to allow you to enable us to potentially help maximize the value of your child's case.

We have decades of experience in representing injured clients and their families who have received millions of dollars from negligent parties and their insurance companies in cases involving:

***Motor Vehicle Accidents***

***Dog Bites***

***Wrongful Death Cases***

***Defective Products***

***Medical Malpractice***

***Premises Liability***

***Fall Down Cases***

***Sports Accidents***

As a further testament of our abilities, we serve as referral counsel for a variety of cases both from local and out-of-state firms. We also have

contacts with some of the best lawyers throughout the country and can assist you or others with your out-of-state cases.

Our greatest source of business comes from our clients. You can be confident that if a relative or friend requires our services, we will provide the same professional hands-on attention that you will receive.

We understand that you could chose from any number of other firms to represent you and your child in your important legal matter. We appreciate the confidence you have placed in us and we will work hard to gain and keep your trust.

Please carefully review and follow the information which is set forth in these pages. We are accessible and encourage you to contact us whenever you have a question.

## *Legal Disclaimer*

The information contained in this book is presented for informational purposes only and is not meant nor is it construed to be legal advice. Further, the information contained herein should not be relied upon and you should always seek the advice of an attorney before proceeding. No attorney-client relationship can be established with the firm unless and until a mutually acceptable written agreement is signed by all parties. If you are interested in asking us to represent you, please contact us so we may be able to decide whether or not we are willing or able to accept your case. Any information submitted to us via our website or by other means may not be considered confidential. We assume no liability caused nor occasioned by your reliance on any information presented in this book nor do we guarantee the accuracy, completeness or representations contained therein.

The author and the publisher make no representation or warranties of any kind; nor are any such representations implied with respect to this information. The author and publisher shall not be liable for any damages, consequential or otherwise, resulting in whole or in part from anyone's use of or reliance upon the contents of this book.



# *Table of Contents*

Introduction .....	11
<b>CHAPTER 1</b>	
Frequently Asked Questions .....	13
<b>CHAPTER 2</b>	
Tort Law: An Overview .....	17
<b>CHAPTER 3</b>	
Types and Causes of Child Injury Cases .....	23
<b>CHAPTER 4</b>	
Potential Theories of Liability in Child Injury Cases .....	37
<b>CHAPTER 5</b>	
Types and Causes of Wrongful Death Cases .....	45
<b>CHAPTER 6</b>	
Your Child's Personal Injury Case .....	49
<b>CHAPTER 7</b>	
Why It Is Important To Hire A Lawyer. ....	55
<b>CHAPTER 8</b>	
Ten Things You Can Do To Improve	
The Value Of Your Child's Case .....	63
<b>CHAPTER 9</b>	
Dealing With Your Child's Health Care Professionals	
In Improving The Value Of Their Personal Injury Case .....	71
<b>CHAPTER 10</b>	
Getting The Best From Your	
Child's Health Care Professionals .....	75
<b>CHAPTER 11</b>	
What Insurance Companies	
Don't Want You To Know .....	83
<b>CHAPTER 12</b>	
Bolstering Your Loss Of Income Claim. ....	87
<b>CHAPTER 13</b>	
Value Drivers—Tips To Get You	
More Money For Your Child's Case .....	93
<b>CHAPTER 14</b>	
What Is My Child's Case Worth? .....	101

<b>CHAPTER 15</b>	
Unique Issues in Serious Child Injury Cases .....	I09
<b>CHAPTER 16</b>	
The Adjuster's Point of View .....	I17
<b>CHAPTER 17</b>	
The Secrets Defense Attorneys Don't Want You To Know .....	I29
<b>CHAPTER 18</b>	
The Litigation Process .....	I39
<b>CHAPTER 19</b>	
Pretrial Conferences .....	I43
<b>CHAPTER 20</b>	
The Trial .....	I45
<b>CHAPTER 21</b>	
Mediation .....	I49
<b>CHAPTER 22</b>	
Preparing To Testify .....	I53
<b>CHAPTER 23</b>	
Instructions To Clients Undergoing An Independent Medical Examination .....	I57
<b>CHAPTER 24</b>	
How Insurance Companies Try To Pay You Less Money For Your Child's Claim, And What You Can Do About It ..	I59
<b>CHAPTER 25</b>	
How To Protect Yourself And Your Family From Irresponsible Drivers .....	I61
<b>CONCLUSION</b> .....	I65
<b>APPENDIX A:</b>	
Glossary of Useful Terms .....	I67

## *Introduction*

An accident can totally disrupt and completely change any adult's life. The way in which you engage in your daily activities may be greatly altered and you unfortunately may be forced to endure a great deal of pain and in the end you might be left with a permanent disability that will cause you significant problems for the rest of your life.

These tragic situations become magnified when they involve our children. It is heartbreaking to watch our children suffering, crying, and struggling with an injury caused by the fault of another.

As a parent, our life is completely turned upside down. Unfortunately, some children are very seriously injured while others suffer unimaginable horror, which is a parent's greatest nightmare: death. These events are so terrible that they may destroy you and tear your family apart. You don't know where to turn or what to do. That is exactly why this book was written in order to help you to navigate these uncharted waters.

You have two main concerns when your child is involved in an accident or is injured: improving your child's physical and emotional condition as quickly as possible and holding the responsible party accountable and maximizing the amount of money you can collect. This book will provide you with answers to many of your questions and it will give you

practical strategies to use in obtaining better medical care for your child and it will help you to assist your attorney in recovering more money for your child's case.

We are available to help answer your questions so you can concentrate on getting your child well. Please carefully review and follow the information which is put forth in these pages. We are accessible and encourage you to contact us whenever you have a question.

## **CHAPTER 1**

### *Frequently Asked Questions*

People who consider bringing a personal injury lawsuit usually come to us seeking answers to certain basic questions. In an easy question-and-answer format, this chapter addresses the concerns most commonly voiced by current, new, or prospective clients.

***Q: How Do I Know If I Need Your Services?***

**A:** You probably will need our services if you have been seriously injured or wronged in some way, as a result of an accident, medical malpractice, a defective product, a slip and fall, a dog bite, a sports injury, or other cause. We provide a free consultation to explore the facts of your case and to advise you of your legal rights.

***Q: Why Should I Hire An Attorney To Assist Me In Resolving My Child's Accident Or Injury Claim?***

**A:** More money for you is the primary reason! An insurance-industry research institution studied personal injury claims conducted by the injured person alone versus those that were handled by attorneys. The study determined that people represented by attorneys had a higher net recovery for themselves (more money in their pocket after attorney's fees and costs) than those without attorneys.

Our attorneys provide you with the advantage of representation by skilled professionals whose experience and insight enable you to equal the playing field and help maximize the amount of money you can recover when dealing with insurance companies and major corporations. Having our firm involved in your case allows you to focus on recovering from your injuries, while we focus on holding the responsible party accountable for your injuries and damages.

***Q: My Child Has Been Injured. What Will It Cost To Hire You?***

**A:** We represent personal injury clients on a contingency-fee basis. In other words, you pay attorney's fees only if we win—and you pay no fees if we lose. You are responsible for costs incurred, but these costs do not include attorney's fees, and the costs are paid from any settlement or judgment entered against the person responsible for your damage or injury. We advance costs so that the case can be properly prepared and presented for settlement or trial. If there is no recovery, you pay no costs as well. In addition, there are no ongoing out-of-pocket expenses that you have to pay. We take all of the financial risk in representing you so that you can concentrate on getting better.

***Q: Do You Offer A Free Consultation?***

**A:** Yes, we offer an initial consultation for which we do not charge. The purpose of this initial consultation is to review the facts of your case, give you an indication of whether the case is one that we might be interested in handling, and discuss with you the financial arrangements for our representation.

**Q: How Soon After My Child Is Injured Must I File My Lawsuit?**

**A:** Every state has certain time limits, which are called statutes of limitations that govern the amount of time you have to file a personal injury lawsuit. In Connecticut, you may have as little as two years to file a lawsuit arising from an accident. There are also a number of notice requirements that must be met within a much shorter period of time. *If you miss the deadline for a notice requirement or for filing your case, your claim can be dismissed.* Consequently, it is important to talk with us as soon as possible after you receive or discover an injury.

**Q: What Is “Negligence”?**

**A:** The critical issue in many personal injury cases is just how a “reasonable person” would be expected to act in the situation that caused the injury. A person is negligent when he or she fails to act like a “reasonable person.” Whether a given person has met the “reasonable person” standard is often a matter that is decided by a jury after the presentation of evidence and argument at trial.

**Q: What If I Can’t Prove That Someone’s Negligence Caused My Child’s Injury? Is There Any Other Basis For Liability Besides Negligence?**

**A:** Negligence is not the only theory of liability. Certain individuals or companies may be held “strictly liable” for certain activities that harm others, even if they have not acted negligently or with wrongful intent. On the basis of strict liability, a person injured by a defective or unexpectedly dangerous product, or by a dog bite, for instance, may recover compensation for the injury without showing that the responsible party was actually negligent.

**Q: *What Compensation Might My Child Receive If My Personal Injury Lawsuit Is Successful?***

**A:** Usually, a person who is liable for an injury—which generally means his or her liability insurance company—must pay an injured person for:

- Past and future medical care and related expenses
- Past and future income lost because of the accident
- Permanent physical disability or disfigurement
- Loss of family, social, and educational experiences
- Emotional damages, such as stress, embarrassment, depression, or strains on family relationships
- Damaged property

You will be awarded “damages,” or compensation, which is money, intended to restore you to the position you were in before your injury. This money is not considered income (excluding monies paid for loss of income) and is not taxable as income by the federal government or state.

## **CHAPTER 2**

### *Tort Law: An Overview*

A tort claim is a cause of action (a case) that results from a civil wrong that does not involve a contract claim. *Tort* is derived from the French word for “wrong,” and tort law is a highly specialized and complex area of practice.

Generally speaking, there are three types of torts:

#### **1. *Intentional Torts***

An intentional tort involves an action or activity calculated to harm or offend the victim. Examples of intentional torts include assault, battery, false imprisonment, intentional infliction of emotional distress, defamation, trespass to land, and trespass to chattels (taking personal property). In certain situations, the conduct involves not only tort law but also criminal law.

The problem with intentional torts is that in many cases there is no insurance coverage available to compensate the injured party for his or her injuries. For example, if a person assaults you and causes you serious injury, you could not successfully submit a claim to that person's homeowners or automobile insurance company, as coverage would be denied. To receive compensation, you would then have to look to the

assets or property owned by the person who committed the tort. In many instances, the offending party will have few, if any, assets. Therefore, you would have little chance of collecting any money for your injuries.

You might have a strong case in which the liability or fault of the offending party is clear, and you may have sustained significant damages that would make your case worth a lot of money. Nevertheless, if an attorney is not able to collect any of these funds, there is no economic incentive for an attorney to take the case, because no one is likely to receive any money even if the case is successful.

It is important to consult with us to review the facts of your case and the *various potential theories* of liability that might provide for insurance coverage, perhaps even from a third party. For example, if a bar serves alcohol to an intoxicated person who later starts a fight with another patron and causes an injury to that patron, then the bar might be liable for serving too much alcohol to the party who started the fight.

## **2. Negligence**

Negligence is a very broad area of tort law that deals with a great many types and causes of action. Basically, negligence involves the failure to exercise the level of care that a reasonably prudent person would have exercised under the same circumstances. If a person causes a motor vehicle accident, for example, an issue that would have to be determined is whether or not the person who caused the accident was negligent; that is, did that person do something that a reasonably prudent person would not have done, such as speeding or going through a red light.

Negligence involves a breach of that duty that one person owes to another person and the damage that results from that breach.

Because the laws vary greatly from state to state, it is important to consult with us to determine how the specific laws of a state impact your case.

There are many issues involved in these kinds of cases that could include differing standards of care, a preexisting condition, statutory duties, age, the use of alcohol or drugs, duties, attractive nuisances, Good Samaritan laws, insurance issues, proximate cause, and foreseeability. These and many other nuances make this a very complicated area of the law.

Typical examples of negligence cases include the following:

- Accident Cases, All Types
- Slips And Falls
- Medical Malpractice
- Birth Injuries
- Traumatic Brain Injuries
- Spinal-Cord Injuries
- Wrongful Death
- Premises Liability
- Lead Poisoning
- Defective Products
- Burns
- Explosions
- Toxic Torts

- Class Actions

A separate kind of negligence case involves medical malpractice, which generally involves a standard of care expected of a medical professional that is not met, resulting in damages to the injured party.

Medical malpractice cases may result from failure to properly diagnose a condition, surgical error, failure to treat properly, failure to properly monitor a condition or situation, failure to get a patient's informed consent, and a number of other causes.

Generally speaking, we will consult with a third-party specialist in the same area of medicine to determine whether or not there was a departure from the standard of care (that is, whether malpractice was committed).

### **3. Strict Liability**

Certain states have specific statutory provisions that make a person or entity strictly liable for a person's injury. For example, certain states recognize some or all of the following strict liability torts: parents being held strictly liable for an act of their child; worker's compensation making an employer liable for an employee's injuries; owners of pets that bite people being held strictly liable for the pet's actions; and certain cases involving toxic torts.

If a party causes you to be injured through his or her negligence, you are entitled to compensation for your injuries, which will entitle you to monetary damages.

Damages are supposed to compensate the injured party for a number of losses, which could include the following:

- Medical Bills (Past And Future)

- Out-Of-Pocket Expenses
- Past Lost Wages
- Future Lost Wages
- Pain And Suffering
- Permanent Injuries
- Punitive Damages (In Extraordinary Cases)

The methods of calculating these damages and a great number of other issues involved make negligence cases an extremely complicated and difficult area of the law.

The importance of contacting us at the earliest possible opportunity cannot be overemphasized. Do so at the earliest possible moment.



## **CHAPTER 3**

### *Types and Causes of Child Injury Cases*

Children and teens are at a high risk for many types of injuries that can cause lifelong injuries or even death. Child injuries could involve any of the following types of cases:

- Birth Injuries
- Paralysis
- Suffocation
- Drowning Accidents
- Choking Injuries
- Traumatic Brain Injuries
- Wrongful Death
- School Bus Accidents
- Mass Transportation Accidents
- Motor Vehicle Accidents
- Firearm Accidents
- Dog Bites/Animal Attacks
- Swimming Pool Accidents

- Child Molestation/ Child Abuse
- Negligent Supervision
- Daycare Injuries
- Playground Injuries
- Coma
- Hospital Errors
- Doctor Errors
- Amusement Park/Theme Park Accidents
- Pediatric Surgical Errors
- School Crossing Injuries
- Power Window Injuries
- Bleacher Falls
- Psychology Injuries
- Slip/Trip and Fall Accidents
- Car Seat Injuries
- Poisoning
- Crib Accidents
- Bicycle Injuries
- Skateboard Injuries
- Defective Toy Injuries
- School Injuries
- Sports Injuries

- Recreational Injuries
- Pediatric Malpractice
- Fetal Death
- Window Falls
- Premises Liability

The following is a partial list of the types of activities or perils that pose some of the greatest threats to the health and safety of our children which include:

### ***Motor Vehicle Accidents***

In 2005 in the United States, 1,335 children ages 14 and under died as occupants of motor vehicles in accidents and approximately 184,000 were injured as reported by the Center for Disease Control and Prevention (CDC). On average, 4 children die each day in motor vehicle accidents and more than 500 are injured.

The risk factors for these accidents are varied but could include the following:

- **Alcohol:** Approximately 25% of child occupant deaths in motor vehicle accidents involved alcohol and more than 66% of these fatalities involved children being in a vehicle with a driver who had been drinking.
- **Front Seat Passengers:** Children under the age of 16 who ride in the front seat of a motor vehicle have a 40% greater chance of being seriously injured in a motor vehicle accident than if they were sitting in the back seat.

- **Not Using Booster Seats:** Using a booster seat with children from 4 to 7 can reduce their risk of an injury by almost 60% compared to just using a seat belt.
- **Being Incorrectly Restraint:** Studies have shown that children who are correctly restrained using the proper restraint for their size, weight, and age are at a greatly reduced risk of sustaining a serious or fatal injury.

### **Teen Drivers**

Motor vehicle accidents are the leading cause of death for teenagers in the United States which account for more than one in three deaths in this age group. In 2008, it was reported that nine teen drivers ages 16 to 19 died every day from motor vehicle injuries. On average, for every mile driven, it is estimated that teen drivers ages 16 to 19 are four times more likely than their older counterparts to get into an accident.

Those who are at an especially high risk for motor vehicle accidents, among teenage drivers, are:

- **Males:** In 2006, the motor vehicle death rate for male drivers and passengers ages 15 to 19 was almost twice as high as those of female drivers.
- **Teen Passengers:** Teen drivers are more likely to get into an accident if they have teen passengers. Additionally, this risk increases with the number of additional teen age passengers present.

- **Teenagers Who Are Newly Licensed Drivers:** Teenage drivers who are licensed within the first year also have an increased risk of being in a motor vehicle accident.
- **The factors, which contribute to teen driving accidents, include:**
  - **Not Recognizing Hazardous Situations:** A teens inability to recognize a hazardous situation resulting from a lack of driving experience;
  - **Speeding:** Speeding and not allowing enough room between vehicles and the presence of a male teenage passenger increases the likelihood of risky or reckless behavior;
  - **Drinking:** In 2005, among male drivers ages 16 to 19 who were involved in fatal accidents, 37% of those were speeding and 26% had been drinking.
- **Not Using Seatbelts:** Teenage drivers have the lowest rate of seat belt use. In one report it was determined that 10% of high school students surveyed in 2005 reported rarely or never wearing a seat belt while riding as a passenger.
- **Drinking:** In 2008, nearly three quarters of all teenage drivers killed in motor vehicle accidents had been drinking and not wearing a seat belt.

- **Day of the Week and Time Of Day:** In 2008, one half of all teenage motor vehicle deaths occurred between 3 pm and midnight and 56% occurred on Friday, Saturday or Sunday.

### ***Pedestrian Accidents***

In the United States, motor vehicle accidents account for twenty percent of all deaths among children ages 1 to 14 and pedestrian injuries account for one third of them as has been reported by the Center for Disease Control and Prevention (CDC).

Pedestrian injuries are more severe on average than injuries to occupants of motor vehicles. Death to pedestrians is five times more likely to occur. In a one year period of time, it was reported that 533 child pedestrians were killed and at least 30,000 children were injured in traffic accidents. Another 200 children were killed in non-traffic situations which include places like driveways, walkways and parkway lots. A major cause of these deaths result from traumatic brain injuries.

The type and cause of child pedestrian accidents is largely determined by a child's age and sex. Boys statistically are more likely to be injured than girls. Generally, children are more likely to be involved in a pedestrian accident in an urban area, on a residential street, in the late afternoon or early evening. At risk children include those who dart out into traffic in the middle of a block, those who run across intersections and those who run out while exiting buses.

All age groups share certain common risk factors. Perhaps the greatest risk factor is a parent's unrealistic expectation of their child's level of understanding in the dangers posed in crossing streets and intersections.

Negligent and reckless drivers pose a very great risk to child pedestrians, which risk factors could include: inattentiveness; speeding; cell phone use; texting; reckless driving; and the use of alcohol or drugs. Additional risk factors center on the time when school ends, how close a child's school is to his or her home, family income, employment status, the highest parental level of education, and the physical environment.

In general, children who are most at risk to suffer a pedestrian injury are those who are younger, that live in a high traffic area and come from a lower income family.

### ***School Bus Accidents***

School buses are the largest type of mass transportation for children in the United States. Approximately one half million school buses transport students to and from school and to after school activities every school day. School buses transport tens of millions of students every school day.

According to a 2002 National Highway Traffic Safety Administration (NHTSA) report, there are over 144 school bus accidents and more than 9,500 children are injured in school bus accidents every year. It has been reported that an average of 21 school children a year die in bus accidents.

Of the people injured in bus accidents each year, approximately 46% were school bus occupants, 8% were school bus drivers, 38% were occupants of other vehicles and less than 1% were pedestrians, cyclists or non-motorists.

## ***Drownings***

In 2007, the CDC reported that there were 3,443 fatal drownings in the United States, averaging nearly ten deaths per day. Additionally, another 496 people died as a result of boating accidents.

More than 20% of all drowning victims are children under the age of 15. For every child who drowns, four are treated in emergency rooms for nonfatal submersion injuries. Nonfatal drowning can cause brain damage that may result in lifelong disabilities including memory problems, learning disabilities and loss of basic functioning skills.

In 2007, males were almost four times more likely to die from drowning than females. Additionally, of all children ages 1 to 4 who died from an injury, almost one third died from drowning, which is the second leading cause of death for demographic.

The major factors in drowning incidents include:

- Lack of supervision and lack of fencing;
- Lack of floatation devices or life jackets;
- Alcohol or drug use;
- Seizure disorders or health problems;
- Lack of swimming skills; or
- Swimming in natural water settings such as oceans, rivers or other waterways.

## ***Playground Injuries***

The CDC reports that each year over 200,000 children under the age of 15 are treated in emergency rooms in the United States as a result of

playground related injuries. Approximately three quarters of all nonfatal injuries related to playground equipment occur on public playgrounds with the majority of those taking place at schools and daycare centers.

For the ten-year period ending in 2000, 147 children ages 14 and younger died from playground related injuries. Of those children, more than half died from strangulation and approximately one fifth died from fall related injuries onto the playground surface.

Perhaps surprisingly, girls sustain more than 50% of these injuries while children 5 to 9 have higher rates of emergency room visits. On public playgrounds, more injuries occur on climbers than any other type of recreation equipment while in residential settings, swings cause the most injuries.

In general, playgrounds in low-income areas have more maintenance related problems than in high income areas, which could give rise to a variety of other negligence claims.

### ***Fall Injuries***

The CDC reports that falls are the leading cause of non-fatal injuries for all children under 20. Each day, approximately 8,000 children are treated in emergency rooms in the U.S. for fall related injuries. This figure adds up to almost 3,000,000 children per year who are injured in falls.

Parents should take the following preventable measures to help insure that their children are less likely to be injured in a fall.

- Perform safety checks of playground equipment that your children use including making sure there is a soft landing surface below the play area;

- Have your children wear protective gear when engaging in sports activities including wearing a helmet; and
- Make sure your children are properly supervised whenever they are engaged in activities that create heightened incidents of possible injury.

### ***Dog Bites***

According to the CDC, about four and a half million people are bitten by dogs each year. In 2006, more than 31,000 people underwent reconstructive surgery as a result of having bitten by a dog.

Dog bite related injuries are highest among children ages 5 to 9 years old and children given their smaller size, are more likely to receive medical attention than adults. A high percentage of child attacks by dogs are bitten on the face, head and neck and the most severe injuries, on average, occur in children under 10.

Children who have a dog in their home are more likely to suffer a dog bite injury and as the number of dogs in the home increases so does the incidents of dog bites. A resident with two or more dogs in their home is five times more likely to be bitten than those living without a dog. Most states, with few exceptions, hold the owner or keeper of a dog or pet strictly liable for the injuries sustained by another as a result of the actions of the offending pet.

### ***Sports and Recreational Accidents***

Approximately 30 million children and teenagers participate in organized sports in the United States each year and approximately 3 million injuries occur each year as a result of these activities.

The following estimations from a number of published reports highlight the dangerous nature of sports related activities:

- Approximately 3 million children and teens under 15 get hurt annually playing organized sports or by participating in recreational activities.
- The leading cause of death in a sports related injury is a brain injury.
- Sports and recreational activities account for more than 20% of all traumatic brain injury cases among children and young teens.
- The majority of head injuries are sustained in bicycle, skateboard or skating accidents.
- More than three quarters of a million individuals under 15 years of age are treated in hospital emergency rooms for sports related injuries.
- Playgrounds, sports and bicycle related injuries occur most often in children between the ages of 5 and 14.
- Nearly 80,000 children ages 5 and under were treated in hospital emergency rooms for trampoline related injuries.
- Most organized sports related injuries occur during practice.

Although statistics of sports related injuries in children and young teens ages 5 to 14 are somewhat difficult to compile, consider the following estimates for a given year:

- **Basketball:** Nearly 200,000 children were treated in hospital emergency rooms;
- **Baseball/Softball:** More than 115,000 children were treated in hospital emergency rooms for baseball related injuries while more than 25,000 students in the same age range were treated for softball related injuries. Baseball has the highest fatality rate for this age group for sports activities;
- **Bicycling:** More than 300,000 children were treated for injuries in hospitals while more than 200 students die each year in bicycle accidents;
- **Cheerleading:** Although this sport involves a slightly older demographic, and results in a large number of catastrophic injuries, more than 20,000 cheerleading injuries result in hospital emergency room visits each year;
- **Football:** More than 150,000 football related injuries result in a visit to a hospital emergency room;
- **Gymnastics:** A leading cause of injury for girls, more than 25,000 visits are made to hospital emergency rooms for gymnastic injuries;
- **Ice Hockey:** This sport accounts for approximately 18,000 visits to hospital emergency rooms;

- **Ice Skating:** Results in more than 10,000 emergency room visits each year;
- **In-line Skating and Roller Skating:** These sports activities involves more than 37,000 visits to hospital emergency rooms;
- **Lacrosse:** One of the fastest growing team sports in the U.S., lacrosse accounts for many injured related emergency room visits each year;
- **Skateboarding:** This activity results in over 25,000 visits to emergency rooms due to injuries;
- **Sledding:** Sledding involves over 7,500 injury related emergency room visits;
- **Snow Skiing/Snowboarding:** Snow skiing injuries result in hospital emergency room visits approximately 30,000 each year while snowboarding injuries involves approximately one third that number of visits;
- **Soccer:** More than 75,000 soccer related injuries involve emergency room visits; and
- **Trampoline:** More than 75,000 trampoline related injuries result in hospital emergency room visits.

### ***Fire and Burn Injuries***

Every day over 400 children under the age of 20 are treated in emergency rooms for burn related injuries and sadly, two children a day die as a result of their burns. Younger children are more likely to sustain burn injuries that are caused by hot liquids while older children are more prone to suffer burns caused by fire.

Death from fire and burn injuries are the fifth most common cause of death in the United States as reported by the CDC. On average, someone dies in a fire every three hours in the U.S. and someone is injured approximately every half hour.

Most victims die as a result of smoke or gas inhalation and not from burns. The leading causes of fires are smoking and cooking with alcohol which are involved approximately forty percent of the time. Males account for approximately two thirds of all fire/burn injuries and children under 4 are at the greatest risk for child injuries or death.

## **CHAPTER 4**

### *Potential Theories of Liability in Child Injury Cases*

**Negligence:** Negligence is a very broad theory of the law, which is an allegation or accusation made about a person's conduct. Negligence law has developed over hundreds of years and is meant to provide judges and juries with a standard to judge a person's behavior that could be flexible enough so the rule could be applied to various individuals in a variety of circumstances.

Negligence is broadly defined as the failure to act as a reasonable person under the same circumstances and in the same situation. A person is negligent if he or she does something that a person of ordinary prudence would not have done under similar circumstances. A person can be negligent by failing to do something that a reasonable person would not have done.

The negligent party must also owe a duty to the injured party (i.e. to not hit their vehicle in their lane of traffic), must breach that duty (i.e. hit their vehicle in their lane of traffic), and the injured party's damages or injuries must result from this breach of duty.

An exception to the above rule involves the conduct of children. Certain states hold that young children, generally speaking under 7 years of age, are incapable of negligence. Other states hold a child to

the reasonable person standard of a child the same age, for example, an 8 year old might be judged by the ordinary standard of care a reasonable 8 year old. In certain instances, a minor child might be held to an adult standard if the child is engaging in an adult activity, such as operating a motor vehicle. In other situations, a third party might be strictly liable for a child's injury despite the fact that the third party did not act negligently.

Every day in the United States, infants, toddlers, children, teenagers and young adults are involved in a variety of accidents that cause serious injuries or sadly, even death. Many of these injuries and the problems they create could have been avoided if proper supervision was provided by a responsible adult or if proper precautions or safety measures had been taken.

Childhood injuries can cause lifelong damages and disabilities of a physical, emotional, psychological, and financial nature on a child. The children and their families who suffer these injuries are entitled to compensation for all past and future damages which are suffered as a result of the fault of another.

When an injury to a child occurs it is extremely important to fully investigate all potential causes of action available against all potentially responsible parties. If your child has been injured in some type of accident, you could potentially assess liability based upon one or more of the following legal theories:

**Presumption of No Negligence:** In many instances, in order to determine if you have a case against another party you have to look at the negligence of the injured person. In cases involving children, they will

generally not be held to the standard of an adult, unless they engage in certain adult activities such as operating motor vehicles.

In many states, however, children by statute are presumed to be incapable of negligence below a certain age which generally speaking is around 7. In certain states, children between the approximate ages of 7 and 14 are presumed to be incapable of acting negligently although this statutory presumption is rebuttable.

**Family Car Doctrine:** The family car doctrine, or as it sometimes is referred to as the family purpose doctrine was developed under the theory that if the head of a family's home gives permission for other people in the family to use the family motor vehicle then the operator of the car acts as the agent of the owner. Under the family car doctrine, if a husband allows his wife to use his car and then causes an accident with the car, then the husband will be legally responsible for the injured party's damages. The same might hold true, depending upon the law of the state and the insurance policy, if a licensed child driver uses his parent's car with permission and injures another person.

**Parental Liability:** Most states hold that a parent is responsible for the damages and injuries caused by their minor child's negligent, intentional or criminal acts. Generally speaking, this means that the legal guardian or parent may be held vicariously liable for the acts of their children and the law might hold them personally responsible for the resulting damages. Parental liability may depend upon a parent's knowledge of their child's prior behavior or if they engage in criminal conduct. State statutes requiring that a parent be liable for their child's actions vary widely depending upon the act committed and the amount that the parent must pay. Some states even place an artificial cap on the amount of

money a parent must pay as a result of the negligent, reckless or criminal actions of their child.

**Negligent Hiring, Training, Supervision or Retention:** In certain instances, an employer can be held vicariously liable for the actions of their employee or agent for negligent hiring, training, supervision or retention.

Negligent hiring is where an employer hires an employee, which the employer knew or should have known could not properly perform the job for which they were hired to do, which results in some harm to another.

Negligent supervision occurs when an employer fails to properly monitor or supervise an employee and some type of injury or damage flows from that conduct.

Negligent training is where the employer fails to properly train the employee so as to prevent the employee from engaging in acts which harm others.

Negligent retention results from a situation where an employer fails to properly remove an employee from his or her position once it becomes apparent that the employee is not properly performing his or her function in a way that poses a danger to others and causes harm to another.

**Negligent Entrustment:** Generally speaking, a negligent entrustment case arises when one party (the entrustor) allows another party (the trustee) to possess or use a dangerous item (such as a motor vehicle or firearm) who the entrustor knows or should have known was likely to use it in an unreasonably risky manner and was not competent to use such item. In such a case the entrustor could be held to be vicariously liable for

the injuries and damages caused by the entrustee in using such item which causes injury to another.

**The Doctrine of Attractive Nuisance:** The law of attractive nuisance holds that a property owner may be held liable for injuries suffered by children who trespass on to the landowner's property if the injury is caused by a hazardous object or condition on the person's property that is likely to attract children on to their property and where the child or children that cannot appreciate the serious risks associated with the hazardous object or condition.

In determining the liability of the property owner, courts can look to whether or not the owner knew or should have known: that children could trespass near the hazard; the type of hazard and the risk posed; whether the children could appreciate the risk involved; the importance of the property owner in maintaining the hazard; how difficult it would be to remove the hazard in relation to the risk posed; and whether the landowner took reasonable steps to protect children from the hazard.

Examples of attractive nuisances could include: swimming pools; trampolines; construction debris; abandoned appliances and motor vehicles; and exotic or dangerous animals.

**Failure to Inspect , Maintain and Warn:** Property owners have a duty to properly inspect and maintain their property in a reasonable and safe condition and to warn or protect others from dangerous conditions, which they know of or should have known of. These same owners and/ or possessors have a duty to properly inspect their property to make sure it is safe for persons using that property. When a property and/ or possessors owner fails to properly inspect their property to discover an

unsafe condition which causes injury to another that owner may be held liable for the damages and injuries incurred by the third party.

Examples of dangerous conditions that should be inspected by the property owner and/or possessors, which could result in liability might include:

- Standing, pooling or dripping water on a surface;
- Ice or snow;
- Inadequate lighting;
- Defective cracked or chipped flooring;
- Improperly secured floor coverings;
- Stairs, steps, or handrails that are dangerous and/or defective;
- Hidden or concealed hazardous;
- Slippery substances on surfaces;
- Mechanical malfunctions;
- Failure to repair broken or defective items;
- Dangerous or defective playing fields; or
- Rusted, broken, or damaged playground equipment.

If a negligent property owner and/or possessors fails to properly maintain, inspect, repair, replace or warn others of hazard, which they know of or should have known of then the injured party or parent of an injured child could make a claim against the negligent property owner and/or possessors.

**Strict Liability:** Strict liability, which is sometimes referred to as absolute liability, imposes liability on one party despite the fact that this individual was not at fault or negligent and despite the fact that the injured party may not have used reasonable care. Under the theory of strict liability, an injured party need only establish that he or she was harmed in a specified way in order to collect compensation.

Examples of strict liability cases could include:

- **Product Liability:** A manufacturer or seller of a defective product may be held strictly liable for the products that caused injuries and have been shown to be defective. These could include cases involving children who were injured by dangerous or poorly designed toys, car seats, booster seats, cribs, strollers, and other items typically used by children;
- **Animal Attacks:** Most states, with a few exceptions, hold the owner or keeper of an animal liable for damages and injuries caused by their animal; or
- **Workers Compensation:** Employers are held strictly liable for their employees damages and injuries which are suffered by the employee during the course of their proper employment.

**Signed Waivers or Releases:** The law of signed minor waivers or releases vary from state to state but generally speaking a minor is not legally competent to enter into a binding contract such as a waiver or release. The only way for a minor to be bound would be to have the minor's parent or guardian sign on their behalf. Even in this instance, a court might not allow a parent to contractually waive their child's right

to sue for damages. Additionally, some states might not allow a party to waive a claim for gross negligence or the waiver or release might be found to violate public policy considerations and therefore not be enforceable.

## **CHAPTER 5**

### *Types and Causes of Wrongful Death Cases*

#### ***Wrongful Death Claims***

Basically speaking, a wrongful death case results when a person dies and the survivors are entitled to file a claim against the responsible party or entity. The causes and types of wrongful death actions can include: any type of accident case; medical malpractice which includes cases against doctors, hospitals, nursing homes, or other healthcare providers; defective products; workplace accidents; other negligent acts; or criminal or intentional conduct. Depending upon the laws of the jurisdiction that apply to the wrongful death action, obtaining compensation from the at fault party or parties may or may not require proof of negligence.

A wrongful death action is unique in that it originally did not exist under the common law principles of jurisprudence that formed the basis of our legal system. Originally, it was held that a claim involving the death of a person “died” with the victim because there was no way to compensate that individual for their damages. The surviving family members were precluded from claiming damages from the party that caused their loved one’s death.

#### ***Wrongful Death Statutes***

Over the years, states began enacting “wrongful death” statutes or laws that provide for a method or means of obtaining compensation for

estates of decedents or family members who have been damaged as a result of the death of the victim. Today, all states have some type of wrongful death law that provides for a means of obtaining compensation for the damages and injuries that result from a decedent's death.

Although wrongful death laws vary from state to state, generally these statutes consist of four basic elements: (1) The death of the decedent or victim which was caused in whole or in part by, or can be attributed to, the Defendant (or responsible party); (2) The Defendant intentionally caused or was negligent or is strictly liable for the decedent's death; (3) There is a surviving spouse, children, dependants or beneficiaries of the decedent; and (4) Damages or injuries have resulted from the death of the decedent.

### ***Damages Recoverable***

The estate of a decedent, depending upon the laws of the state that apply, could be entitled to recover some or all of the following types of damages:

1. Expenses associated with or related to the victim's death which could include: ambulance, hospital, doctor, surgical, medical and rehabilitative care bills; and funeral and burial expenses;
2. Loss of the victim's future earnings until their retirement or death which sum is meant to compensate the estate for the decedent's inability to earn these sums in the future. This sum is generally determined by having an economic expert perform a number of complicated calculations and provide a report detailing the method and manner in which these

future lost earnings were calculated; past loss of income from the date of the accident or incident until the decedent's death; pain, suffering and mental anguish which was experienced by the victim prior to their death and the pain, suffering and mental anguish experienced by the survivors; the loss of consortium on the part of the surviving spouse; and the injuries suffered by the children of the decedent for loss of care, companionship, care, love and affection, comfort, guidance, counsel and associated losses. These damages are awarded to compensate family members for the loss of the decedent's presence in their lives.

### **Who Can Sue**

Generally, in order to commence an action to recover damages in a wrongful death lawsuit the law of the specific state should require that the case be instituted by and in the name of the personal representative of the estate of the deceased person. This representative is usually the Executor named in the decedent's will or if the victim died without a will, the person appointed the Administrator of the decedent's estate who is in most cases the surviving spouse or another person appointed by the Probate or Surrogate's Court.

### **Most Common Causes of Wrongful Death Cases**

Wrongful death cases can occur in a number of different circumstances, which could include:

#### ***Motor Vehicle Accidents:***

Drivers have a responsibility to operate their vehicles in a conscientious manner, such that other drivers, passengers and

pedestrians are safeguarded against injury or death by negligent driving maneuvers. Unfortunately, for the approximately 38,000 people who died in motor vehicle accidents in 2008, this was not the case. In addition to obeying traffic laws, drivers must take into account road conditions, traffic flow and hazards and adjust their driving accordingly so as to not operate their vehicles in a negligent or reckless manner.

***Medical Malpractice:***

Medical malpractice is an increasingly common cause of wrongful death. Medical and healthcare professionals have a duty to provide treatment and care in accordance with acceptable standards of practice. Wrongful death medical malpractice occurs when a medical professional negligently fails to deliver appropriate medical care to a patient who consequently dies. The deceased patient's family members, through the decedent's legal representative, can bring wrongful death claims against doctors, hospitals, nurses, psychologists and other healthcare providers who are responsible for the negligent care and causally related death of the patient.

Because of the complicated nature of a wrongful death action and due to a number of considerations, not the least of which are notice provisions and statute of limitation deadlines, it is extremely important that an experienced wrongful death lawyer be contacted at the earliest possible moment.

## **CHAPTER 6**

### *Your Child's Personal Injury Case*

It is important to adhere to at least the following steps after your child has suffered personal injuries.

#### ***Talk To No One About Your Child's Accident***

Do not talk to anyone about the accident except one of the lawyers or representatives of our office. Do not even talk to your own insurance company, or any lawyers hired by your own insurance company, without notifying us so that we may be present if we wish. Generally, we will want all statements to be taken in our office. Remember, you may unknowingly hurt your case by statements you make without our assistance.

#### ***Keep Your Doctors Informed***

You should return to each of your child's doctors as often as necessary and tell them about all of your child's complaints. Your child should not minimize their ailments to the doctors. Your child's descriptions of their injuries and symptoms help the doctors determine how to treat your child, and doctors will keep records of these complaints. It is important that you not cancel scheduled appointments with your child's doctors, which might later be construed to mean that your child was really not in serious pain or in need of medical care. Be sure we are advised immediately

of the names and addresses of all of your child's treating physicians, including specialists you may be referred to by your family physician or general practitioner. Please keep a detailed list of every appointment and the amount of every bill.

### ***Gather Your Insurance Policies***

To ensure that you obtain all coverage and benefits available, we will examine your insurance documentation, including your health insurance policies. It is important that you provide us with complete copies of all insurance policies, including the declaration pages that were in effect on the date of the accident, as well as the policy and declaration pages of all automobile polices of any relative living with you. Additional benefits may be available to you.

### ***Arrange For Payment Of Bills***

You should submit all medical bills to your motor vehicle insurance carrier (if your policy includes medical payments coverage) and then to your health insurance carrier. You must also send copies of all your bills, including prescription charges, to our office.

### ***Keep A Record Of Complaints***

Please keep a daily diary of your child's complaints and progress. Make sure that you write on the front of your diary "Prepared for My Attorney Which Contains Privileged Information". Your child's diary should include problems encountered, such as sleepless nights, inability to perform certain activities, visits to the doctor, and dates on which you have to hire help. This diary can be very useful. A year later, you will not

be able to recall your child's pain and difficulties as vividly. This information should be detailed in the Workbook for Child Injury Cases.

### ***Stay In Regular Contact With Our Office***

We will write to you at regular intervals to find out how your child is progressing. The easiest way for us to do so is via e-mail, so please make sure you provide us with your e-mail address, and be sure to answer all correspondence promptly.

### ***Note Wages And Earnings Lost***

Please keep an accurate record of all days lost from work because of your child's injuries. This information should be documented in the Workbook.

### ***Retain Copies Of Medical Bills***

Obtain and duplicate copies of all medical, hospital, and drug bills. Periodically, you should send these bills to us for our files. Also keep a record of any other expenses you may incur in connection with your child's injuries. Be sure to obtain and keep receipts. You should keep a list of all your child's medical bills and all the costs incurred in visiting doctors.

### ***Defer Car Repairs***

If your child has been injured in an automobile accident, do not have your automobile repaired until you have taken numerous pictures of the vehicle. Please be sure to take pictures from every conceivable angle and from different distances so that we will have a complete record detailing damage to your vehicle. Write your last name and the date that you took

the pictures on the back of each photograph. If possible, you should also e-mail us these pictures.

### ***Photographic Evidence Of The Severity Of The Crash***

If your child has received any bruises on their body caused by the seat belt or by striking part of their body against something inside the car, you should take photographs of these injuries. The photographs will be used to demonstrate the severity of the impact.

Even though there may be slight or minimal damage to the vehicle, it is important to take many photographs of any and all damage. You should keep all photographs and provide this office with copies of both the photographs and any estimates or bills you are given for the repair of damage to the vehicle.

### ***Preserve Records Of Medications***

Another very effective way of demonstrating the amount of pain your child has suffered is to keep a very accurate record of all prescribed muscle relaxers, pain medication, or other medicines taken by your child to obtain any type of relief.

### ***Contest Traffic Offenses***

Never plead guilty to any traffic offense. If there was an arrest in connection with the accident, call our office immediately. We will see that someone represents or advises you.

### ***Witnesses***

Immediately furnish us the correct names, addresses, and telephone numbers of any and all witnesses to the accident.

### ***Save Your Cast***

If your child's injury requires a cast, brace, traction, or other appliance, save it for evidence at trial. You should notify us that you are keeping these items, and when the case is set for hearing, you should bring them with you.

### ***Send Photographs***

Send us prints of and, if possible, e-mail us any photographs pertaining to your child's case taken by you or any of your family or friends. Be sure to have pictures taken of all your child's injuries as soon as possible after the accident. If your child is required to remain in or report to a hospital and are administered any treatment, such as traction or physical therapy, have pictures taken of that as well.

### ***Submit Hospital And Doctors' Bills***

Have your own automobile insurance carrier pay as many hospital and doctors' bills as possible under the payment provision of your policy. You should also have your medical insurance, such as Blue Cross and Blue Shield, pay as many of your child's bills as possible. Doctors and hospitals are more cooperative when their bills are paid. You should not expect them to wait to receive payment until your case is tried or settled. You should, therefore, pay any balance as soon as you can.

### ***Copy And Send Us Bills And Receipts***

It is very important to provide us with copies of all your child's bills and receipts for any and all accident-related expenses.

### ***Settlement Of Claims***

This office will attempt to settle any and all claims with the insurance companies prior to commencing suit. We will not be in a position to attempt to settle any claim until such time as your child's treating physician declares that your child has reached "maximum medical improvement" and furnishes us with a final medical report. Naturally, we will discuss the value of your child's case at that time.

### ***Contact And Questions***

We may not contact you, except as already noted, to receive updates on your child's condition until we have something definite to report. We will be contacting you for depositions, for answers to interrogatories, and when your child's case goes to trial, which may be many years after your suit is filed. If you have any specific questions regarding these instructions or want to discuss any other matters concerning your child's case, please feel free to call or write us.

### ***Your Address***

Be sure to keep us informed of any change in your physical address, telephone number, or e-mail address.

## **CHAPTER 7**

### *Why It Is Important To Hire A Lawyer*

You should be aware that studies have shown that experienced lawyers can negotiate settlements and obtain judgments that are often considerably higher than what the injured parties can negotiate for themselves. In other words, in most cases, you will do better off after paying a lawyer than you would if you attempted to negotiate your own settlement with insurance company claims' adjusters.

#### ***Claims Adjusters***

Insurance company claims adjusters are professional negotiators who have extensive experience in dealing with claimants who are not represented by attorneys. These adjusters use an array of psychological techniques, including intimidation and befriending you. Their methods are designed to get you to accept the least amount of money possible for your claim.

Claims adjusters know that if they can keep the injured party negotiating, there is a very great chance that a settlement favorable to the insurance company will be obtained. Claims adjusters also know that in almost every case, injured parties will not file a lawsuit on their own because they do not have the required level of skill, expertise, or experience. They often

feel that their only option is to obtain some type of settlement from the insurance company.

In many instances, claims adjusters will discourage or dissuade injured parties from hiring a lawyer by telling them that lawyers' fees will cost a great deal of money, leading claimants to conclude that they shouldn't pay a lawyer to do something they can do for themselves.

Insurance companies utilize a number of different types of computer programs to analyze personal injury cases in an effort to give insurance adjusters little, if any, discretion in negotiated settlements. This strategy will ultimately result in lower settlements for injured parties.

In addition to the above considerations, there are many complicated issues that arise in a personal injury or medical malpractice case. These various legal issues are fraught with potential problems and are so complex that sometimes they can even be the subject of a malpractice action against an attorney who improperly handles a case. A nonprofessional has little chance of navigating these depths successfully without an experienced attorney's assistance.

### ***Statutes Of Limitations***

The statute of limitations is the time period specified by law within which an action must be filed. If you do not file within the applicable statute of limitations period, your claim could be subject to dismissal, preventing you from pursuing the claim regardless of the merits of the case.

Statute of limitations dates vary from state to state. Some states provide that the action be filed within the applicable time period from

the date of the injury, while other states allow for a tolling, or extension, of the filing period from the date of discovery of the injury.

Under certain circumstances, if the claimant is incompetent or is a minor, some states allow for a tolling of the statute of limitations until the claimant becomes competent or reaches their majority.

### ***Notice Provisions***

There are also certain notice provisions that have very short limitation periods, especially those that relate to local, state or federal governmental entities. In certain circumstances, if you do not comply with the statutory notice provisions, you may lose the right to file your lawsuit, even if you act within the applicable statute of limitations period.

The statute of limitations in any particular case may be somewhat difficult to calculate, because a claim may involve different causes of action against different defendants. Once you miscalculate when the statute has run or fail to properly provide statutory notice, your claim may be forever barred despite its validity or the extent of your damages.

### ***Joint And Several Liability***

The doctrine of joint and several liability holds that a number of defendants who engaged in separate and independent acts of negligence that combined to cause a single injury are held to be jointly and severally liable. In other words, if one party was 1 percent at fault and the other parties were 99 percent at fault, the party who was 1 percent at fault could be held responsible for 100 percent of the damages suffered by the injured party.

The law of joint and several liability varies from state to state, and a number of states have somewhat complicated variations or modifications of this rule.

### ***Vicarious Liability***

Vicarious liability concerns the ability to hold institutions or companies liable for the acts of their nonemployee affiliated personnel. For example, in some states, a hospital may be liable for the negligence of a physician acknowledged to be an independent contractor, while in other states; hospitals may not be liable for the acts of nonemployee members of the medical staff.

### ***Expert Testimony***

In certain states, a plaintiff in a medical malpractice suit must file a certificate of good faith, or a similar document, that states that a medical expert has reviewed the file and has determined that there is a good-faith basis for a malpractice claim.

### ***Threshold Limits***

In some states, your injuries must exceed a minimum threshold of seriousness before you are allowed to file suit. Some states define “serious injury” as an injury that results in death, dismemberment, significant disfigurement, a fracture, permanent loss of use of a body function, or other significant permanent disability. In other states, before you can file a suit, your medical bills must exceed a certain dollar figure or you must be out of work for a certain number of days.

### ***Damage Caps***

A growing number of states place artificial caps on the amount of money an injured party is able to obtain for his or her injuries. This cap may apply whether the claim is for an injury or a death.

### ***Collateral Source Rule***

In certain states, the negligent party is allowed to offer evidence of certain collateral or other payments that the injured party has received, which information could then be used to reduce the award that the responsible party has to pay.

### ***Last Clear Change***

This legal principle holds that if a plaintiff has the last opportunity to avoid an accident or an injury and fails to do so, that party will then be held solely responsible for their injuries regardless of the negligence of the person who caused the injury.

### ***Prejudgment Interest***

Certain states allow for the court or jury to provide interest on the award made to the plaintiff. The interest rates and commencement period for the accumulation of interest vary from state to state.

### ***Assumption Of Risk***

This legal doctrine provides that a plaintiff who has knowingly and voluntarily exposed himself or herself to a dangerous condition or situation that results in an injury may not be entitled to compensation on the grounds that the plaintiff has assumed the risk and agreed to accept the consequences.

### ***Immunities***

A number of states provide immunities in specific cases, generally to governmental entities and their employees. Certain states provide for abbreviated notice provisions, which means that you have a much shorter period of time in which to provide a required notice to a governmental agency or employee by way of a state agency or claims commissioner before a claim can be reviewed.

### ***Doctrine Of Sudden Emergency Or Unavoidable Accident***

Some states hold that even though a party causes an accident and causes injuries to another, the responsible party may not be held liable for the resultant injuries if it is determined that an actual emergency existed, which perilous situation was not created by the party causing the accident, and the responsible party when confronted with the emergency, chose a course of action that would or might have been taken by a person of reasonable prudence in the same or similar situation.

### ***Contributory Negligence***

Certain states follow the principle of contributory negligence, which states that a plaintiff is prevented from recovering for damages caused by someone else's negligence if he or she contributed to or was in any way responsible for the negligence or injury.

### ***Comparative Negligence***

Certain states follow the principle of comparative negligence, which states that a plaintiff's damages may be reduced if the plaintiff is in any way at fault for the accident or injury. In some states, if the plaintiff is

found to be 50 percent at fault, no damages will be awarded. In other states, whatever the plaintiff's percentage of fault is in the accident or injury, the award will be reduced by the same percentage.

### ***Overtreatment***

Claims adjusters often allege that the injured party was over treated for the injuries that he or she sustained as a result of their client's negligence. The adjuster may also claim that excessive tests were ordered or that the injured party was overcharged for treatment.

This list of potentially problematic legal issues represents only some of the matters that must be investigated before proceeding with a claim. If any one of these issues is overlooked or not dealt with properly, very serious negative consequences could ensue, not the least of which could be the dismissal of your case without any prospect of recovering anything in the future.

### ***Conclusion***

Although the aforesaid legal issues and principles have been discussed in general terms it is important to consult with a lawyer at the earliest possible opportunity to review the facts of your case so you can get specific advice as to how to proceed.



## **CHAPTER 8**

# *Ten Things You Can Do To Improve The Value Of Your Child's Case*

People often make mistakes that can have a very negative impact upon their serious injury case. Your actions are vitally important, and you can help improve the value of your case by doing at least the following:

### **1. *Return To The Site Of The Accident***

If your child has been involved in some kind of accident—whether it is a motor vehicle accident, a slip and fall accident, or an accident whereby your child received some type of injury through someone else's fault—you should return as soon as possible to the site where your child was injured (preferably not later than the next day).

If your child's injuries prevent you from returning to the accident site, you should have someone else go there for you once you make that person aware of exactly what happened, where it happened, and what you need for them to do in your stead.

You want to return to the site of the injury as soon as possible in order to identify and locate any evidence that might assist you in the prosecution of your child's case and to take photographs of any and all conditions that might have caused or contributed to the accident or that reflect the extent of the damage.

Because an accident can happen so quickly, and because once it happens, your child may be in a state of shock, panic, or confusion, your child may not remember many details about the accident. People are sometimes very surprised to learn of facts or situations that may have caused their accident that they were not aware of at the time they were injured.

Your first photograph should include a copy of that day's daily newspaper with the date of the paper clearly visible in the picture. This photograph will ensure that you do not forget when the pictures were taken.

At a motor vehicle accident site, you may be able to find skid marks that should be photographed. If so, measure the skid marks and record these measurements with a magic marker on sheets of paper. Then place the paper giving the correct measurement to one side of each skid mark and photograph each mark. Each picture will thus show both the mark and its length.

You might also find that a stop sign that was supposed to be posted at an intersection was not there, or perhaps a traffic light turns green in one direction while allowing left-hand turns in the other direction, or maybe a traffic light was not working properly. You should also take photographs of all such items.

You may find evidence of the collision at the point of impact. It is usually the area where dirt and broken glass remain as a result of the force of the collision. You should determine where that point appears to be and photograph it. The evidence may indicate, for example, that the other driver crossed over into your lane and caused the accident.

In the case of a fall, you may be able to photograph some evidence of a defect that caused you to fall before the defect is repaired.

You should take a great many photographs from every possible angle so that people who are unfamiliar with the accident scene will be able to understand the physical layout of the site just by looking at your pictures. Your pictures should answer any questions about where the accident scene was and how it appeared.

If possible, photograph the accident site at the same time of day as when your accident occurred, unless conditions are such that you are unable to obtain good quality photographs (as when, for example, there is insufficient light). If you can, you should reproduce the same conditions that were present when your accident occurred.

## **2. Protect And Photograph Physical Evidence**

Determining who was at fault in a case can sometimes be determined by physical evidence—something you can touch, see, or examine, as opposed to just describing or talking about it.

Examples of physical evidence include: skid marks, to establish the speed of the vehicles; the point of impact of the collision; damage to the vehicles; holes in the sidewalk that caused a fall; defective or broken stairs or walkways; and damaged, ripped, or blood-stained clothing.

Physical evidence can also show the extent of the damage. Photographs of the vehicles can establish the force of the impact; a copy of your motor vehicle auto-body repair bill can establish the extent of the damage to your vehicle; and torn or bloody clothing can dramatically show that your injuries were very severe.

If your child's case involves a defective product, keep the product. If the case involves an injury due to a foreign object, keep the object. If the

injury requires a cast, a brace, screws, plates, or any other appliance, save it as evidence.

When taking pictures of physical evidence and features of the scene that may have contributed to the accident, it is best to use a digital camera or a camera that makes negatives that later can be blown up or enlarged. Have the film developed immediately in case certain pictures did not come out properly and need to be retaken, or e-mail us the photographs. The person who took the photographs should also write on the back of each one the date on which it was taken and what the photograph depicts. You should also keep your receipt for the development of the pictures to further verify when they were taken.

### ***3. Keep Detailed Records And Document Your Case***

Document all evidence and matters related to your child's case so that the information can be reviewed and used by us. Specifically, you should at least do the following:

- Keep an accurate record of all days lost from work because of your child's injuries.
- Obtain and duplicate copies of all medical, hospital, and drug bills, and keep a record of all other expenses related to the case. Always keep receipts. Keep a list of the hospitals your child has been admitted to and the doctors and other health care providers your child has seen, noting the date and costs of each such visit.
- Keep a very accurate record of all prescription muscle relaxants, pain medication, or other medicines your child has taken

to obtain any type of relief. This can be a very effective way of demonstrating the amount of pain your child suffered.

- If your child has been injured in a motor vehicle accident, do not have your vehicle repaired until you have taken numerous pictures of the vehicle. Be sure to take pictures from every conceivable angle and from different distances in order to show all the damage. Write your name and the date on the back of each photograph.
- If the vehicle has been damaged, get a repair estimate. Save a copy of the estimate to help establish the collision's severity.
- If your child has received any bruises about their body, you should take photographs of these injuries so that these can be used to further demonstrate the severity of the impact.

#### **4. Write A Narrative Of The Accident**

Be sure to write a detailed description of exactly what happened on the day and especially at the time of the accident. This description should include very specific information as to the-who, what, when, where, why, and how of the event, i.e., any question that could possibly be asked of you or your child. Include in your description times, places, people, the place that your child was going to and why your child was going there, how the accident occurred, what parts of your child's body hit what objects and what injuries your child sustained, where your child was taken and what was done for your child and by whom, and so on. Make sure you write at the top of your narrative "Prepared for My Lawyer Which Contains Privileged Information".

## **5. Locate Witnesses**

A witness to the accident can be an invaluable resource to further explain what happened and who was at fault. Witnesses—ideally, disinterested third parties—may be able to describe things your child did not see or provide information supporting your child’s story.

Witnesses sometimes hear responsible parties make statements directly after the accident, at a heightened level of excitement that he or she would not have made later, after reflection or in a calmer moment. Examples of such “excited utterances” could include the following: “Oh, it was my fault,” “I meant to repair those stairs,” or “I just wasn’t paying attention.”

As soon as possible, get the names, addresses, and phone numbers of all witnesses to the incident or accident. You should also take notes as to what each witness told you or your child or what they would be willing to offer in the way of testimony.

It is important that these witnesses be contacted as soon as possible. The longer you wait, the less a witness may remember. This could affect both their credibility and their willingness to give us a statement. Another concern is that it might be much more difficult for us to locate a witness if too much time has elapsed.

## **6. Do Not Give Any Statements**

Do not discuss your child’s case with anyone except us. Do not even talk to your own insurance company or any lawyer hired by your own insurance company without first speaking with us. You may unwittingly hurt your case by making statements without our assistance.

## **7. Do Not Delay Contacting Our Office**

There are a number of reasons why you should contact us as soon as possible. We will be able to counsel you regarding what you should and should not be doing. Your child's case might require the assistance of a private investigator, who will want to look into the matter as soon as possible after the accident or incident. Evidence might need to be preserved and statements might need to be taken. You will also want us involved at the start of your child's case in order to preserve and protect any notice or statute of limitations dates.

## **8. Do Not Discuss Your Case With Others**

It is not a good practice to discuss your child's case with others, because you could inadvertently say something harmful to another party that may later be used against you. Additionally, *you may sacrifice the attorney-client privilege if you discuss your attorney-protected conversations with others.*

## **9. Your Doctor**

Your child should return to each of their doctors as often as necessary and tell them about all their medical complaints in as much detail as possible. Your child should not minimize their ailments to the doctors, as it is one of the best ways for them to know how to treat your child and because the doctors will keep a record of your child's complaints.

It is important that you not cancel scheduled appointments with the doctor, because this can later be construed to mean that your child was not really in such severe pain or in need of medical care.

If your child sees any additional doctors, be sure to advise us immediately of their names and addresses. You should keep a detailed list of every appointment and the amount of each such bill.

#### ***10. Follow Your Doctors' And Our Instructions***

It is imperative to follow through with any advice or instructions that are given to you by us or by your health care professionals. Failure to follow these instructions could severely jeopardize your child's case.

You should also be sure to provide our office with copies of all medical bills, prescription charges, therapy bills, your motor vehicle estimate, all photographs and any other documentary evidence as soon as possible.

If you follow the steps in this chapter, you can avoid making costly mistakes that could reduce the value of your child's case. It is important to follow all of the suggestions here to help us maximize the value of your child's case.

## **CHAPTER 9**

### *Dealing With Your Child's Health Care Professionals In Improving The Value Of Their Personal Injury Case*

When insurance companies evaluate a case, they consider your child's medical care and treatment and how the injury has affected your child. In order to increase the value of your child's case, it is important to keep in mind the following points:

Insurance companies thoroughly examine an injured party's medical records. It is extremely important to make sure that all of your child's injuries, symptoms, problems, and restrictions on activities are expressed to their health care professionals so that these factors are recorded in their medical records. Today, doctors are very pressured and do not have much time to spend with patients. Often, they seem to be very rushed. Hence, it is important for you to focus on your child's visit before you see the doctor.

Ideally, you will want to choose a primary care doctor who conveys a sense of genuine concern, interest, and involvement in your child's medical treatment—someone who instills a sense of confidence in you. Your primary care doctor will function as the "gatekeeper" who grants or blocks access to specialists. Choosing a good primary care physician could become vital in your child's ultimate recovery. Even if you are satisfied that you have chosen a good primary care physician, if you feel you

are being unjustly denied services you need, don't be afraid to request and, if necessary, fight for them. To find out if your doctor is board certified and that his or her certification is up-to-date, call the American Board of Medical Specialties at 866-ASK-ABMS and inquire about your doctor's status.

Although a physical examination and various tests will follow, the first step in your child's proper care and treatment is their initial description of your child's symptoms to the doctor. It is a good idea to prepare a full and accurate statement in advance of the appointment, in writing if possible, rather than waiting to organize your thoughts when you are in the doctor's office. The added anxiety of the office environment may make it more difficult for you to clearly and accurately describe your child's problems.

You should also be prepared to give your doctor your child's complete medical history.

If you wish to minimize the amount of time you must wait to see your doctor, you should ask for either the first appointment in the morning or for the first slot after the doctor's lunch hour.

It would be helpful to tell your treating physicians about some or all of the following:

***1. Tell Your Doctor About Every Pain Your Child Is Experiencing As A Result Of The Accident***

- Does your child experience a sharp pain, a burning pain, a dull pain, or an aching pain?

- Is this specifically defined pain limited to one body part? Does it occur in other body parts, or does it radiate or travel to other body parts?
- How frequently does your child experience these pains? How long do they experience these pains? Are they more frequent during certain times of the day, or do they tend to occur after certain activities, and, if so, which ones?

### ***2. Tell The Doctor How These Problems Affect Your Child***

- Does your child spend time in bed because of the pain? If so, when, and how often?
- Do they have to rest more frequently? If so, when, and how often?
- Do you miss time from work as a result of you caring for your child? If so, how much, and when?
- Does your child take medication for the pain? If so, what type, and how frequently?

### ***3. Tell The Doctor What Activities Your Child Does That Causes Pain Or What Activities Your Child Can No Longer Do As A Result Of The Pain***

- Does your child avoid certain school or sporting activities that they used to participate in? If so, what activities?
- Does your child avoid certain hobbies that they used to enjoy doing? If so, which ones?

**4. *Tell Your Doctor About All Forms Of Home Health Activities And Aids Your Child Now Requires Or Uses To Relieve Their Symptoms***

- Is your child exercising at home pursuant to the instructions of a health care professional?
- Is your child using hot packs or ice?
- Did you buy or heating pads, creams, or other items for your child?

**5. *Whenever Possible, Do Not Allow Large Gaps In Treatment***

- If your the doctor wants to see your child you in two weeks, make sure you keep that appointment.
- If the doctor tells you to come back when your child is in pain, be sure to follow these instructions. Make an appointment to see your doctor again rather than having your child bear the pain stoically. If you cannot make an appointment, at least call your doctor so your complaints can be recorded.

## **CHAPTER 10**

# *Getting The Best From Your Child's Health Care Professionals*

When your child is a patient with a serious injury, condition, or other health care challenge, there are many things you can do, as a parent, to get the best care from your child's medical providers. What you must remember is that you are the captain of your child's health care team, and, ultimately, it is you who makes the decisions that affect your child's care and treatment.

### ***You Are In Charge Of Your Child's Health Care Team***

Before every doctor's appointment, you should write down, in the order of importance, all of your concerns, questions, and your child's medical problems. If the doctor interrupts you, be sure you return to your list of problems and concerns. Make sure you get answers to all of your questions before your examination is over.

### ***Taking Charge***

**1. Want Answers? Ask Questions!** If you have questions—and, yes, you should have many—ask them of your child's doctors, nurses, therapists, and other health care providers. Don't be timid or shy. You are the one who is most concerned about your child's health care, so be sure to ask questions—and lots of them.

## ***When It Comes To Your Health, There Is No Such Thing As A Dumb Question.***

In fact, it's a good idea to start a health care notebook to keep a record of your child's visits, symptoms, side effects, pain, complaints, and all the medicines your child is taking, your questions, and the answers you receive. Plan to ask questions about your child's current condition and what to expect about your child's future care. Don't be afraid to ask, "Why?" Make sure you write at the top of your health care notebook "Prepared for my Attorney which contains Privileged Information."

Bring your notebook to all of your appointments so that you won't forget anything. Write down all the answers the doctor or other people give you. Don't feel rushed. This is the time to get the answers you need. If you do not have time to write down all of the information during the appointment, make sure you make notes immediately afterward—preferably in the waiting room of the health care professional's office, while the information is still fresh and clear in your mind. There is a lot to keep track of, so keep a thorough written record of everything.

If you do not understand something, say so. Doctors are often in a hurry, but it is part of their job to listen to you and give you all the information that you need. Your doctor wants you to understand everything so that you can do your part and actively participate in getting your child well.

## ***If You Still Don't Understand Something, Keep Asking Questions.***

**2. Do Not Be Intimidated By Your Doctor.** Make a list of what you need to talk about and stick to it. You should always maintain eye contact when talking with your doctor. This will show that you are very serious

about participating in your care and treatment. Do not let the doctor avoid answering your questions or make insensitive comments that go unchallenged.

**3. Tell Your Doctor Everything.** Be honest and detailed. Do not tell the doctor what you think you should say or say that your child is doing better than they really are. You should be completely honest about everything your child is feeling, experiencing, and thinking. Talk about your child's current condition- what is changing, what is better, what is worse, and how your child is progressing. Tell the doctor about other conditions your child experiences, what times of the day the symptoms occur, what activities cause your child the most discomfort, and discuss all the medicines your child is taking. If you think a medicine may be causing a problem, mention it. If you feel things are not progressing quickly enough, say so!

Be completely honest about your child's health habits. If your child misses taking a medicine, say so. Tell the doctor if your child has been depressed or anxious. Your child's doctor can only provide the best treatment—treatment developed especially for your child—if the complete medical history is known.

**4. Tell Your Doctor If You Are Unhappy With Your Child's Medical Care.** People will often keep negative comments to themselves, fearing that complaints will create a bad doctor-patient relationship. In fact, most doctors respect open and honest communication and communicative patients often receive better health care.

**5. Keep All Your Child's Health Care Professionals Informed.** Tell each of your child's health care professionals about the other health care providers your child is seeing, what they are doing for your child,

and what they are telling you. Whether your child is receiving physical therapy, or another treatment, each provider on your child's team needs to know the big picture in order to provide your child with the best care. You are the only person who knows everything that is going on, so you should keep everyone on the team informed about your complete medical situation.

**6. Network With Others Similarly Situated.** Whatever your child's injury, condition, or situation, a national nonprofit health organization is generally available to help people like you. These organizations can offer a wide range of support and helpful advice—from people who know exactly what you are going through. They can educate you about the latest news and research and have toll-free phone numbers, Web sites, newsletters, and sometimes even local support chapters that can help you. Ask your providers about an organization for you, or do some research on the Internet.

**7. Educate Yourself Completely.** An informed and knowledgeable patient will get better treatment. The more you know about your child's situation, the different tests and treatments that are used for their condition, and the typical symptoms and how they can be expected to change over time, the more you can be an active part of your child's health care team. When a health care provider deals with an educated and informed patient or parent of that patient, the quality of their care and attention is likely to improve.

**8. Take Someone With You To Your Child's Appointments.** There is strength in numbers. Sometimes, it is hard to keep track of all the advice you get, the instructions you are given, and what you need to do to follow up. Bring a family member or a friend along with you to your

child's medical appointments to assist you. This can make you feel more comfortable and more confident and help you to have a more informed conversation with the doctor or other health care provider. Your family member or friend can also help you take notes, follow through on your doctor's advice.

**9. *Second Opinions Make A Lot Of Sense.*** It is standard practice in the world of medicine to seek a second opinion. When you have a serious condition or injury and are told that your child needs a test or certain treatment—especially surgery—it is a good idea to get a second opinion from another doctor. Find out if your insurance plan covers a second opinion. Your doctor should understand this and should not be offended when you say you plan to seek another opinion. Here are some polite ways you can use to arrange for a second opinion.

- ***If You Are Told Your Child Needs Surgery*** or a complex test or treatment, tell the doctor or the office staff that you must first check with your health insurance carrier to see if it is completely covered.
- ***Call Your Health Insurance Carrier*** to determine if the procedure itself will be approved and if a second opinion is covered—or required. If so, ask the health plan representative for a list of other providers whose services the plan will cover for the second opinion. Be sure to write down the name of the person you spoke to, the date and the details of the conversation in your health care notebook in case you have a problem later.

- **To Find Other Health Care Providers,** ask friends and relatives if they know of doctors who have treated others with your child's injury or condition. You can also call a local doctor-referral service or contact your state medical society. (The number can be found in the "white pages" of the phone book.)
- **When You Call To Make The Appointment With The Second Doctor,** tell the office staff that you are seeking a second opinion. Depending on your child's condition, you will be asked to bring certain medical records, which you will need to get from the current doctor's office staff. Do not be shy about requesting these records.
- **Once You Get A Second Opinion,** compare the two findings. Ask questions of the second doctor about the differences in opinions. Remember to bring your friend or a family member with you to this very important meeting. Again, write down everything that is said in your healthcare notebook. When you next visit with the first doctor, you should again ask questions about the different opinions, making sure you understand everything and then make an informed decision about what to do.

**10. Take Charge Of Your Child's Health Care Team.** Keep in mind that your child's health care team is there to help you and that ultimately you make the decisions regarding your child's care and treatment. That means you need to let everyone on the team know what is working for

your child and what is troubling you. Talk to each one of them openly and cordially.

If you are not comfortable with someone and feel that you cannot talk to that person about your child's health care needs—or you are not getting the care and attention you deserve—you are better off making a change, no matter how difficult it may seem to do so.

### ***It's Your Child's Health . . . You Need To Be In Charge***

If your child has an injury or a medical condition that requires you to see doctors and other health care providers, you have a compelling need to manage your child's health care team. You must take responsibility for following the instructions you and your providers have worked out together. Step up! Ask questions! Educate yourself! Tell your medical providers everything, and keep everyone on your team connected. You will improve your child's care and accelerate their medical treatment and ultimate recovery.



## **CHAPTER 11**

### *What Insurance Companies Don't Want You To Know*

Many insurance companies currently use a computer software program called Colossus to evaluate the value of personal injury claims. How Colossus works is a mystery to the general public. Neither the insurance companies nor the developer of Colossus will divulge exactly how they determine their baseline values.

Essentially, this program is a database that evaluates claims based on information entered by the insurance adjuster. Therefore, the evaluations can only be as good as the information that the adjuster enters into the program.

By utilizing Colossus, most insurance companies will try to artificially lower the value of your claim by plugging in such things as damage to your vehicle, expected length of treatment, expected cost of treatment, and a number of other “objective” variables before determining a value.

The Colossus program will *not* take into account such factors as the extent of your pain and suffering, the duration of your pain and suffering, how your injuries affect your ability to work and carry on your normal life's activities, your inability to perform certain activities, emotional stress and trauma, how this has affected your relationship with

your spouse (loss of consortium), or any number of other factors that a jury would consider.

Perhaps the biggest problem with Colossus is that the insurance adjuster assigned to handle your claim is usually locked into the settlement figure that the program generates. Insurance companies will deny this and will tell anyone who will listen that the program is nothing more than an evaluation tool. The insurance industry claims that the settlement figure generated by Colossus is merely a starting point from which the adjuster can go up if additional facts and circumstances warrant it. This representation is not true: the adjuster has little, if any, room for movement.

Colossus is a well-kept secret of the insurance industry. It is the leading bodily injury claims adjusting software in the world and is being used by an increasingly large number of insurance companies. According to Computer Sciences Corporation, the company that produces Colossus, the software is used by thirteen of the top twenty U.S. property and casualty insurers to minimize variance on similar bodily injury claims. A former Farmer's Insurance employee who left the company to consult for plaintiffs' lawyers estimates that insurance companies are saving from 15 percent to 30 percent on injury claims payouts by using Colossus.

*Therefore*, in order to increase the value of your child's case, when dealing with an adjuster who is relying on Colossus, you should consider the following:

- The single most important thing you can do to increase the value of your child's case is to make sure all of your child's injuries, complaints, problems, preexisting conditions, pain, depression, anxiety, loss of life's activities, and other relevant

information is properly and completely expressed to the doctors so that all information is recorded in your child's medical records.

- Be specific in describing your child's injuries. As a general rule, the more specific you can be the better. If your child cannot perform certain activities, tell the doctor.
- Gaps in treatment will reduce the value of your client's case, so be sure to follow up with the doctors on a regular basis. If you do have any interruptions in treatment, be sure you can explain the reasons for these gaps.
- Colossus generally opposes alternative medical treatments, such as acupuncture. If you do seek alternative treatment, make sure that you do so with a doctor's referral.
- Colossus typically values treatment according to time ranges such as one to three months, three months to six months, six months to nine months, and so on. This means that thirty-one days of physical therapy would make a case worth more than thirty days of physical therapy.
- Colossus has other yardsticks for assigning values to the length of treatment. For example, for the first three months, physical therapy visits might be valued at \$100 per visit, but in the fourth month, they might be valued at \$40 per visit, and by the sixth month, the amount might go down to \$10 per visit. If you visit a medical doctor between the third and fourth

month, then Colossus might bump the value back up to \$100 per visit for the next ninety days.

- Wearing a seat belt helps the value of your child's motor vehicle accident case. If your child was wearing a seat belt at the time of the accident, be sure to tell this to your child's treating physician so that it appears in the medical records.

By properly describing your child's injuries, complaints and problems to the doctor and following up with needed medical care you can potentially increase the value of your child's case when dealing with an insurance adjuster who utilizes the Colossus software program

## **CHAPTER 12**

### *Bolstering Your Loss Of Income Claim*

One of the many elements of your child's personal injury claim is the amount of income that you lose as a result of all of the time you missed from work as a result of caring for your child. This is especially important if your child has a serious accident which requires you to take extended periods of time off from work so you can properly care for your child. The calculation of your loss of income can be either very easy or extremely complicated, so it is a good idea to follow the following suggestions:

#### ***Assume That The Insurance Company Is Not Going To Believe Your Claim For Lost Wages, So Be Prepared To Prove Everything***

If your child is injured and you miss time from work and you work a forty-hour week, with no overtime, then the insurance carrier will want to see some proof from your employer of your salary (paystub, W-2, tax return, etc.). You should keep a complete record of all lost wages. At the very least, you should obtain a statement from your employer that outlines your salary, the number of hours you work in a week, the time that you have missed from work, and any other monetary losses that you have incurred.

It is a good idea to obtain other forms of documentary evidence such as paystubs, copies of paychecks, calendars, ledgers, time cards, and anything else that will help to establish your losses. Additionally, you will also need some documentation from your employer establishing how much time you lost from work.

It would also be helpful to have a note or notation in your child's medical record from the treating physician that your child could not go to school or was confined to the home for some specific time due to the injuries your child sustained in the accident. It is also important for you to report to the physician your child's inability to go to school or leave the house, and why, so that it will become a matter of record.

### ***Overtime, Sick Time, And Vacation Time***

If the doctor indicates to you, which should be in writing, that your child cannot go to school or leave the house, you are entitled to collect monies that do not include just your lost salary, if you miss work to care for your child. These losses can also apply to overtime, sick time, and any vacation time that you use. These all have a value, and you are entitled to be compensated for the loss of these values because of another's negligence.

It is important to note that you should always follow your doctor's instructions. If your doctor tells you to keep your child out of school for three weeks and you have to stay home to care for your child, then it is much easier for us to argue that the loss of income incurred during this period of time is the responsibility of the party at fault. It is imperative that you be as detailed as possible when telling your child's doctor about the physical problems your child is experiencing.

If you lose overtime or are forced to use sick time or vacation time from your work, you should arrange to get a letter from your employer (we will arrange for this after you speak with your employer) indicating how much overtime you lost on each day and the value of that overtime. If you had to use sick days or vacation time, have your employer draft a letter indicating how much sick time and vacation time you used and the value of that time.

### ***Trips To The Doctors***

If you have returned to work but have to take time off to visit health care professionals with your child, you are entitled to be compensated for any money you lose or for the value of the vacation or sick time you have to use. Your employer should clearly document the time you missed from work for these appointments. You should keep a calendar of all time missed from work, the reason you missed time, the hours you missed, and why you missed this time. Make sure your employer knows that you are missing time as a result of your child's accident related appointments and provide written documentation to your employer to confirm this information.

### ***Self-Employed Persons***

Unlike an employer-employee situation where the calculation of lost income is much more straightforward, losing self-employed income is much more difficult to calculate. As a self-employed businessperson, you could be entitled to lost income, loss of earning capacity, lost profits, lost business opportunities, and the loss of goodwill and/or the diminution

in value to your company. It is your responsibility to lessen or mitigate your damages, to the extent possible.

Again, it is very important to be as detailed as possible in keeping accurate records. Make sure your child's doctor understands your child's physical limitations and why it is necessary to spend extended periods of time caring for your child so that the doctor can place this information in your child's medical record to help support your lost income claim.

You will be asked to provide tax returns for approximately the last three to five years. Unfortunately for many, this income history does not adequately explain your current situation or what your future may be. You will also want to prepare a year-to-date financial statement that indicates your current financial position. You will need to present as much evidence and proof as possible to establish the losses you are claiming.

It is a good idea to make copies of your calendar of appointments and get letters from current or prospective clients or customers to provide a better picture of lost income or loss of future business or opportunities.

Another difficulty for a self-employed businessperson is that you are generally doing your job and marketing for future work at the same time. For more complicated cases, it might be prudent for us to hire a forensic accountant or an economist to help clarify your lost income situation.

Many times, claims of loss of income by self-employed business-people are speculative and difficult to prove. Because you know your business better than anyone else, including your attorney, it is necessary for you to provide the best possible documentation to help prove your claim.

### ***Commissioned Salespeople***

If you are a commissioned salesperson and are out of work due to injuries sustained by your child in an accident, it may be very difficult to prove what income you lost as a result of not being able to work. It would be difficult to prove what new orders you might have received, how many new clients or customers you would have gotten, and how much additional income you would have had.

You should make a copy of your day planner to show what accounts you were working on or were scheduled to begin working on. You should get a copy of your year-to-date commissions and make a list of all prospects that you have “in the pipeline.” You should get letters from your employer and make a list of your current accounts and any future accounts that you may be working on. You could also get letters from your coworkers or other salespeople who can help verify what you were doing in the way of business.

### ***Your Accountant***

Perhaps the best type of documentation and/or proof to help establish your loss of income claim would be a detailed letter on your accountant’s letterhead that explains in detail your business, any seasonal changes you experience in your income, why your business and income were on the rise, forecasting what your income would have been and explaining in great detail the reasons behind that calculation, and any other information that is relevant to explaining any loss of income or business which you incurred or can expect to incur.

## ***Proving Your Case***

As the injured party, it is up to you and your attorney to prove your case to either the finder of fact, which can be an adjustor, arbitrator, judge, or jury, by a preponderance of the evidence. In loss of income cases, it is very important to present as much “proof” as possible to support your claim. Many times this can be done with letters from employer, coworkers, family members, and friends who can explain why you are not able to work or cannot earn what you were once making. At other times, paystubs, tax returns, expert reports (economists or accountants), and letters from current or potential customers or clients will help to make your case. You should remember that insurance companies rarely rely on oral representations of facts, so don’t think it will be enough for you to just say you could not work. You must have written materials to corroborate your representations.

Put yourself in the mind of the insurance adjuster, arbitrator, judge, or a member of the jury. What proof would be necessary to help you decide what would be the greatest amount of money to award for past loss of income, future loss of income, or diminution in one’s business? While there is no hard-and-fast rule as to what to present, you should be as comprehensive and creative as possible. You should discuss all aspects of your business with us so that a comprehensive loss of income claim can be developed and presented.

## **CHAPTER 13**

### *Value Drivers—Tips To Get You More Money For Your Child's Case*

In order to maximize the value of your child's personal injury claim, it is important for you to understand how to develop your child's case, acquire the vocabulary and recognize which areas of your child's case you need to emphasize in order to maximize your claim.

One of the most important "buzz" phrases utilized by insurance adjusters is the term "value driver." Generally speaking, a value driver is anything that will drive the value of your personal injury case upward.

There are basically two types of value drivers: those which affect the economic value of your case that can be calculated using a formula or algorithm and are quantitative; and those which affect the noneconomic value of your case which cannot be calculated using a formula or algorithm and are qualitative.

In developing your child's personal injury case it is important for you to be aware of these considerations so you know what you should and should not be doing. It is therefore helpful for you to know and understand the importance of certain key value drivers.

#### ***Medical Bills***

The total amount of your child's medical bills is a key value driver because generally speaking, the higher the medical bills, the higher the

value of your case. There are a variety of exceptions to this general rule which would include an analysis of some or all of at least the following issues:

1. Are your child's medical bills reasonable and necessary?
2. Did your child have any unnecessary tests and or did the test indicate a negative result which did not uncover any type of injury?
3. Have all of your child's medical bills been paid for by insurance?
4. Are visits to physical therapists being monitored by an orthopedist or other specialist?

In order for you to maximize the value driver for your child's medical bills, you should return to your child's doctor or medical provider whenever they have an appointment and do not miss scheduled appointments. You should also contact your child's doctor whenever you feel they need for them to be seen for any problems they are experiencing rather than suffering in silence or not receiving the necessary or needed treatment.

### ***Specialists***

If your child is being seen by a specialist or by multiple specialists, then this can act as a value driver. Are they seeing an orthopedic doctor in conjunction with their physical therapist? Do they see a neurologist for complications arising out of their injury case? Have they been referred to or are they going back to see a specialist for a condition that came about as a result of their accident or has a preexisting condition been

exacerbated as a result of their accident that requires them to return to their rheumatologist, internist or other specialized medical provider? If they need to see a specialized medical provider, this can act as a value driver and can increase the value of your child's case.

### ***Positive Diagnostic Testing***

Diagnostic testing that reveals some type of objective finding such as a broken bone or disc herniation acts as a value driver. Adjusters are often presented with claims that result in subjective findings as opposed to objective findings which generally act as a negative value driver. A subjective finding results in data being obtained from the subject or patient, for example, "my back hurts when I bend or twist and causes me restrictions in my movement" vs. an objective finding which results in the data being obtained from an object, for example, an x-ray, CT scan or MRI which shows some type of medical problem such as a fracture.

### ***"Buzz" words and key phrases in your medical records***

Insurance company adjusters carefully review your child's medical records looking for "buzz" words and key phrases that can act as value drivers. So, if your child is experiencing any of these problems and/or conditions, it is important that you use certain terms or phrases when describing them to your treating physician which could include the following:

- Dizziness
- Ringing in your ears
- Pain radiating from one body part to another

- Being knocked unconscious
- Headaches
- Muscle spasms
- Restriction of movement
- Tightness
- Nausea
- Vomiting
- Vision disturbances
- Balance problems
- Neurosis
- Anxiety
- Depression
- Sleeplessness
- Bruising
- Contusions
- Specific pain complaints (burning, tingling, throbbing, etc.)
- Other specific complaints resulting from your accident or injury

If you are specific in describing your child's complaints to their treating physician who properly documents these items, then your medical records can act as a value driver.

### ***Use Of Medical Devices Or Aids***

The use of medical devices such as a TENS unit or health aids such as crutches, a walker, cane or neck brace act as value drivers. Be sure you properly document the devices which your child uses, keep receipts, take photographs, keep the device or aid and be prepared to show why your child had to use each such item usually by or through a doctor's written instruction. The fact that your child had to use these medical aids will act as a value driver.

### ***Documented Out Of Pocket Expenses***

Properly documented reasonable and necessary out of pocket expenses will be a value driver. It is important to keep track of and document all out of pocket expenditures such as:

- Insurance co-payments
- Deductibles
- Household help needed to assist you
- Prescription charges and over the counter pain medicine
- Braces, crutches, canes, walkers or other devices and all other out of pocket expenditures
- All other expenditures which result from your child's injury for which you expend funds

### ***Medical Insurance Premiums***

Properly documenting all insurance or medical premiums paid by you or your employer for each month that your child was treated for their injuries will act as a value driver and in certain jurisdictions will increase

the value of their case through the collateral source deduction this will create. It is important that you obtain and retain this information.

### ***Property Damage To Your Vehicle***

Generally speaking the higher the property damage to the vehicle, the easier it can be to relate your injuries to the accident. You should take your vehicle to a dealer for the make of your vehicle and insist on new parts, not reconditioned or aftermarket, parts.

Take pictures of all vehicles involved in the accident as one vehicle might show significant damage while your vehicle might show little or no damage. A good example of this type of a case is when you are rear ended. The other vehicle that hit you might have extensive front end damage while your bumper absorbed all of the impact of the collision without showing any visible signs of the severity of the impact. By properly documenting the force of the collision and the resulting damage, you can turn this into a value driver.

### ***Documenting Lost Time From Work***

Properly documenting lost time, income and/or wages acts as a value driver. You should get as many different types of documentation as possible to prove your lost wages or loss of income. In addition to pay stubs or tax returns, you should get a letter from your employer that further solidifies your claim. If you used sick or vacation time you should get a letter from your employer that sets forth the fact that you had to use sick time or vacation time so the value of those days can be calculated as well.

### ***Duties Under Duress***

If your child cannot take time off from school and they continue to go to school when they should not be doing so, or if they have to engage in certain activities despite their limited physical condition which resulted from their accident, then these are oftentimes viewed by insurance companies as duties under duress which, depending upon the circumstances, can be a value driver.

These activities usually require that they participate in them despite the level of pain they experience. These activities could include your child's job, going to school, household chores, yard work or certain social obligations such as a child's or grandchild's special event (wedding, graduation, etc). It is helpful to get signed statements from individuals (friends or family members) who can corroborate these claims.

### ***Restrictions On Your Normal Daily Activities***

If your child has serious and documented problems that cause them to be restricted or unable to perform their normal daily activities then this can be a value driver. If your child was on a sports team or engaged in other activities and can no longer play or participate, get signed statements from your child's teammates attesting to this fact. These are real value drivers so long as they are documented and are properly connected to your accident. Any and all documented restrictions you receive drive the value of your child's claim up.

It is important for you to consider the various value drivers as you proceed in the course of your care of your child's treatment so that you can take the necessary steps to maximize the value of your child's personal injury case.



## **CHAPTER 14**

### *What Is My Child's Case Worth?*

Determining the value of any personal injury, wrongful death, or medical malpractice case is both an art and a science.

The science in determining the value of a claim is making sure that all the necessary facts and figures are gathered and put together in a complete package that answers all possible questions. The art of the process lies in being able to present this information persuasively enough to convince the reader of the significance of the great value of your injuries.

Because there is no mathematical formula that can be used to put a value on a case, it is very important that you have us apply our knowledge, experience, and visceral feel for determining the worth of your particular case.

It should be stressed that no case should be settled until such time as the injured party has reached maximum medical improvement until that person has reached a point where their medical condition can no longer improve and their situation is stationary and permanent.

If the claimant's medical condition is subject to change, has not stabilized, and will continue to improve, then settlement discussions should not be started. The only exception to this situation occurs when there is not enough insurance coverage to compensate the individual for the damages

suffered to date and there is no hope of recovering any other funds. For example, if a person is involved in a motor vehicle accident caused by the fault of another who has \$20,000 of total insurance coverage available and the at-fault party has no assets and no other means of paying any judgment, the injured party might settle with the at-fault party while still being treated, taking the \$20,000 of insurance coverage prior to reaching maximum medical improvement, even if the injured party's case is worth more than \$20,000.

In general, however, once you have reached maximum medical improvement, we can begin to assess the value of your case.

The first major issue that must be evaluated is the strength of your case based on liability. In other words, a determination must be made as to who is at fault. In many instances, this question is relatively easy to answer, yet in other cases, the issue becomes much more complicated. In a typical case, an injured party must prove that their injuries were caused by the fault of another.

In many states, an injured party may pursue a claim even if he or she is partly responsible for the injuries sustained, due to the principle of comparative negligence. In those instances, an injured party will have the award reduced by the amount of fault assessed against them. For example, if the injured party is found to be 20 percent responsible for his or her injuries and a jury finds the case to have a value of \$100,000, the injured party's award would be reduced by the comparative fault (20 percent), which would result in an award to the injured party of \$80,000 (\$100,000 less the 20 percent at-fault percentage, \$20,000 [20 percent of \$100,000]).

Some states follow the principle of contributory negligence, which holds that if the injured party is in any way at fault, there is no recovery whatsoever. Still other jurisdictions follow a modified comparative negligence standard.

In still other cases, fault is assessed on public policy grounds, which results in a finding of strict liability. Certain states hold that a person or a company is automatically liable for the injured party's injuries. In such states, the owner of a dog is strictly liable for the injuries suffered by a person who is bitten by their dog, and the manufacturers of certain products may be strictly liable for injuries caused by their use.

The second major issue that must be analyzed is the question of damages. Essentially, two types of damages are recoverable in a negligence action: economic damages and noneconomic damages.

Economic damages are intended to cover injuries for which an exact dollar amount can be calculated. These could include the following:

- Medical expenses that have been incurred to date, along with future medical expenses likely to be incurred as a result of the injury;
- Lost wages or loss of income incurred to date, as well as loss of the ability to earn the same or more income in the future, which are likely to result from the injury sustained;
- The cost of past and future special services and/or medical devices needed to assist with activities that were previously performed without aids by the injured party;

- The cost of any vocational or other training that might be reasonable in order to retrain or otherwise assist an injured party who has a permanent disability; and
- All reasonable out-of-pocket expenses.

Noneconomic damages are intended to cover injuries for which an exact dollar amount cannot be calculated. Noneconomic damages could include compensation for the following:

- Pain and suffering to date, as well as future pain and suffering
- Loss of enjoyment of life's activities normally experienced by the injured party;
- Emotional distress; and
- Loss of companionship by a loved one (generally this is a separate claim available to a spouse).

The determination of economic damages is generally regarded as a science. Medical expenses can be obtained from health care providers (including doctors, hospitals, and therapists). Future medical expenses can be addressed by the injured party's treating physician or other medical experts.

Past lost wages or loss of income can generally be calculated from tax returns or paystubs. Future loss of income is usually determined by an economist and/or vocational rehabilitation expert. All out-of-pocket expenses can be calculated and documented by the injured party.

The determination of a person's noneconomic damages is generally an art. There is no formula or other "objective" way to calculate the dollar value of the loss of function of a certain body part or permanent injury to a person's body, or of the loss of one's enjoyment of life.

We know through personal experience and jury verdict research what juries have awarded in similar cases. This experience and professional access to research may help us arrive at a range of values for a particular case.

To further complicate matters, the value of an injured person's case can also be influenced by any one or more of the following factors and/or considerations:

- The age of both the injured party and the at-fault party
- The likeable qualities of both the injured party and the at-fault party, including the impression each party might have on a jury
- The ability of each party's lawyer to influence the jury to side with his or her particular client
- The willingness of the injured party to go to trial
- The willingness of the injured party's lawyer to go to trial
- The willingness of the at-fault party's lawyer to go to trial
- The cost of defending the case
- The cost of prosecuting the case
- The experience, skill, and history of the trial judge
- The speed with which the case is likely to come to trial

- The available insurance limits and any risk that there may be a verdict in excess of the available coverage
- The assets of the at-fault party
- The injured party's life expectancy and any unrelated conditions that might shorten the injured party's life
- The chance of the injured party being awarded punitive damages from the at-fault party
- The injured party's need for the money
- The assessment of the injured party's treating physicians
- The assessment of the injured party's expert witnesses
- The assessment of the at-fault party's expert witnesses
- The strength of the claims for future damages
- The probability of success for future medical treatments for the injured party
- Any claimed lien amounts on file by any health care professionals, insurance companies, or other parties
- The nature and extent of any scarring or deformity
- The sex of the injured party
- The extent of any preexisting conditions
- Any statutory caps for damages
- The applicable law of the particular jurisdiction

The above factors are just some of the considerations that make the evaluation of a case an art. The ability to know what information to look for, how to evaluate it, and how to present it makes the proper evaluation of a case very difficult. We will be able to gather all the needed information and properly weigh each piece, and we will then be able to persuasively present it to the insurance adjuster, judge, or jury to help maximize the amount of money an injured party can receive.



## **CHAPTER 15**

### *Unique Issues in Serious Child Injury Cases*

A minor child, meaning someone under the age of 18, is legally incompetent to sue, to be sued, or to enter into legally binding contracts (in most cases). A child or adolescent also faces other concerns as a result of experiencing a serious injury to a body that is still developing and growing. Therefore, a serious child injury case can present a number of other complications which merit a brief review which include but are not limited to the following:

#### ***Growth Plate Fractures***

The skeletal structure of both adults and children share many of the same risks of injury. Children however are also subject to a unique injury referred to as a growth plate fracture.

The growth plate, also referred to as the epiphyseal plate or physis, is that area of growing tissue located near the end of the long bones in children and adolescents. Each long bone has at least two growth plates with one being located at each end of the bone.

The growth plate essentially determines the length and shape of the mature bone when it is fully developed which generally happens during adolescents. After the growth plates close, they are replaced by solid

bone. Generally growth plates are the weakest skeletal areas of children and adolescents, they are more vulnerable to injury and could result in a growth plate fracture.

Growth plate injuries occur almost twice as often in boys than in girls due in part to the fact that girls bodies mature earlier than boys which means that their bones finish growing sooner so the growth plates are replaced with solid bone. Additionally, one third of all growth plate injuries result from sports injuries while about one fifth result from motor vehicle accidents, falls, chronic stress and overuse.

A child who has persistent pain or has a great deal of difficulty in moving the affected limb could be just told to live with the pain rather than be seen by a specialist to determine if a growth plate has been fractured. In certain instances, if left untreated, a growth plate fracture may result in a permanent disability or may interfere with the proper growth of the limb.

The care and treatment of a growth plate injury should be commenced as soon as possible. The treatment for a growth plate injury depends upon the nature and severity of the fracture but could include:

- **Immobilization:** The affected limb might be put in a splint, an air cast, a soft cast or a hard cast and the child would be told to limit his or her activity;
- **Manipulation or Surgery:** If the fracture is displaced, which means that the ends of the fractured bone do not meet as they should, then the doctor will either have to put the bones back in their correct position either by manipulating the bones manually or by a surgical procedure;

- **Physical Therapy:** Your child's doctor might prescribe a course of physical therapy which is meant to strengthen the muscles that support the affected area so as to improve the affected limb's ability to move more freely; or
- **Long Term Follow Up:** Your child's doctor will probably want to follow up on a periodic basis to monitor your child's progress which could include the use of diagnostic imaging including X-rays to make sure the bone is healing properly.

The vast majority of growth plate injuries heal without any long term negative effects. The ability of your child's growth plate fracture to heal without a long term disability would depend upon some or all of the following factors:

- The location of and severity of the fracture on the bone;
- The type of fracture;
- The specific growth plate which is fractured;
- The timeliness and type of treatment; or
- The age of the child.

It is very important that this unique child injury be properly examined and treated so that the injured child can get the best result possible and hopefully not be left with any type of permanent disability.

## **Structure Settlements**

In the 1970s, personal injury claimants began resolving cases through structured settlements. In the early 1980s, Congress enacted legislation that encouraged broader use of structured settlements. The key terms of a party's agreement to be paid in periodic installments must be agreed to by the injured party and the responsible party's insurance company.

The new laws enacted by Congress changed the way these funds were treated by the IRS and effectively created a tax shelter for accident victims. As long as the structured settlement, or annuity, was properly set up then all installment payments made would be received tax free (excluding monies paid for loss of income). Therefore, a structured settlement is a method of resolving an injury claim by paying settlement proceeds over time, resulting in tax free monies received by the injured party.

The annuity payments can be paid at agreed upon times which might cover expenses such as college tuition, a down payment on a house, or yearly living expenses. To maximize the amount of money being paid by and through an annuity, it is important to remember the following:

- The more money that is used to fund the annuity, the greater the payment can be;
- The later the payments being made, the greater the payments can be;
- The longer the payment schedule extends, the greater the payment can be; and
- The smaller the payments are at the beginning of the payment schedule, the greater the payment can be.

It would be prudent for you to at least investigate the option of a structured settlement to see if it might be of interest to you. There are a great number of considerations to review, so make sure you go over all of these issues with a tax expert and/or your attorney.

### ***Special Needs Trust***

In 1993, Congress authorized the establishment of Self-Settled Special Needs Trusts which allow, among other things, a disabled person to receive the proceeds of a personal injury or medical malpractice lawsuit in a trust, which will not disqualify that individual from receiving the benefits of certain government establishment programs.

A Special Needs Trust, or as it is sometimes called, a Supplement Needs Trust, when properly set up, makes it possible to appoint a trustee to hold the settlement proceeds of your child's injury settlement for the benefit of your disabled child. A Special Needs Trust can provide for the needs of your disabled child while not disqualifying him or her from such government programs as social security and Medicaid.

A trustee for a special needs trust for your disabled child could be any of the following:

- A trusted family member
- A trusted family friend
- A bank or other financial institution
- A financial professional or CPA
- Other qualified individuals or institutions

There are both positive and negative considerations for establishing a Special Needs Trust so those issues should be explored if this is the type of situation which involves your child.

### ***Settlements Of Claims Involving Minors***

Most, if not all, states require court approval before a case can be settled on behalf of a minor child. Generally the court that handles this procedure is the Surrogates or Probate Court depending upon the jurisdiction in which the minor child lives.

Generally, once a settlement is reached in a minor's case a Guardian ad litem will have to be appointed by the Court to act as the representative of the minor child. The Guardian ad litem is generally the parent or guardian of the minor child.

A motion asking that the Probate or Surrogate's Court Judge approve the minor's disputed claim would be filed with the Court by the Guardian ad litem (usually drafted by the Attorney representing the minor child) which will set forth some or all of the following information:

- The facts and circumstances surrounding the minor child's case
- A complete history of the medical history of the minor child as it relates to his/her injuries
- A summary of the medical treatment and all costs and expenses incurred
- A report of future expected treatment and the anticipated cost
- Any and all nonmedical expenses and costs

- A list of all alleged defenses to the action
- A summary of court filings, if any
- The proposed settlement amount and payment terms
- A list of all legal fees and costs
- The reasons why the Guardian ad litem feels that this is a fair and reasonable settlement which should be approved by the Judge
- How much money the minor child will net after the payment of all costs, fees and expenses

Once the settlement is approved, the Judge will typically order that the settlement proceeds be deposited in to some types of trust account on behalf of the minor child which will be periodically monitored by the Judge who will be provided with an accounting or intern report furnished by the Guardian ad litem.

The nature and type of the investment must be reasonably prudent and the process of monitoring and expending those funds will be governed by state law.



## **CHAPTER 16**

### *The Adjuster's Point of View*

Insurance adjusters are presented with new personal injury files every week and look to resolve cases for the least amount of money possible. Adjusters have a great number of resources available to help investigate and develop personal injury cases. This chapter has been developed in conjunction with an insurance company adjuster to better explain how adjustors work, what they look for, and how they go about evaluating claims.

This information is being presented to help you better understand the process from an insider's point of view, as well as providing you with the information needed to help you help us better develop your case and get you more money.

A typical insurance adjuster would be concerned with some or all of the following:

#### ***Coverage***

The first item of business that an adjuster considers is verifying coverage. The adjustor, or its claims representative, needs to verify coverage for each loss, usually before the investigation begins, to determine how much coverage (money) is available to pay the claim. When

handling automobile accident claims, it is extremely important for the adjuster to determine who was driving the insured vehicle. Is the owner different from the operator? Is there excess coverage available? Carriers generally do not reveal the policy limits to attorneys prior to suit, unless there is a valid reason to do so.

Insurance carriers are notified of new claims in many different ways, whether from the parties themselves (claimants/insured's), agents, or directly from the claimant's attorney. The information received during the initial contact is usually the most important, and the more information received the better.

### ***Initial Investigation***

The police/incident report is obtained on most, if not all claims, whether for car accidents, dog bites, or even homeowners' losses, when available. All of the relevant parties are listed and are usually contacted for further information about the loss. This usually includes contact with the insured, injured party (when possible) and any witnesses to the loss. Recorded interviews are important but not vital to the investigation. Photographs of the accident site are taken when applicable. Photographs of all vehicles involved are essential to determine the extent of impact and also points of impact when liability is not clear.

### ***Liability***

Determining liability in any claim is essential and is usually conducted expeditiously with a thorough investigation. Connecticut's negligence law is modified comparative or 50/50. If it is determined that the claimant is 51 percent at fault or greater, a liability denial letter

is usually issued. There are some circumstances where carriers settle cases even when the investigation has determined the claimant holds 51 percent or more liability. An example of this scenario would be a severe injury with minimal coverage.

If there are multiple parties who may have contributed to a loss, it is important that each party that contributed be advised of the claim. The carrier for each responsible party would send a letter of claim, placing them on notice of the claim and asking for contribution whether to the claimant's bodily injury claim or property damage claim.

### ***Verification Of Injuries***

The adjuster will want to establish early contact with the injured party's attorney in order to secure all relevant injury information. This is important in order to set initial case reserves. A reserve is the amount of money the insurance company estimates the case is worth based upon all available information. If the injuries claimed appear to be questionable or negligible based on the type of accident (i.e., low impact loss) the claims representative usually shifts the investigation into a "low impact" type investigation. For a "low impact" case, the insurance company looks to pay a nominal amount of money due to the relatively minor nature of the collision and the expected injuries.

The investigation usually involves securing photographs of all the involved vehicles. Accident reconstruction experts are sometimes considered. At this point, the claims representative usually notifies the claimant's attorney to advise the attorney that the loss was a "low impact" type accident. It is important that the attorney is aware of the extent and type of the accident so it can be decided whether or not to advise the client of

how the insurance carrier is viewing the case. Surveillance is sometimes considered but only on a case-by-case basis.

In the early stages of the case, claims representatives access systems that enable them to determine if the injured person has a prior loss history. If it is determined that prior losses with similar injuries have been claimed, the claimant's medical records are requested. A medical authorization is usually needed to independently obtain all medical records for the subject loss and any prior or subsequent losses.

The adjuster is very eager to get this information to establish and/or argue that the injuries suffered were not the fault of their insured and/or that they are only responsible for some small percentage of the loss.

### ***Medical Bills***

Prior to a claims adjuster evaluating any type of bodily injury claim, it is imperative to determine the amount, nature, and extent of the claimed medical bills to determine if they are related to the loss. The insurance adjuster will want to investigate a great number of issues regarding these claims.

- Were the bills paid by medical payment coverage or health insurance?
- Were co-pays involved?
- If health insurance paid the bills, is there a lien that has to be repaid?
- Did Workers' Compensation pay any of the bills and what liens have resulted?
- Does the Claimant appear to have been over treated?

- Do the medical bills appear to be reasonable?

### ***Loss Of Income Claims***

Lost wage claims are very common with personal injury cases. Some are minimal and last only from a few days to a week, but others can last for months or even years. Insurance adjusters usually require documentation from management at the claimant's employer for such information as salary, time lost from work, lost sick time or vacation time, and a calculation of the amount of money lost as a result of the subject accident.

For larger claims, it is essential to get the prior year's W2 and tax return. When lost wage claims become complicated, insurance adjusters have resources, such as their auditing department, to review documentation to determine if the wage claim presented is accurate. It is very important for claimants to keep a diary of the time they lose from work and lost advancement opportunities due to their injuries.

### ***Preexisting Injuries***

There are several ways for claims adjusters to determine if an injured party has a prior medical history or even a loss that occurs after the injury in question. Most insurance carriers utilize vendors such as NICB (National Insurance Crime Bureau) and ISOOnet. These systems provide information on prior and subsequent claims history. These companies get this information from the insurance carriers themselves. Most, if not all, injury claims are reported to these vendors. This information is invaluable in determining not only the proper loss history but also if the claimant is telling the truth about prior claims.

## **Reserves**

A reserve is the amount of money an insurance company is required to set aside, or “reserve,” for the payment of a particular claim. All insurance carriers have differing reserving philosophies. Some reserve cases based on a “worst case scenario,” while others base their reserve on the “most probable outcome” of the case. Some companies utilize “step” reserving and change reserves throughout the life of the claim based on the length of time a claimant treats.

At the onset, reserves are set based on the type of claim that is presented. If the case involves a motor vehicle accident and the injuries are unknown, the reserve may be set based on the extent of the impact, age of the claimant, or even the location of the case. Soft-tissue injuries generate certain reserves and are essentially the same but sometimes differ based on the claimant’s age, loss history, and other factors. When new information is provided, such as medical reports that indicate the injuries are no longer soft tissue in nature, the reserves will increase. If, for example, a herniated disc is diagnosed or surgery is recommended, the reserves will increase dramatically.

## ***Personal Liability Of The Insured***

If an attorney provides a letter indicating that the tortfeasor may be personally exposed, the insurance adjuster will take the necessary steps to advise their insured(s). The first step is usually to check the policy limits and compare that to the injuries presented. Attorneys sometimes send these letters to find out the available policy limits. Generally, carriers do not reveal the policy limits unless the injuries claimed suggest potential exposure at or above the policy limits or if requested by the Plaintiff’s

lawyer pursuant to the requirements of a recently enacted statute. When it appears exposure may exceed available policy limits, insurance carriers will put their insured on notice of potential excess exposure. Occasionally, this generates a response from a personal attorney who is representing the insured. Some personal attorneys may even request that the case be settled for the policy limits to protect their client from personal exposure. This request is taken seriously, but insurance carriers generally settle the case based on its merits and not because of threats from the insured's personal attorney.

### ***Case Evaluation***

Once all of the medical records and reports are obtained, it is time to decide whether or not a case is ready for evaluation. The major issue that all claims representatives' address prior to evaluating a claim is whether or not the injuries claimed appear related to the loss. If there are any concerns about a particular injury being related to a loss, the claims representative will usually consider obtaining a peer review, where a doctor will review the claimant's records and comment on both the reasonableness of the treatment and whether or not the injuries appear to be related to the accident, and/or an independent medical evaluation, where a doctor selected by the insurance company will examine the claimant and then write a report setting forth their findings.

Once a case is ready to be evaluated, several factors need to be considered:

- The type and extent of the injuries
- Treatment required for the injuries

- Recuperative period
- Medical bills (past and future)
- Lost wages (past and future)
- Disability period
- If the injuries are permanent in nature (PPD rating(s), scarring)
- If future treatment is recommended/warranted
- The nature and cost of future treatment
- How the injuries have affected the injured party
- How the injuries can expect to affect the person in the future

The age of the claimant and witness potential are also key factors and can increase and even reduce the value of a particular case. The Defendant's witness potential is also considered and can change the value of a case significantly. Was the defendant driving recklessly? Where drugs or alcohol involved? What type of a witness will the Defendant make?

Experience is key when evaluating a bodily injury case. All cases are different, but most have similarities that carry over from case to case, which is why it is very important to have an experienced personal injury attorney represent you from the start of your case.

### ***Plaintiff's Attorney***

Experienced claims adjusters are familiar with most, if not all, of the personal injury attorneys in the state. Over time, adjusters become accustomed to the way an attorney presents a case and even what can be

expected as a Settlement Demand Package from certain attorneys. Most, if not all bodily injury cases, start with a Settlement Demand Package that includes all medical bills, reports, lost wage information, and other important documents that are essential to the claimant's case. A demand letter provides a brief summary of the case and usually ends with a monetary demand. Sometimes, the demand is strategic or realistic, but occasionally the demand is unrealistic. Attorneys gain an essential edge in their negotiations with a well-organized demand letter and a package of medical specials. A well-organized demand package informs the adjuster that the attorney is organized and has put a lot of time into the case.

### ***Negotiations***

Once it is time to attempt to resolve a case, the insurance adjustor generally prefers to make the initial offer, but sometimes a demand is warranted prior to making an offer. Claims representatives generally argue the facts and try to shy away from arguing dollars and cents. The strengths of the case are generally pointed out when negotiating. It is helpful for a claims representative to know all of weaknesses of the case so there are no surprises and it is easier to counter a particular attorney's arguments. Claims adjustors like to chip away at a claimant's case, pointing out such issues as:

- Low-impact collision
- Over-treatment
- Not seeking medical attention until weeks after the accident
- Sporadic treatment or gaps in treatment
- Missing medical appointments

- Low disability ratings
- Preexisting injuries
- Advanced age
- No lost time from work
- Contributory negligence
- Emergency circumstances
- Poor witness potential
- Other issues that might be present to potentially reduce it's the value of a case

In order to increase the value of a claimant's case, it is important for the claimant's attorney to review the issues that might negatively affect the case and explain to the client what can be done to help increase the value of the claimant's case.

Once negotiations fail or just prior to the statute of limitations expiring, the claimant's attorney will put the case into suit, at which point, the claimant's adjustor will refer the case out to defense counsel to represent the claimant. This attorney technically represents the insured but is paid by the insurance company by virtue of the coverage afforded under the policy.

After the case is put into suit, the insurance company has the opportunity to conduct extensive discovery through written interrogatories and requests for production, deposing the claimant, the claimant's witnesses, the claimant's treating physicians, and, most importantly, having the claimant examined by a doctor that the insurance company hires, who

generally disagrees with some or all of the claimant's treating physicians' findings, which further helps to reduce the value of the case.

A great number of other considerations also factor into the decision of when to settle a case and for how much. The greatest benefit a claimant has is involving an experienced personal injury attorney in their case right from the start so they get continuous practical advice and do not jeopardize the value of their case.



## **CHAPTER 17**

### *The Secrets Defense Attorneys Don't Want You To Know*

Many plaintiffs file personal injury actions thinking that they are all but certainly guaranteed win their cases and take home huge awards. They believe that bringing a lawsuit is like winning the lottery. What many plaintiffs overlook, however, is that defense attorneys are always looking for a “silver bullet” which can deal a death knell to their cases. Defense attorneys have numerous extremely effective tools at their disposal which can be used to establish that a plaintiff is exaggerating or that the claim has absolutely no merit at all. This chapter examines the secret weapons used by defense attorneys to attack a plaintiff’s claim.

#### ***Police Reports***

Police reports can have a devastating effect on a plaintiff’s case. Since the information in these reports is recorded immediately after an event by an officer of the law whose position, by its very nature, bestows upon him a degree of credibility, it could be very difficult for a plaintiff to convince a jury of the falsity of the information in such a report. The following example, from an actual case, illustrates just how a police report can change the complexion of what appeared to be a “slam dunk” claim.

The plaintiff claimed that he slipped and fell on a crack on the sidewalk and broke his leg. The evidence clearly showed that the crack was caused by a tree root and the plaintiff had a strong argument that the defendant landowner knew or should have known about the problem. The injury was extremely serious and led to three surgeries. Had the case gone to trial, the plaintiff could have received a substantial verdict. However, the defendant obtained a police report establishing that, on the night the alleged accident occurred, the plaintiff was being pursued by two assailants and that, during the pursuit, one of the assailants tripped the plaintiff and broke his leg. Once the police report was exchanged with plaintiff's counsel, the plaintiff's \$1 million demand plummeted instantly and the case was subsequently resolved.

This further illustrates that an enterprising defense attorney has at his disposal numerous means by which to ascertain whether a claim is fabricated.

### ***Ambulance Records***

Ambulance records are another valuable source of information to defense attorneys. When a person is reeling from the effects of a trauma, he may be more inclined to speak without thinking about the ramifications of what he says and may volunteer certain information which will contradict the claims he makes once he files suit. Defense counsel can argue that the information divulged by a plaintiff to an ambulance attendant carries a great deal of weight because it was uttered immediately after the accident and before the plaintiff had a chance to reflect on how to best craft his account of the incident to support his claim.

There are other ways in which ambulance records can be valuable. For instance, if a plaintiff claims that he was unconscious following the accident and the ambulance report reflects that he was alert and oriented; his credibility will of course be called into question. Similarly, if the plaintiff claims that he had pain in a certain area of his body immediately after the accident and the ambulance report is silent as to any pain in that area, the plaintiff is less likely to be believed.

### ***Big Brother Is Watching You***

Many plaintiffs who commence lawsuits do not realize how many methods exist for observing their conduct, both before and after the accident in which they were allegedly involved. As technology advances, so do the means of capturing plaintiffs on video. During the last few years, security cameras have been mounted in thousands of public locations. The footage captured by these cameras can be extremely effective in undermining a plaintiff's claim. If a plaintiff claims that he was injured in front of a particular building at a particular time and security video contradicts the plaintiff's version of the incident, his credibility could be destroyed.

Similarly, virtually every cell phone has a camera or video camera built into it, allowing people at the site of an accident to take photographs which could contradict a plaintiff's version of events. For example, a photograph showing a trip and fall plaintiff on the ground in an area nowhere near the crack in the sidewalk on which he said he tripped could be devastating to his case.

Another highly effective tool is surveillance. Following the commencement of a lawsuit, the defendant can hire an investigator to follow the

plaintiff around in an attempt to ascertain whether he is capable of engaging in the activities he claims he cannot perform. If, for example, a plaintiff testifies at his deposition that his back hurts so much that he can no longer take out the garbage, and he is captured on videotape carrying large garbage cans from his driveway to the curb, he could lose his credibility with the jury.

### ***Your Litigation History Is Fair Game***

If a plaintiff made a prior claim about an injury to the same part of his body injured in his current lawsuit, it could severely undermine his claim.

There are numerous databases where defendants can search a plaintiff's prior litigation history. ISO searches and court data bases can lead to information about prior claims made by the plaintiff. The defendant can find out not only what the plaintiff's injuries were in the prior action, but who he sued and where. This includes workers' compensation claims as well.

Deposition testimony and pleadings in a plaintiff's prior personal injury action can be particularly effective for a defense attorney in a personal injury claim. If, for example, the plaintiff claimed permanent injuries to his cervical spine in a prior action, a jury is less likely to believe that the cervical injuries alleged in his current lawsuit had anything to do with his more recent accident. This is especially true if the plaintiff, and not his attorney, personally verified the pleadings or bill of particulars in the prior action. This will enable the defendant's attorney to destructively cross-examine the plaintiff at trial about those prior claims.

Prior lawsuits commenced by the plaintiff can also reflect a motive for bringing his current suit. For example, a plaintiff may sue his landlord

claiming that he was injured because the premises where he lived were unsafe. However, a search of the plaintiff's litigation history may reveal that he has been in litigation with the landlord for years over rent disputes, suggesting that his current lawsuit was intended as a retaliatory measure.

Finally, if the plaintiff has commenced numerous prior lawsuits, his litigation history can help portray him as a litigious individual, further undermining his credibility.

### ***Medical Records And Radiological Studies***

One thing a plaintiff may not know is that, by commencing a personal injury lawsuit, he waives the doctor patient privilege. This means that his prior medical history becomes accessible to the defense attorney so that the latter can determine whether the plaintiff's injuries preexisted the alleged accident or the accident merely exacerbated, but did not cause, the alleged injuries.

In conducting the investigation of the plaintiff's past medical history, defense counsel can order a Trace Hospital Search, which will identify each hospital visit ever made by the plaintiff. The defense attorney can then obtain the hospital records from these prior visits in order to ascertain whether the prior ailments were in any way related to those claimed in the plaintiff's current lawsuit. The plaintiff cannot hide this important information.

The waiver of the physician-patient privilege also includes any records from psychiatrists, psychologists, or social workers who treated the plaintiff should there be an allegation of mental or emotional suffering.

### ***Spoliation***

The success or failure of a lawsuit is of course intrinsically related to the evidence which comes out at trial. If you are a plaintiff who is injured in an accident and you sue to recover for your injuries it could be very difficult, if not impossible, for you to prove your case without showing the judge or jury the item which caused your injury.

For example, if you buy a replacement blade for your lawnmower at your local home improvement store and are injured when it allegedly malfunctions, you should not dispose of the mower since it will be crucial evidence at trial. If the mower cannot be inspected by the defendants, then they will all but certainly assert that they are entitled to sanctions arising from the “spoliation,” or disposal, of evidence since they have been deprived of establishing the defense that the blade was installed improperly by the plaintiff or that the mower and blade were not defective.

In many jurisdictions, the defendant does not even need to show that the spoliation was intentional; mere negligent spoliation is sufficient to give rise to a sanction. The court typically has the discretion to determine the severity of the sanction, which can range from:

- The dismissal of the complaint to
- An instruction from the court advising the jurors that they are able to draw an adverse inference against the plaintiff that the evidence would have benefited the defendant to
- A monetary sanction.

The court has the power to impose this sanction even though there is no guarantee that the defendants would have discovered anything beneficial to them if they had inspected the missing piece of evidence. This, of course, could be a tremendous benefit to the defendant at trial. Therefore, the plaintiff must be extremely careful not to lose or dispose of such crucial evidence.

### ***Your Life Is An Open Book***

If you commence a lawsuit, your hobbies, everyday activities, and even criminal convictions will fall under strict scrutiny, even though you may not even be aware that this investigation is taking place.

For example, if you testify that you cannot golf any more due to a back injury, the defendant can obtain the records of your country club or, if you are a member, the United States Golf Association. These records could reveal that you have continued to golf often since your alleged accident.

Or, if you claim that your back is so badly injured that you cannot even sit at your desk to surf the web, your internet records can be obtained. Even if the internet records are redacted to remove any private information, they will still demonstrate that you have been able to engage in activity you said you were unable to perform.

If you are injured in an automobile accident and maintain that you were not on your cell phone when it occurred, your cell phone records can still be obtained to validate your claim.

If you claim that you are too ill to travel due to your injuries, your passport can be obtained and the defendant can demonstrate that you have continued to travel all over the world since your accident.

Finally, a plaintiff's criminal convictions can be more damaging than any other evidence to his credibility. Such convictions are a matter of public record and are readily available from various websites.

### ***Your Medical Expert***

If you retain a medical expert, be it a treating physician or not, there is no guarantee that person will be believed on the stand. That physician can be impeached at trial in many different ways.

IDEIX searches help to gather data on an expert, such as how many times has he testified for plaintiffs in the past. Of course, if an expert always testifies for plaintiffs, he will be viewed as nothing more than a biased "hired gun."

If your lawyer referred you to your doctor, this could cast suspicion on your need for the treatment and/or the validity of that doctor's opinion. The negative effect these referrals can have on your claim can be even more pronounced if your lawyer sends you to a litany of physicians in an attempt to bolster your claim.

If your expert has given prior testimony or written books or journals contradicting what he says on the stand, this could be devastating to your case.

### ***Physical And/Or Mental Examinations***

If you commence a personal injury lawsuit, you are subject to examinations by doctors designated by the defendant to evaluate your condition. These doctors will be called by the defendant as experts at trial and they are likely to claim that you are not as badly injured as you claim. They may even claim that you are not injured at all.

Similarly, if you claim that you have experienced mental suffering as a result of the incident, the defendant may designate a psychologist or psychiatrist to examine you.

If you claim that you can no longer work, the defendant may designate a vocational rehabilitation specialist to evaluate your ability to work. This type of expert is usually able to identify various jobs that even an injured individual can perform.

One or more of these defense experts can establish that you are exaggerating your symptoms and are able to resume your regular daily activities.

### ***Comparative Fault***

Just because you prevail in a personal injury action does not mean that you will walk away with all of the money you are awarded by the jury. Many states are comparative negligence jurisdictions, meaning that if you are partially to blame for your accident, then your award can be reduced by your own share of fault. Additionally, some states have collateral source rules allowing a deduction of medical and/or wage payments made by third parties.

Additionally, a jury can find that, although an accident occurred and the plaintiff was injured, the plaintiff's own actions were the sole proximate cause of the incident. Therefore, it is extremely important to discuss exactly how the accident occurred with your attorney in order to thoroughly evaluate your chances of success before commencing the action.

### ***Conclusion***

Every plaintiff who brings a personal injury claim must discuss the strengths and weaknesses of his case with his attorney. This conversation must include the “dirty laundry” which could be exposed during the action. Although a plaintiff may not want to share sensitive private information with anyone, such a candid conversation would of course be protected by the attorney client privilege. It is far more beneficial for a plaintiff to discuss the pitfalls of his case at the outset of the litigation, when he and his attorney can do “damage control,” than to withhold this information from your attorney and let him learn about this devastating information while you are being cross-examined at trial. By that time, your attorney’s chances of rectifying the situation will be all but lost. If you heed the caveats contained in this chapter, you will enhance your attorney’s ability to effectively represent you which could increase the value of the case.

## **CHAPTER 18**

### *The Litigation Process*

Approximately 95 percent of all personal injury claims are resolved before trial. Experienced attorneys know that the best way to settle a case is to prepare it for trial. Therefore, attorneys for both parties follow a heavily scripted process in which documents are exchanged; questions are posed; witnesses, including experts, are disclosed; depositions are conducted; and evidence is gathered to build a strong case. This process can be divided into the following categories: the filing of pleadings, discovery process, pretrial conference, and trial.

#### ***Pleadings***

Pleadings include a variety of legal documents that state and/or allege the opinions, positions, damages, injuries, or theories of law of a party to a lawsuit, and these documents are filed with the court. The pleadings below are the most common.

**1. Complaint.** A lawsuit is initiated when the plaintiff, or petitioner, serves the initial complaint on the defendant, or respondent. A complaint sets forth the basic elements of a case, including what happened and the injuries and damages incurred. It also describes the plaintiff's allega-

tions as to why the defendant is responsible for the plaintiff's injuries and damages.

**2. Answer.** The defendant's attorney has a prescribed amount of time to respond to the plaintiff's complaint in the form of the answer. This is the document wherein the defendant admits, denies, or alleges insufficient information to respond to each allegation of the plaintiff's complaint.

**3. Special Defenses.** These are filed with the answer and allege reasons why the defendant is not responsible for the plaintiff's injuries or claim that the plaintiff is partially responsible for the injuries. Special defenses are unique to every personal injury case. The defendant may claim the plaintiff's injuries were caused by his or her own negligence, or that the plaintiff's claim is barred by the applicable statute of limitations. These are defenses to the plaintiff's complaint or cause of action.

**4. Counterclaims.** If the defendant feels that a claim can be made against the plaintiff, then a counterclaim is filed along with the answer.

**5. Claim For Jury Trial List.** This is the point when the court is informed that the plaintiff is ready for trial.

## ***Discovery***

Typically, discovery is the process by which attorneys for both sides "discover" all the facts, witnesses, and testimony regarding the case. During discovery, attorneys for both parties share information about the lawsuit. This is accomplished through written and verbal questioning, as well as through documents, records, and physical examinations. In most personal injury cases, this information will help convince the parties to reach some sort of out-of-court settlement instead of going through the

long, drawn-out process of a trial. Attorneys proceed to gather evidence in many ways.

**1. *Interrogatories.*** Interrogatories are written questions sent from one attorney to the other party, which are to be answered as accurately as possible. These questions are answered under oath and must be returned with a certain amount of time.

**2. *Request For Production.*** This document is sent from one attorney to the opposing attorney requesting that documents, photographs, bills, records, reports, or other forms of evidence be produced and made available to opposing counsel.

**3. *Requests For Admission.*** Parties are permitted to require the other side to admit to certain facts under oath. Requests for admission must be answered under oath within a short time or they will be deemed to be admitted by the other side. These admissions are useful as proof of obvious facts; as it is not necessary to introduce additional evidence at trial to prove these already admitted facts.

**4. *Depositions.*** Along with written discovery, oral questions may be asked of the parties involved. This takes place out of court and in the form of a deposition, in which the plaintiff, the defendant, a witness, or another person involved in the case is examined and cross-examined by the opposing attorneys, under oath. Depositions allow attorneys to find out what witnesses are going to say in court; witnesses' answers can then be used to refute, impeach, or discredit them. Attorneys will often call for disclosure of the opposing counsel's expert witnesses so they can be deposed before the beginning of a trial.

**5. *Independent Medical Examination (IME).*** Usually, an important part of a plaintiff's personal injury case will be the testimony of the

medical professionals who were involved in the case. It is this evidence that tells the jury what injuries the plaintiff suffered, how they were incurred, and—in the expert opinion of the medical professional—if those injuries were causally related to the accident in which the parties were involved.

The defendant's insurance carrier will often require that the plaintiff be examined by a doctor of its choosing, which is called an independent medical examination. This is seen as a chance to refute, discredit, or downplay the injuries that the plaintiff's treating physician indicates the plaintiff suffered, and, if possible, to tarnish the credibility of the plaintiff's physician.

## **CHAPTER 19**

### *Pretrial Conferences*

A pretrial conference is held in private, usually in the judge's chambers, with the judge and opposing counsel present. Several objectives can be accomplished during one of these conferences. A status conference, for example, occurs after all pleadings have been filed and is used by the judge to manage upcoming events. The judge may set dates for further pretrial conferences or set a tentative trial schedule.

A judge may also use the pretrial conference to encourage settlement of the matter by acting as a mediator, attempting to move both parties closer to an acceptable settlement figure. Generally speaking, a pretrial judge will not serve as the trial judge because of prior knowledge of and involvement in the settlement process. Pretrial conferences are also a forum in which the opposing counsel and judge can discuss the case and agree on undisputed facts, or stipulations, or can argue disputed issues. Stipulations benefit attorneys because these facts no longer have to be determined in the trial, and they might move the case and the attorneys closer to a settlement.

The Client should be aware that many times cases do not settle during a pretrial conference, but this conference may provide the parties

with an opportunity to reconsider opposing party's viewpoints, which may later result in a settlement of the case.

Although a Client generally does not participate in the pretrial conference, it is important for the Client to be fully prepared and ready to discuss any aspect of their case should the opportunity arise.

## **CHAPTER 20**

### *The Trial*

If the parties cannot settle their case after a pretrial conference, a judge will set the case down for a trial date. The trial process attempts to ensure that both plaintiff and defendant receive a fair trial.

The first step in any *jury* trial is to pick the jury! The selection process, known as *Voir dire*, occurs in the courthouse, sometimes before the judge and always with opposing counsel present. The attorneys advise the jury pool of the lawyers they practice with and their potential witnesses to see if anyone has any prior knowledge of or experience with any of the named parties. After determining if there are any conflicts regarding witnesses, the attorneys will then ask the potential jurors questions in order to ascertain whether they can serve as unbiased interpreters of the facts.

Each attorney has a number of “preemptive challenges,” whereby a potential juror may be removed from a case without demonstration of cause. Additionally, each attorney may seek to have a juror removed for cause these challenges are decided by the judge.

Once a jury of six is selected, the trial will begin with the opening statements of each side. The attorneys for the plaintiff and the defendant

use these statements to outline their case and their theories of law to the jury.

Following the opening statements, the plaintiff's attorney will call witnesses and introduce evidence. The defendant's counsel has the opportunity to cross-examine every witness the plaintiff calls. The plaintiff may then have a chance to conduct a re-direct questioning, followed by the defense's opportunity for a re-cross-examination.

After all the plaintiff's witnesses are called, the defendant's counsel may move for a directed verdict, whereby the defendant alleges that the evidence and testimony provided by the plaintiff has not proved his/her case by a "preponderance of the evidence." If the judge agrees with the defendant, then the case is decided in the defendant's favor. Normally, though, this does not occur, and the defendant has the opportunity to present evidence. This process is very similar to the presentation of the plaintiff's case. After the defense "rests," i.e., completes the presentation of its evidence, the plaintiff may call rebuttal witnesses and present rebuttal evidence that refutes or discredits witnesses or evidence presented by the defendant.

After both parties have rested, opposing counsel give their closing arguments. These arguments allow the attorneys to review the evidence that was presented and to refocus the jury on their version of the case. The plaintiff's attorney gives the first summation, followed by the defendant's attorney. The plaintiff's attorney then has the opportunity to give a rebuttal closing argument.

Following closing arguments, the judge will provide the jury with instructions or charges for deliberation. The judge tells the jurors to base their judgment solely on the evidence provided and the laws relevant to

the case. These instructions are referred to as jury charges. Attorneys may request that specific charges be given to the jurors, but the eventual decision as to what charges to express is left to the judge. Once the jury has reached a verdict, it is announced to the court. The judge may accept, reject, or modify the verdict based on his or her interpretation of the case, at which point a judgment is entered.



## **CHAPTER 21**

### *Mediation*

Mediation is the process of inviting an experienced, acceptable, impartial third party (Mediator) who has no decision making authority but who will attempt to assist adverse parties in voluntarily negotiating an acceptable settlement of a dispute.

The client should understand that the Mediator is trained and experienced in dispute resolution and has no bias for or against any party and whose function is to analyze the issues and assist the parties in reaching an equitable solution of the case.

Mediators have different styles in how they conduct their own mediation. Most mediators normally practice “shuttle diplomacy” in that the Mediator goes back and forth discussing matters with one side at a time without the other side being present.

Some Mediators are facilitative, which means they provide a forum in which information is exchanged in order to promote a voluntary agreement between the parties. Facilitative Mediators neither express opinions concerning the merits of the case nor offer estimates as to the value of the case. Other Mediators are evaluative in that they assess the merits of the claim based upon information submitted by the parties and thereafter express an opinion regarding the likely outcome of the case and may offer

an opinion as to the value of a case. In still other cases, a Mediator can be both facilitative and evaluative.

The timing of mediation is important in determining when to submit a case to a Mediator. The best time to mediate any case is when ALL parties and their attorneys are prepared to engage in serious settlement discussions.

Generally, materials concerning each side's case (liability discussions, medical bills, medical records, lost wages, disability ratings, defenses, and the like) are provided to the Mediator in advance of the day of the scheduled mediation. These "position papers" are reviewed by the Mediator so that the Mediator is aware of the parties' positions. It is extremely helpful if the Client is made a part of the process of developing these materials so that all issues are properly presented to the satisfaction of the Client.

Most Mediators begin the mediation process with a group meeting involving the Mediator and all the parties (all clients and lawyers). Generally, the Mediator will introduce his or herself and explain what to expect in the mediation process. Most Mediators require that all parties sign an agreement that the Mediator will not be called as a witness for any purpose, and that all parties agree to keep an open mind and voluntarily participate in the process.

A Mediator will generally allow each side to present their case. The Client may be called upon to comment about certain issues, and the Client may also be hearing from opposing counsel, who may make many negative comments about the Client and/or their case. The Client should be prepared for these possibilities and should not allow these negative comments to detract from their willingness or ability to move toward a settlement.

Many times the mediation process moves along very slowly, and a potential settlement might not seem possible. The Client needs to realize that much of the process will be spent waiting while the Mediator shuffles back and forth between rooms, discussing various issues with the parties. The Client needs to understand how this process works and that it takes time to unfold. In order to help pass the time, the Client should consider bringing something to occupy their time (for example, a book). Patience is one of the most important qualities to have during mediation.

In addition to being patient and keeping an open mind, it is also important that a client be flexible. Flexibility allows the Client to be open-minded about other arguments or viewpoints and, where necessary, to reconsider their position. Staying flexible often results in an agreeable outcome.

It is important to review all materials regarding your case well in advance of your mediation so that you are fully prepared to intelligently discuss your case. Be flexible, listen, and be patient. If you understand and follow these instructions, then you will improve the likelihood of your chances of obtaining a settlement.



## **CHAPTER 22**

### *Preparing To Testify*

No matter how well prepared you are, it is impossible to predict what will happen when you give sworn testimony under oath.

The best advice is to relax, be yourself, take your time, and answer all questions truthfully and to the best of your knowledge.

The following list attempts to cover some of the general rules you should follow when giving sworn testimony.

**1. *ell The Truth.*** Honesty is the best policy. At no time is this truer than while you are under oath. When you are unable to recall something with 100% accuracy, you should avoid a yes-or-no answer and instead reply that you are testifying from memory and that your response is accurate to the best of your ability to remember.

**2. *Answer Only The Question Asked.*** Just give a very brief answer (one word or one sentence). If the question is, “Do you know what time it is?” the answer is not, “It’s 9:30 a.m.” The answer is either “yes” or “no.”

**3. *Do Not Volunteer Information.*** Answer only the question asked. Offering information only creates potential problems.

**4. *Fully Answer Questions That Can Hurt The Other Side Or Help Your Case.*** If you are asked to list every activity that you cannot

engage in now as a result of your accident, you should be prepared to give a comprehensive, all-inclusive list.

**5. Use The Nine-Word Magic Answer.** When asked by defense counsel, “Is that all?” you should give the nine-word magic answer: “That is all I can recall at this time.”

**6. Think About The Question.** Think about the question before answering it. Remember the question, “Do you know what time it is?”

**7. Obey The Approximation Rule.** Use the word approximately when giving a time, date, speed, distance, and so on.

**8. Do Not Guess.** You should never guess at an answer without explaining that you are approximating.

**9. Never Say Never Or Always.** These words can be used against you and are not necessary to fully answer a question.

**10. Let The Other Attorney Finish Asking A Question Before Answering.** Do not anticipate the question or interrupt opposing counsel.

**11. Point Out When You Are Interrupted.** If you are interrupted by opposing counsel, let the attorney go ahead and finish speaking. You should then respond with, “I’m sorry, but I had not completed my answer to the previous question.”

**12. What To Do When You Do Not Understand The Question.** You can tell opposing counsel that you do not understand the question and ask for clarification or to have the question restated or rephrased.

**13. Always Be Polite.** Courteous witnesses make a positive impression on the jury.

**14. Client Appearance And Demeanor.** You should dress and behave appropriately. Wear clothes you would normally wear for a

celebration dinner or to a religious event. Witnesses who are neat, calm, articulate, and polite rarely go wrong.

**15. Traps For The Plaintiff.** Questions regarding how much money you are looking for or what is meant in particular legal documents are meant to trip you up. You should answer questions such as these by saying, “You would have to ask my lawyer that question.” If you are asked to state everything you can no longer do, you should say after you have listed those things, “That is all I can recall at this time.”



## **CHAPTER 23**

### *Instructions To Clients Undergoing An Independent Medical Examination*

An independent medical examination (IME) is set up by the defendant's insurance carrier to help bolster its claim that you are either not injured or that your injuries are less severe than your doctor states.

The doctor the defendant's insurance company selects to examine you is paid by the insurance company and is looking for ways to discredit either you or your treating physician. It is therefore helpful to review a few basic ground rules to follow when going to an IME.

**1. Do Not Be Late.** It is helpful to be punctual and to show respect for others. Likewise, the IME doctor should not keep you waiting.

**2. Be Polite.** A polite "Good morning" or "Good afternoon" is sufficient to start things off. Do not try to be overly friendly or get on the doctor's "good side."

**3. Answer The Questions Asked.** Do not ramble on unless it is to elaborate all the complaints, problems, or pain you experience.

**4. Do Not Exaggerate.** You can only hurt your case by constantly talking about the "excruciating" pain you are experiencing.

**5. Do Not Understate Your Problems.** Make sure you tell the doctor about all the pain, discomfort, limitations, and problems you experience.

**6. Know About Your Case.** Make sure you know about your case before you go in to see the IME doctor. Be able to say, for example, what was the date of the accident, what happened, what doctors you have seen, and so on.

**7. Follow Instructions.** When the IME doctor asks you to walk, twist, or bend, do what is asked of you as best you can without making a big production out of it or explaining anything.

**8. Know Your List Of Complaints.** Be prepared to tell the doctor how this injury has affected you and what activities you can no longer perform.

**9. Avoid Being Emotional.** To the extent you can answer questions in a non dramatic fashion, the better.

**10. Be Honest.** Do not try to “con” the IME doctor, as this can only hurt your case.

## **CHAPTER 24**

### *How Insurance Companies Try To Pay You Less Money For Your Child's Claim, And What You Can Do About It*

A number of insurance companies have implemented a new program aimed at reducing the amount of money you are paid as a result of your motor vehicle accident. Under this program, insurance companies are making low settlement offers on all soft-tissue injury claims involving low-speed crashes and minor vehicle damage.

The new program is referred to as DOLF (Defense of Litigated Files) or MIST (Minor Impact Soft Tissue) cases. These cases typically involve low-impact crashes with minor property damage as a result of which the injured party claims injuries to the neck or back—the classic whiplash case.

One of the major factors insurance companies look at in these cases is the amount of property damage, because they allege that the less damage there is to a motor vehicle, the less injury the claimant suffered.

Whiplash, or soft tissue injury, has been the subject of a great deal of research and study. Roughly one million whiplash injuries occur each year, many in low-impact crashes. Studies have shown that even in an impact at only five miles per hour, the sudden movement results in g-forces (gravitational and acceleration forces) high enough to turn the average human head into a 150-pound load resting on the spine.

One study showed that the less a car is damaged in a collision, the higher the acceleration of the impacted vehicle and the greater the risk of injury to the spine. This happens because a motor vehicle that compresses or collapses in a collision absorbs more of the force of the impact than one that remains undamaged.

***So What Can You Do To Improve The Value Of Your Personal Injury Case If You Are Involved In A Low-Impact Collision?***

One definition insurance companies use to determine if an impact was minor is whether there is less than \$1,000 of property damage to the motor vehicle.

Since property damage estimates can vary by hundreds of dollars, you should take your damaged vehicle to the dealership for that make of motor vehicle. Generally speaking, dealerships will charge more to repair your damaged vehicle than will the local body shop. You should also insist that new parts, not reconditioned or used parts, be used to repair your vehicle.

If the estimate to your vehicle is higher, you stand a better chance of defeating the DOLF or MIST strategy used by many insurance adjusters.

## **CHAPTER 25**

### *How To Protect Yourself And Your Family From Irresponsible Drivers*

What would you do if you or someone in your family were seriously injured in a motor vehicle accident, only to find out that the responsible driver either did not have insurance or had minimum limits of insurance coverage that would not properly compensate you or your family member for your injuries and damages?

Unfortunately, when people obtain motor vehicle insurance, they tend to look no further than what the premium will be in order to determine what type of liability coverage to buy. As a result, many people purchase the minimum limits of liability coverage. Worse, a great number of people choose to operate a motor vehicle without any insurance coverage at all.

You can protect yourself and your family if you're involved in an accident caused by someone who either doesn't have any insurance or who has insufficient liability coverage to compensate you adequately for your injuries by carrying uninsured /underinsured motorist coverage on your own motor vehicle insurance policy.

This coverage—UM/UIM, as it is frequently called—pays for injuries to you, your passengers, and family members who are injured by another driver who is at fault but who doesn't carry any liability

coverage (an uninsured motorist, or UM) or doesn't have sufficient insurance coverage to pay for all of your losses (an underinsured motorist, or UIM).

Clearly, UM/UIM is one of the most important coverages you can have on your motor vehicle insurance policy. It's like buying liability insurance coverage for every driver on the road. The premium for this kind of coverage is relatively modest in comparison to the protection it can provide.

There are two basic types of UM/UIM coverage: straight coverage and conversion coverage. Straight UM/UIM coverage allows you to access this coverage only if your UIM coverage is greater than the insurance coverage carried by the at-fault driver. Conversion coverage allows you to access your UIM coverage regardless of the at-fault driver's insurance coverage.

Let's assume that you have UIM limits of \$50,000, the responsible party has \$20,000 in bodily injury coverage, and your case is worth \$60,000. If you had straight UIM coverage, you would receive \$20,000 from the responsible party and \$30,000 from your carrier—that is, \$50,000 (your UIM limits) less \$20,000 (the responsible party's limits), for a total of \$50,000. If you had conversion coverage, you would recover \$20,000 from the responsible party and \$40,000 from your carrier for a total of \$60,000.

We strongly recommend that you carry at least \$500,000 of UM/UIM conversion coverage, if not more. You should have UM/UIM limits equal to your liability insurance coverage, and you should never reduce your UM/UIM limits below your liability limits. Again, you may be surprised to learn how little this additional coverage will cost you.

You should also obtain an umbrella or excess liability policy of at least \$1,000,000, if not more.

You can also obtain additional protection for yourself and your family by purchasing medical payment benefits (med pay) and/or basic reparations benefits (BRB). These types of coverage pay for the medical bills you incur as a result of a motor vehicle accident, up to the stated policy limits. Your BRB coverage will also pay for wages lost as a result of your accident, up to the limits provided for in your policy.

It's important for you to call your insurance agent immediately to discuss your insurance options and to determine how much it will cost you to augment your coverage.



## **CONCLUSION**

If you follow the information contained in this book, you will enable us to maximize the value of your child's personal injury case. This ultimately puts more money into your child's pocket.

A more important consideration in following these instructions is getting better health care for your child and thus improving your child's chances of recovering much more quickly.

Please contact us as early as possible during the process if you have any problems, concerns, or questions.



## **APPENDIX A:**

### *Glossary of Useful Terms*

**Accident Law:** Refers to a broad range of claims that involve a variety of accidents, ranging from motor vehicle accidents to slip and falls.

**Action:** Another term for a complaint or a lawsuit.

**ADA:** Abbreviation for the Americans with Disabilities Act, the federal law that prohibits discrimination against a person with disabilities.

**Additor:** An increase in the amount of damages awarded by a jury made by a judge.

**Admissible Evidence:** Evidence that can be legally and properly introduced in a court proceeding.

**Affidavit:** A written statement signed and sworn to under oath.

**Affirmative Defense:** A defense raised by a Defendant as a defense to the complaint that might include contributory negligence or assumption of risk.

**Airplane Accidents or Aviation:** A very specialized area of the law that deals with injuries or deaths resulting from commercial or passenger flights.

**Allegation:** A statement made by one party to a lawsuit filed in a pleading, which that party is prepared to prove in court.

**Alternative Dispute Resolution:** A process for resolving disputes that exists outside of the court system and which typically includes arbitration and mediation.

**Amicus Curiae:** A Latin phrase meaning “friend of the court.” This refers to a party that is allowed to provide information to the court (usually a legal brief or memorandum) even though they are not directly involved in the case.

**Annuity:** A contract that provides for a person to receive fixed payments for a defined period of time.

**Answer:** A Defendant’s written response to the allegations contained in the Plaintiff’s complaint or petition, which must be filed within a specified period of time.

**Answers to Interrogatories:** A written statement sworn to under oath that answers written questions asked by the other party in a lawsuit.

**Appeal:** A request or petition to a higher court, usually composed of a panel of judges, to overturn the legal ruling of a lower court.

**Arbitration:** A method of resolving a dispute or case outside the court system by agreeing to present it to an impartial third party or panel of individuals (usually three) for a decision that may or may not be binding.

**Asbestos Cases:** Cases where there has been or may be an injury arising from prolonged exposure to asbestos and which are normally handled as class action cases.

**Assumption of the Risk:** A defense raised in personal injury cases that states that the Plaintiff knew that a particular activity was dangerous and therefore bears all or some of the responsibility for the injury which resulted.

**Attorney of Record:** The attorney principally responsible for signing all documents relating to the lawsuits.

**Attorney-Client Privilege:** A rule that keeps communications between an attorney and a client confidential and which are not discoverable in any court proceeding.

**Attorney-in-Fact:** A person named in a written power of attorney who is to act on behalf of the person who signs the document. The attorney-in-fact's power and responsibilities depend on the specific powers granted in the power of attorney.

**Attractive Nuisance:** Something that is located on a property that attracts children and endangers their safety. For example, unfenced swimming pools, open holes, and certain dangerous and defective conditions may qualify as attractive nuisances.

**ATV (All-Terrain Vehicle) Accidents:** Accidents involving injuries and/or deaths resulting from the operation of an all-terrain vehicle.

**Aviation Law:** The area of the law that deals with the operation of civilian, usually commercial, aircraft. It generally deals with cases involving airline disasters, plane crashes, hijackings, and wrongful death.

**Bad Faith Cases:** Bad faith cases normally involve a claim or lawsuit against your own insurance company, alleging unfair claims practices.

**Bench Trial:** A trial before a judge without a jury.

**Beneficiary:** A person named in a will or an insurance policy that is to receive some type of asset or assets.

**Bifurcation:** The process of splitting a trial into two parts. The first phase deals with liability, and the second phase deals with damages.

**Boating Accidents:** These cases are somewhat specialized and involve accidents between boats, which are governed by state or federal admiralty or maritime law.

**Brain Damage:** This is a specialized area of the law that deals with cases which result in brain damage either through an accident or a medical malpractice case.

**Brief:** A legal document that outlines a party's legal arguments in a case, which typically cites applicable case law.

**Burden of Proof:** The responsibility of convincing the decision maker in a trial that their version of the facts is true. In a civil trial, this means that the Plaintiff must convince the judge or jury "by a preponderance of the evidence" that after balancing all of the evidence, the scales of justice tip ever so slightly in favor of one party. Because a person's liberty is at stake in a criminal trial, the government has a harder job and must convince the judge or jury "beyond a reasonable doubt" that the Defendant is guilty.

**Canon of Ethics:** The formal standards of ethical conduct that must be followed by all attorneys.

**Case:** A term that refers to a lawsuit. Case can also refer to a judge's decision. Finally, the term also describes the evidence a party must submit in support of their position.

**Case Law:** Also known as common law and which is created by judges when deciding individual cases. The cases decided by the U.S. Supreme Court become the law of the land, and cases decided by the states' highest court (usually the State Supreme Court) becomes the law of the state.

**Case of First Impression:** A novel legal question that has not yet been decided by a court.

**Catastrophic Law:** The area of law that deals with serious personal injury and wrongful death cases.

**Cause of Action:** A specific legal claim for which a party seeks a remedy or compensation.

**Certiorari:** A Latin word that means “to be informed of.” This refers to the order an appellate court issues so that it can review the decision of a lower court.

**Challenge for Cause:** This occurs when a potential juror can be rejected if it is established that for some reason the juror cannot or will not be willing to set aside any preconceived biases that would avoid prejudice to one party.

**Change of Venue:** A change in the location of the trial that is granted to avoid some type of prejudice to one of the parties to a lawsuit.

**Circumstantial Evidence:** Indirect evidence that implies that something happened that does not directly prove that it occurred.

**Civil Case:** A noncriminal case or lawsuit.

**Civil Law:** Deals with all areas of the law that do not involve criminal law.

**Civil Procedure:** The rules used to dictate how a civil case proceeds from the time the initial complaint is filed through the trial itself and any subsequent appeal. Each state enacts its own rules of civil procedure.

**Civil Rights:** The area of law protecting those rights guaranteed by the Bill of Rights (the first ten Amendments of the Constitution) and the 13th and 14th Amendments to the Constitution, including the right to due process, and the equal treatment under the law of all people regarding the pursuit of life, liberty, property, and protection.

**Civil Rights Act of 1964:** Federal legislation enacted to end discrimination based on religion, color, race, or national origin. This law guarantees the right of equal access to education, public facilities, and public accommodations and prohibits discrimination in employment.

**Claim:** A demand made by a person who is seeking to recover damages from a loss.

**Class Action:** A lawsuit or an action in which a large number of people with similar legal claims join together in a group (the class) to sue a common Defendant, which is usually a company.

**Clear and Convincing Evidence:** The level of proof sometimes required in a civil case needed for a Plaintiff to prevail. It is more than a preponderance of the evidence but less than beyond a reasonable doubt.

**Closing Argument:** At the conclusion of the presentation of evidence, a summary that is made by each party or their attorney.

**Confidential Communication:** Information exchanged between two people who have a relationship whereby private communications are protected by law.

**Common Law:** See Case Law.

**Comparative Negligence:** A system followed in certain states that allow a Plaintiff to recover some portion of his/her damages.

**Compensatory Damages:** Money awarded to a party to compensate him/her for their injuries.

**Complaint:** It is the document in a civil action that initiates the lawsuit. It outlines the allegation and the hope for the requested legal remedy.

**Complex Litigation Cases:** This area of the law usually involves a difficult case involving many lawyers and significant amounts of evidence.

**Conflict of Interest:** Refers to a situation when someone, usually an attorney, has competing or conflicting obligations that make it difficult, if not impossible, to properly fulfill his/her duties in a fair manner. In certain situations, this conflict may require that the attorney withdraw from further representation in a case.

**Conservator:** Sometimes known as a guardian, this is a person appointed usually by a probate court to manage the affairs of another.

**Consortium:** Consortium includes all the benefits that one spouse derives from the other, including material support, companionship, affection, and sexual relations. In many instances, a spouse brings a claim against a third party for "loss of consortium" after their spouse is injured or killed.

**Consumer Protection:** The area of law that deals with the remedies available in most states and from the federal government, which have enacted statutes and laws and set up agencies to protect the consumer from inferior, adulterated, hazardous, or deceptively advertised products or services, as well as deceptive or fraudulent sales, acts, or practices.

**Contingency Fee:** A method of paying a lawyer for legal representation by which, instead of an hourly fee, the lawyer receives a percentage of the money obtained for the client.

**Continuance:** The postponement of a legal proceeding to a later date.

**Contributory Negligence:** A system followed in certain states that prevent a Plaintiff from recovering damages if he/she contributed in any way to the injury.

**Costs:** These may refer to monies that are advanced by a lawyer on behalf of a client, or it could be monies that a court may order one party to pay to another.

**Counterclaim:** A claim by a Defendant that the Plaintiff committed some wrong that would allow the Defendant to be awarded monetary damages or receive some other type of relief.

**Construction Accidents:** These cases involve injuries that occur at a worksite and which may be caused by heavy equipment or machinery.

**Corroborating Evidence:** Evidence that supplements or tends to strengthen initial evidence.

**Court Costs:** Certain expenses of prosecuting or defending a lawsuit that do not include legal fees.

**Cross Complaint:** A legal claim filed by the Defendant against the Plaintiff or some other person or entity that is not yet a party to the lawsuit.

**Cross-Examination:** The opportunity to question any witness, including your opponent, who first testifies on direct examination.

**Custodian:** The person appointed to manage the assets of a minor.

**Damages:** In a claim or lawsuit, it is the money awarded to one party based upon the injury or loss caused by the other party. There are many different types of damages that may include the following:

**Compensatory Damages:** Compensatory damages are intended to put the injured party into the same position they were in prior to the injury. Compensatory damages typically include medical expenses, lost wages, damages for pain and suffering, and any permanent injury.

**Economic or Specific Damages:** Damages intended to cover injuries for which an exact dollar amount can be calculated. Economic damages are usually composed of medical bills, lost wages, and out-of-pocket expenses.

**Noneconomic or General Damages:** Damages intended to cover injuries for which an exact dollar amount cannot be calculated. Noneconomic damages typically include pain and suffering, permanent injuries, loss of companionship of a loved one, and loss of life's enjoyment.

**Nominal Damages:** A term used when a judge or jury finds in favor of one party but determines that no real harm was done and therefore awards only a very small amount of money.

**Punitive Damages:** Also called exemplary damages, these damages are awarded over and above compensatory damages to punish a party because of their willful or malicious misconduct.

**Statutory Damages:** Damages imposed by a state or federal statutory law. These damages can be awarded in addition to compensatory damages.

**Death Cases:** These cases are also referred to as wrongful death cases, which represent an action claiming damages from the person or entity responsible for the death of another and brought under a wrongful death statute.

**Decedent:** A person who has died, also referred to as “deceased.”

**Declaratory Judgment:** A court decision in a civil case that decides an issue and tells the parties what their rights and responsibilities are, without awarding damages or ordering them to do anything.

**Default Judgment:** A court decision awarded to the Plaintiff when a Defendant fails to contest the case or file documents in a timely manner.

**Defective Product Cases:** These cases involve the area of the law dealing with the liability imposed on a manufacturer or seller of a defective and/or unreasonable dangerous product.

**Defective Vehicles:** These cases involve some type of product design or defect that results in dangerous conditions which create some type of injury to a consumer, such as a vehicle rollover.

**Defendant:** The person, also referred to as the respondent, against whom a lawsuit is filed.

**Demurrer:** A written pleading filed by the Defendant stating that the complaint as filed does not set forth an actionable case.

**Deposition:** A type of pretrial discovery where under oath one party questions the other party or a witness before a stenographer or court reporter.

**Direct Evidence:** Evidence that is self-explanatory to prove an alleged fact.

**Direct Examination:** The initial questioning of a party or witness in court by the side that has called that person to testify.

**Directed Verdict:** A ruling or verdict by a judge, typically made after the Plaintiff has presented all the evidence but before the Defendant puts on his or her case that awards judgment to the Defendant because the judge has determined that the Plaintiff has not proven their case.

**Disbursements:** Expenses associated with a party's case that the lawyer passes onto the client.

**Discovery:** A pretrial process during which parties to a lawsuit request relevant information and documentation, either through written or oral examinations, in an attempt to "discover" all relevant facts.

**Discrimination:** The area of law dealing with unfair or unequal treatment of a person based upon their belonging to a protected class of individuals.

**Dismissal with Prejudice:** When a case is dismissed and the Plaintiff is barred or prohibited from bringing a new suit based upon the same claim.

**Diversity of Citizenship:** The situation where one party to a lawsuit is a citizen or resident of one state, while the opposing party is a citizen or resident of another state, which is a jurisdictional issue in federal court.

**Dram Shop Cases:** These cases involve the liability imposed upon the seller of liquor for damages caused by the purchaser of liquor.

**Duty to Warn:** The legal obligation required of one party to warn people of a danger. This is typically required of manufacturers of dangerous products.

**Eggshell Skull:** A hypothetical medical condition and legal principle used to illustrate the fact that you accept your Plaintiff as you find them. You are responsible for all the consequences, whether you could have foreseen them or not. For example, if you bump into a person with an eggshell skull and cause it to fracture, you are responsible for whatever happens to that person, even though you had no way of knowing that the injury would be so severe.

**Elements (of a case):** The components or parts of a legal claim or cause of action that must be proven in order to prevail in a legal claim.

**Evidence:** Various methods and things represented in court to prove an alleged fact, including testimony, documents, drawings, photographs, maps, and tapes.

**Ex Parte:** A Latin phrase meaning “by or for one party.” This refers to the situation in which only one party to a lawsuit appears before a judge.

**Executor:** The person named in a will to handle the affairs of someone who has died.

**Executrix:** The term for a female executor.

**Expert Witness:** A witness with specialized knowledge of a particular subject who is allowed to give an opinion in court, even though that person did not personally witness the relevant event or occurrence.

**Failure to Diagnose Cases:** These cases involve the failure of a health care professional (usually a doctor) to diagnose a medical condition where such misdiagnosis results in some type of harm or even death.

**Fault Automobile Insurance:** This refers to a system in which the responsible party to an accident insurance company is responsible for the damages up to the stated limit of liability.

**Federal Court:** United States government courts operating pursuant to powers derived from the U.S. Constitution that hear and decide cases involving federal law and cases involving diversity jurisdiction, where the parties to the lawsuit are from different states, and the value of the case exceeds a certain threshold.

**Foreseeability:** A key element in determining a person's liability that states that if a Defendant could not have reasonably foreseen that someone might be injured by his/her actions, then there may be no liability.

**General Practice:** Concerning many or different areas of the law.

**Golden Rule Argument:** During a jury trial, an attempt made by Plaintiff's attorney to persuade jurors to put themselves in place of the victim or the injured person and deliver the verdict that they would wish to receive if they were in that person's position.

**Gross Negligence:** A situation where a Defendant fails to use even the slightest degree of care and that shows reckless or willful disregard for the safety of others and which may in certain situations provide for an award of punitive damages.

**Guardian:** An adult who has been given the legal right by a court to control and care for a minor or for a person and their property, who is judged to be incompetent.

**Guardian Ad Litem:** A person, not necessarily a lawyer, who is appointed by a court to represent and protect the interests of a child or an incapacitated adult during some type of court proceeding.

**Head of Household:** A person who provides for the support in the household of one or more people who are closely related to him/her by blood, marriage, or adoption.

**Health Law:** The area of law dealing with the health care industry.

**Hearing:** A legal proceeding, other than a trial, held before a judge.

**Hearsay:** Secondhand testimony that a witness only hears from another party without personally seeing the event.

**Hearsay Rule:** A rule of evidence that prohibits the consideration of second-hand testimony at a trial unless it falls within a recognized exception.

**Heir:** One who is to receive property from someone who has died.

**Hung Jury:** A jury that is unable to come to a final decision, resulting in a mistrial.

**Impeach:** To discredit the testimony of a witness in an effort to establish that the witness is not to be believed.

**Impeachment of a Witness:** An attack on the credibility of a witness in a legal proceeding, utilizing evidence introduced for that purpose.

**Inadmissible Evidence:** Testimony or other evidence that fails to meet certain court rules governing the types of evidence that can be presented to a judge or jury and is thereby not to be considered by the judge or jury.

**Incapacity:** Lacking various abilities that results in a person's inability to properly manage their own affairs.

**Incompetence:** The inability, as determined by a court, of a person to properly manage their own personal or financial affairs.

**Industrial Accidents:** These cases involve accidents that occur in an industrial setting.

**Informed Consent:** An agreement made to do something or to allow something to happen that is arrived at after receiving complete knowledge of all relevant facts, such as the risks involved or any available alternatives.

**Injunctive Relief:** A situation in which a court grants an order, called an injunction, requiring a party to refrain from doing something.

**Insurance Law:** The area of law that deals with insurance, insurance agents, insurance carriers, and insurance issues.

**Intentional Tort:** A deliberate wrongful act that causes harm to another, for which the victim may sue the wrongdoer for damages.

**Interrogatory:** A type of discovery whereby written questions designed to discover key facts about an opposing party's case are posed to a party in a lawsuit.

**Intestate:** The situation whereby one dies without a valid will.

**Invitee:** A business guest or someone who enters property held open to members of the public, such as a visitor to a store, with the consent of the possessor of the property.

**Implied Warranty:** A guarantee about the quality of goods or services purchased that is not expressed either orally or in writing.

**In Camera:** A legal proceeding is "in camera" (Latin for "in chambers") if it is held before a judge in private chambers, the public being excluded from the courtroom.

**J.D.:** Is an abbreviation for the degree of juris doctor or doctor of jurisprudence awarded by most law schools on its graduates.

**Joint and Several Liability:** It is a doctrine whereby one person may be sued for the damages caused by the liability of more than the one person being sued.

**Judgment:** A final court ruling settling the key issues in a lawsuit and determining the rights and obligations of the parties.

**Judgment Not Withstanding the Verdict (JNOV):** A reversal of a jury's verdict by a judge after a judge believes that there were insufficient facts on which to base the jury's verdict, or that the jury did not correctly apply the law in arriving at the verdict.

**Jurisdiction:** The legal authority of a court to hear and decide a case.

**Jurisdictional Amount:** The minimum monetary amount that determines whether or not a particular court can hear a particular case.

**Juror:** A person, sometimes referred to as a venierman, who serves on a jury.

**Jury:** A random group of people selected by the attorneys in a case to apply the law, as stated by the judge, to the facts of a case and render a decision.

**Jury Charge:** The judge's instructions to the jurors at the end of a case, regarding the law that applies in the case and providing definitions of relevant legal concepts.

**Jury Trial:** A trial held before a group of people selected by the attorneys in the case who listen to the evidence and then relate the facts of the case to the law provided by the judge and then render a verdict or decision.

**Labor & Employment Law:** This area of the law encompasses a wide variety of issues, such as Occupational Safety & Health Regulations, Affirmative Action, and Sexual Harassment. Employment or labor lawyers can help protect workers when their rights are being violated.

**Legal Malpractice:** The delivery of substandard care by a lawyer that results in some type of injury or harm to the client.

**Liability:** A legal duty, responsibility, or obligation owed by one party to another.

**Lis Pendens:** The term from the Latin meaning "suit pending" is a written notice that is filed against a piece of real estate which is in some way affected by the litigation.

**Litigation:** The area of law that deals with the preparation and presentation of a lawsuit or other resort to the courts to determine a legal question or matter.

**Malpractice:** The delivery of substandard care by a licensed professional, usually a doctor, lawyer, dentist, accountant, or some other professional.

**Malpractice Law:** The area of law that deals with representing those who have suffered through negligence, misconduct, lack of ordinary skill, or a breach of duty in the performance of a professional service (medicine, law, accounting, etc.) resulting in some type of injury or loss.

**Mediation:** A method of intervention between parties to promote resolution of a case outside the court system.

**Medicaid:** A program established by the federal government and administered by the individual states to help pay medical costs for financially needy people.

**Medicare:** A program established by the federal government that assists older and some disabled people in paying their medical costs. The program is divided into two parts: Part A is hospital insurance and covers most of the costs of a hospitalization; Part B, medical insurance, pays some of the costs of doctors and outpatient medical care.

**Minor:** A person who has yet to reach the age of majority and who does not enjoy the legal rights of an adult.

**Misdiagnosis:** A specialized area of the medical malpractice law that deals with the late or missed diagnosis of a medical condition that causes injury or death to the individual.

**Mistrial:** A trial that ends prematurely and without a judgment or verdict, due either to a mistake that jeopardizes a party's right to a fair trial or to a jury that cannot agree on a verdict (a hung jury).

**Motion:** An oral or written request asking a judge to issue a ruling or an order on a specific legal matter.

**Motion for a New Trial:** A request made by a losing party to a lawsuit that asks for a new trial because it is alleged that the original trial was unfair due to legal errors that prejudiced the case.

**Motion for Directed Verdict:** A request made by the Defendant, typically made after the Plaintiff has completed his/her case, asking that the judge rule in favor of the Defendant because the Plaintiff failed to make a *prima facie* case.

**Motion for Summary Judgment:** A request made by the Defendant asking the judge to rule in favor of the Defendant because the Plaintiff failed to state a claim for which relief could be granted.

**Motor Vehicle Accidents:** This is a broad category that involves a variety of motor vehicles, ranging from cars to trucks to motorcycles, where an accident results in injury or death.

**Negligence:** In simplistic terms, it is the failure to act as a reasonable person would be expected to act under similar circumstances.

**No-Fault Insurance:** Motor vehicle insurance that requires the insurance companies of each person involved in an accident to pay for medical bills and lost wages of their insured, up to the stated limits, regardless of who was at fault.

**Nursing Home Neglect:** The area of law focusing on the rights of the elderly and infirmed that provides for the proper maintenance and nursing care for persons who are unable to take care of themselves.

**Oath:** A statement that a person will tell the truth, or a promise to fulfill a pledge, often calling upon God as a witness. One of the best-known oaths is the witness pledge “to tell the truth, the whole truth, and nothing but the truth” prior to testifying in a legal proceeding.

**Objection:** When one party takes an exception to some statement or procedure in court, which is either sustained (allowed) or overruled by the judge.

**Opening Statement:** A statement made prior to the introduction of evidence at a trial, either by an attorney or self-represented party and which outlines the theory and facts of the case.

**Order:** A decision or directive issued by a court.

**Order to Show Cause:** An order from a judge or court that directs a party to come to court and convince the judge why they should be entitled to the relief they have requested.

**Perjury:** A criminal offense in which a person knowingly makes a false statement under oath.

**Personal Injury:** A general category that relates to an injury to a person's body, mind, or emotional well-being.

**Personal Injury Recovery:** The amount of money awarded in a lawsuit or paid through a settlement to compensate someone for injuries to that person's body, mind, or emotional well-being.

**Personal Injury & Torts:** The area of law that involves civil law cases and designed to obtain compensation for injury to an individual.

**Plaintiff:** The person who institutes or files a lawsuit.

**Pleadings:** The written allegations by each party to a lawsuit stemming from the various claims and defenses.

**Polling the Jury:** The procedure, after the jury verdict has been announced, of asking jurors individually if they agree with the verdict.

**Post-Trial:** Refers to all matters happening after the trial.

**Power of Attorney:** A signed document that gives another person legal authority to act on your behalf.

**Prayer for Relief:** What the Plaintiff asks the court to award as part of the Plaintiff's complaint.

**Precedent:** A legal principle that requires lower courts to apply the decisions of appellate courts when faced with similar legal issues.

**Preemptory Challenges:** A limited number of challenges each side has during jury selection, which may be used to eliminate potential jurors without stating a reason.

**Pretrial Conference:** A conference, called at the discretion of the judge, whereby the judge meets with opposing counsel to narrow or define issues to be tried and to attempt to settle the case prior to trial.

**Prima Facie:** A Latin phrase meaning “a first view.” This refers to the minimum amount of evidence a Plaintiff must present in order to avoid having the case dismissed.

**Privileged Communication:** A communication that takes place within the context of a protected relationship, such as between an attorney and a client, a priest and a penitent, or a doctor and a patient. The law often protects the disclosure of such communications.

**Pro Se:** A Latin phrase meaning “for himself.” A person who represents themselves is said to appear *pro se*.

**Probate:** The area of law dealing with the validity of wills, administration of estates of deceased persons or the disabled, and sometimes involving the affairs of minors and persons determined to be incompetent.

**Products Liability Law:** The area of law dealing with the liability imposed on a manufacturer or seller of a defective and/or unreasonably dangerous product.

**Proximate Cause:** A person is generally liable for an injury caused to another if it was proximately caused by their actions or failure to act when there was such a duty present.

**Punitive Damages:** Monetary damages awarded to a Plaintiff that are intended to punish a Defendant and which is meant to deter others from similar conduct.

**Quash:** To vacate or void a type of legal document, such as a summons or subpoena.

**Re-Cross-Examination:** The questioning of a witness about matters that were raised during the redirect examination.

**Re-Direct Examination:** The questioning of a witness about matters that were raised during cross-examination.

**Remand:** When an appellate court sends a case back to the trial court with directions for further proceedings.

**Request for Admission:** A discovery procedure or process that authorizes a party to a lawsuit to ask an opposing party to admit certain facts to be true. If the party either admits the facts or does not respond in a timely manner, the facts will be admitted as being true for purposes of trial.

**Res Ipsa Loquitur:** A Latin phrase meaning “the thing speaks for itself.” This doctrine creates presumption or inference that the Defendant was negligent, based upon proof that the thing causing the injury was in the Defendant’s exclusive control, and that the accident ordinarily would not happen in absence of negligence.

**Retainer:** This is the up-front payment a lawyer receives from a client to accept a case.

**Serious Injuries:** While there is no hard-and-fast rule about defining a serious injury case, typically, it is a case involving an injury that results in a major disruption of the life of the victim caused by the fault of another person. Examples of serious injury cases would include wrongful death cases, spinal cord injuries, traumatic brain injuries, amputations, injuries involving surgery, disfigurement cases, loss of senses (vision, hearing, taste, smell), or any other life-altering injury.

**Service of Process:** The act of advising the other parties to an action that it has begun and informing them of the steps they should take in order to respond to the lawsuit.

**Settlement:** The agreed upon resolution by the parties to a civil lawsuit.

**Settlement Agreement:** The agreed upon resolution by the parties to a civil lawsuit set forth in writing.

**Setoff:** A claim made by a Defendant that alleges the Plaintiff's damages should be reduced because the Defendant suffered damages or money is owed to the Defendant by the Plaintiff.

**Social Security/Disability Law:** The area of law assisting those who, due to disability, require a program of public assistance for the economic security and social welfare of the individual and his or her family.

**Standard of Care:** The degree of care that a reasonable person would take to prevent harm or injury to another.

**Standing:** The legal right one possesses to start a lawsuit.

**Stare Decisis:** A Latin phrase that means "let the decision stand." It is a doctrine that requires judges to apply the same decisions in legal issues which have already been decided in a similar case.

**State Court:** A court that decides matters involving the law of that state or its constitution.

**Statute of Limitations or Repose:** The time limitation imposed by state or federal law for the filing of a lawsuit.

**Strict Liability:** This theory states that a person is liable for the injuries caused to another, even though there is no proof of negligence. In certain states, an owner of a dog can be strictly liable to the injured party when their dog bites the injured party.

**Structured Settlements:** In certain instances, usually in cases involving catastrophic injuries, insurance companies that are responsible for the payment of these damages may want to pay out the funds over an extended period of time, which may result in tax advantages to the Plaintiff.

**Subpoena:** A document that compels a party to appear in court or at a deposition.

**Subpoena Duces Tecum:** A subpoena that compels the witness to produce documents.

**Summary Judgment:** A final decision that is issued prior to trial.

**Summation:** The closing argument made at the conclusion of a case.

**Summons:** A document that advises the Defendant that he/she is being sued.

**Surviving Spouse:** A widow or widower of the deceased.

**Tort:** A civil wrong that does not involve a contract and which causes injury to another for which the responsible party can be held liable.

**Tortfeasor:** A person who commits a tort.

**Toxic Tort:** An injury caused by prolonged exposure to a toxic material.

**Trial:** The process that focuses on the judicial examination of issues of fact or law before a judge or jury for the purpose of determining the rights of the parties.

**Underinsured Motorist Coverage:** The portion of a motor vehicle insurance policy that compensates you for any injuries resulting from an accident with a driver who has an insufficient amount of insurance to compensate you for your injuries.

**Uninsured Motorist Coverage:** The portion of a motor vehicle insurance policy that compensates you for any injuries resulting from an accident with a driver who has no insurance to compensate you for your injuries.

**Veniremen:** People who are summoned to court and questioned as potential jurors and who may be chosen later as jurors for a trial.

**Venue:** The law that governs the proper court in which to file a case.

**Vicarious Liability:** When one person is liable for the negligent actions of another, even though the first person was not directly responsible for the injury. In certain cases, parents can be vicariously liable for the acts of their children, and an employer can sometimes be vicariously liable for the acts of an employee.

**Voir Dire:** A Latin phrase meaning “to speak the truth.” This is the process of interviewing prospective jurors.

**Willful Tort:** A harmful act that is committed in an intentional manner.

**Witness:** A person who testifies under oath at a deposition or court proceeding.

**Workers’ Compensation Law:** The area of law that deals with the remedies and compensation for injuries to an employee arising out of and in the course of employment and that is paid to the worker or dependents by an employer whose strict liability for such compensation is established by law.

**Writ:** A judicial order or decree.

**Wrongful Death:** An action that claims damages from the person or entity responsible for the death of another and which is brought under a wrongful death statute.



**HASTINGS, COHAN & WALSH, LLP**  
*Attorneys at Law*

440 Main Street  
Ridgefield, Connecticut 06877

Telephone: 203-438-7450  
Facsimile: 203-438-0263

[www.hcwlaw.com](http://www.hcwlaw.com)

WA

# **THE CRASH COURSE ON CHILD INJURY CLAIMS**

**AN ACCIDENT** can totally disrupt and completely change your life. The way in which you engage in your daily activities can be significantly altered and you may be forced to endure a great deal of pain.

**THESE TRAGIC SITUATIONS** become magnified when they involve a child. It is heartbreaking to watch our children suffering, crying and struggling with an injury caused by the fault of another.

**YOU HAVE TWO MAIN CONCERNS** when your child is involved in a personal injury case: improving their condition as quickly as possible; and maximizing the amount of money you can collect.

**THE CRASH COURSE ON CHILD INJURY CLAIMS** gives you easy and practical strategies to use in obtaining better medical care and in helping your attorney recover more money for your child's injury case.

## **IN THIS COMPREHENSIVE BOOK YOU WILL LEARN:**

- What to do first;
- How a child injury claim is put together;
- What insurance adjustors don't want you to know;
- The do's and dont's;
- How to better communicate with your healthcare providers;
- Secrets you need to know;
- What you need to do to help your attorney improve the value of your child's claim.

**\$29.95**

Legal Advice

ISBN 978-1-59571-581-4

52995 >



9 781595 715814

**WA** WORD ASSOCIATION  
PUBLISHERS  
[www.wordassociation.com](http://www.wordassociation.com)  
1.800.827.7903