

# Personal Injury Victim's Handbook

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## A Guide for Personal Injury Victims In Vermont And New Hampshire

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# Personal Injury Victim's Handbook

## Introduction

Because you have asked for these materials there is a likelihood that you, or someone close to you, has recently been seriously injured in an accident that may be the fault of another. The purpose of this Handbook is to give you, the reader, practical, common sense information written in plain English about our personal injury system of law and how it may work in your case. While the information in this handbook cannot substitute for a lawyer's advice, (**See disclaimer below**), we hope it will help you make an intelligent decision on how to go forward with your claim.

## Disclaimer

**It is important to know that every personal injury case is different, and the results may vary greatly from case to case. There is no way to predict the outcome of a case based solely on these materials. This Handbook is designed to provide general information about personal injury law and is not indented to provide legal opinions or advice.**

# **Chapter 1**

## **How Personal Injury Law Works**

### **The Questions**

When a person is seriously injured in a way that may be someone else's fault many questions arise.

- Is the injured person entitled to compensation for the injury?
- How is the compensation decided?
- Is the injured person entitled to payment of medical bills?
- Is the injured person entitled to payment for lost wages?
- Is the injured person entitled to compensation for pain and suffering?
- How do you prove who was at fault?
- Does the injured person require the services of a lawyer?

The purpose of this short book is to provide basic information that will hopefully answer some of these questions and provide sufficient information to help find answers to others.

### **Three Parts of Personal Injury Law**

Generally speaking, there are three basic parts to personal injury law. These are liability, damages, causation. These three general topics can be broken down into subtopics. We will discuss each topic and subtopic and give examples to demonstrate. Let's go over some of these general principles of personal injury law.

#### **Liability**

The first thing to know is the *legal basis* for a personal injury claim. Essentially, the law says that under most circumstances we have a duty not to act in a way that causes an unreasonable risk of harm to others.

The law goes on to say that when a person breaches that duty, and acts unreasonably in a way that causes injury to another, then that person is responsible for the injuries they cause. The

unreasonable conduct is called negligence. In essence, all personal injury law is based on this straightforward premise.

The easiest way to think about negligence is through the example of an automobile accident.

### **Example One** **Automobile Accident**

Driver A is proceeding through an intersection with the right of way. Driver B approaches the intersection from a side road at the same time and fails to stop at a stop sign and a collision results.

The rules of the road require Driver B to stop at the stop sign and give the right of way to driver A. In other words, Driver B had a duty to driver A, and others legally on the road way, to follow the rules of the road and stop at the stop sign. Driver B's failure to stop was a breach of that duty. Driver B's conduct was unreasonable under the circumstances and therefore negligent. Driver B is responsible for the collision.

The legal concept of negligence, including duty, breach, causation and damages does not only apply to motor vehicle cases but is the basic law that covers personal injury cases in almost all circumstances.

### **Example Two** **Slip and Fall Accident**

Let's look at another example. Customer A is entering a supermarket. It rained earlier that day. The floor of the foyer is a smooth, marble like surface and there are no mats or carpets covering it. The floor of the foyer is wet and slippery. No one from the supermarket has mopped up the wet surface or taken other precautions even though the manager and other employees know the foyer is wet and slippery. Customer A enters the foyer slips and falls and sustains a personal injury. Is the supermarket responsible for the injury? Personal injury lawyers analyze the question as follows:

Q: Did the supermarket have a duty to the customer.

A: Yes. Commercial establishments have a duty to take reasonable care to keep their premises safe for patrons.

Q: Did the supermarket breach its duty? Asked another way, did the supermarket act unreasonably in the way it maintained the foyer?

A: Yes. Since the manager knew the floor was slippery and the patrons would walk on the slippery surface there was a duty to make the condition safer. Failure to mop up the wet surface would be considered a breach of duty.

Q: Did the supermarket's negligence cause the customer's injury?

A: Yes. In this case, the evidence supports the claim that the customer slipped on the wet surface and the injury was caused by the store's negligent failure to mop the floor or take other precautions.

From the above examples, we see that the law of personal injury starts with the question of whether there was a duty. The second question is whether the duty was breached and the third question is whether the breached duty caused the injury in question. If so, there is case for negligence. If not, there probably is no negligence.

### **Damages**

Once liability, or as we say negligence, is established, the next question to consider is the harm done by the negligence. This determines whether the injured person is entitled to compensation for the injury and what that compensation may be. There are several areas of damage compensation that the victim of negligence may be entitled to recover against the negligent party. They are, generally speaking, broken down into the following categories:

- medical expenses;
- lost wages;
- lost earning capacity;
- pain and suffering;
- disability; and
- loss of quality of life.

There follows a brief discussion of each element of damages.

## **Medical Expenses**

Almost all serious injuries require medical treatment of some kind. The law provides that all reasonable medical expenses related to the care and treatment of the personal injury victim is the responsibility of the negligent party. They can include emergency room treatment, all other hospital bills, office visits to doctors, clinical treatment, physical therapy, prescriptions, over the counter medications and the like.

The medical treatments and expenses must be reasonable and not excessive. An issue can arise when there is an allegation of “over treatment” or payment for treatment of medical conditions not caused by the negligence. More will be said on this issue in the section below about causation.

### **Example Three**

#### **Automobile Collision Injury Victim**

Jane Doe is injured in a motor vehicle accident when a negligent driver runs a red light and crashes into her vehicle. She is taken by ambulance to the hospital and receives x-rays and emergency room treatment. She is diagnosed with a severe back sprain and possible concussion and she is referred to her primary care physician for follow-up. She is given a prescription for pain medication. The next day her pain is even worse and she goes to her primary care physician who refers her to physical therapy for her back and to a neurologist to rule out serious head injury.

The neurologist does tests and diagnoses her with post-concussion headaches and prescribes another medication. She receives two months of physical therapy three times a week. After this treatment, her pain is better, but her back is still seriously injured. Her previous physician then refers her to a chiropractor who follows up with adjustments once a week for the next six months. After this, the chiropractor releases her from treatment even though she has residual pain. It is recommended that she follow up with home remedies. In this case, a summary of medical expenses that the negligent party may be responsible for paying would look something like this:

### Summary of Medical Expenses

Fast Ambulance Service.....	\$ 150.00
E.R. Treatment, Shady Grove Medical Center.....	\$1,500.00
Prescriptions, On Time Pharmacy.....	\$ 200.00
Dr. Primary Care.....	\$ 300.00
Dr. Burns, Chiropractor.....	\$1,800.00
Dr. John, Neurologist (office visit, neurological testing).....	<u>\$1,000.00</u>
Total Medical Expenses.....	\$6,150.00

Under the law of damages, with few if any exceptions, the negligent party will be responsible for paying all these medical expenses.

What happens when it is not clear whether a medical expense is actually related to the injury caused by the accident? For example, if Jane Doe was going to the chiropractor before the accident as well as after the accident, the insurance company might argue that the treatment after the accident was merely a continuation of the pre-accident treatment and not actually related at all. In this case, the insurance company then seeks to reduce the medical expenses by \$1,800.

The issue is resolved by the available evidence. The evidence in this case will be in the form of the doctor's opinion. If the treating chiropractor explains that the treatment after the accident was not merely a continuation of the pre-accident treatment, but was treatment for new injuries sustained in the accident, then the chiropractic expense will be included in the recoverable medical expenses.

Sometimes the insurance company will contest this and have other doctors review the record or examine the patient and conclude that the treatment was not for injuries related to the accident. In these cases, either a compromise is negotiated or the case may have to go to court.

When the insurance company asks one of its doctors to examine the claimant they call it an "independent medical examination." This is a misnomer. The examination is conducted by doctors who are paid directly by the insurance company. Most doctors who do this work do it on a regular basis over and over again for the same insurance companies. For those familiar with the process, it is no secret who these doctors favor. It is in the insurance company's best interest for the doctor to down play the injury. The less serious the doctor finds the injury, the better the insurance company's excuse for not paying or reducing the value of the claim. These doctors

know that the more they down play the injury, the more cases they get from the insurance company and the more money they make. The personal injury claimant is ill-advised to accept the insurance company doctor's opinion at face value. These exams by doctors, hand picked by the insurance companies, are more accurately referred to as "defense medical examinations" or "insurance company examinations" not by the misleading name "independent medical examinations." There is nothing independent about them.

It is the experienced personal injury attorney's job to see through this sham and make whatever effort necessary to bring fairness and justice to the process. Sometimes the attorney is successful in negotiating an exam by a more neutral doctor. Sometimes a person on the attorney's staff will accompany the client to the defense doctor's exam and record the entire proceeding. The bottom line is that if the insurance company wants to examine the injured person precautions must be taken.

### **Medical Liens**

In most cases medical bills in personal injury cases are paid by third parties. These include the medical payments provision of automobile insurance companies, health insurance companies, Medicaid, Medicare and the like. Sometimes medical bills are left unpaid until the personal injury claim is resolved. In these cases, the third party that paid the bills or the medical provider that is owed for the services will assert a claim for repayment against the proceeds of the personal injury claim. This is known as a medical lien.

The medical lien has evolved over the years and can be quite complicated. Of course, the bottom line question is how much of the amount claimed as lien has to be legally paid to the lien holder? Sometimes, the claim for repayment is not even technically a lien. This is important for legal reasons because it can determine the rights of the insurance company or unpaid medical provider to be paid back. Needless to say, the fewer medical liens that need to be paid back, the more of the recovery the injured party gets to keep.

For example, if the health insurance company that paid the medical bills comes from a medical insurance policy that a person has from their employment, that policy is governed by the Employment Retirement Income Security Act (ERISA). A few years ago the United States Supreme Court held that, under ERISA, medical insurance companies did not have a legal right to sue personal injury victims for recovery of money paid out under the ERISA governed

medical policy. So, if the medical insurance company had no legal right to bring a claim for repayment then the personal injury victim did not have to pay back the company. Recently there have been other cases that have narrowed this ruling. Whether a medical insurance company has a right to bring a legal claim against a personal injury victim to enforce its “lien” is a question in a state of flux and must be examined on a case by case basis.

Another example of complications surrounding the repayment of medical liens involves attorney fees. Since the personal injury victim is often paying an attorney to represent them in obtaining the personal injury settlement or verdict, and traditionally paying the attorney one third of the recovery as a fee and also reimbursing the attorney for expenses associated with the claim, then the argument is that the medical lien holder should be paying its fair share of attorney fees and expenses as well. This should lead to at least a one third reduction in the amount of the lien that must be repaid.

From the examples above, it should be cautioned that the legal issues surrounding the repayment of medical liens can be complex. It is highly recommended that any personal injury victim that has a potentially large medical lien against the proceeds of their claim ought to seek the advice of an experienced personal injury attorney who will take care of these issues for them. Again, as noted elsewhere in this text, many lawyers who hold themselves out as experienced personal injury attorneys are not able, or are not willing to deal with the complex issues surrounding medical liens. These attorneys, knowing that they will still collect the same fee for their services whether the liens are repaid or not, often advise the client to pay the liens in full to expedite a complete settlement of the case and the payment of their fees. Before hiring a personal injury lawyer for your case, it is very important to ask whether they will take care of all the lien issues that may be connected to your case.

**Lost Wages**

In almost every serious personal injury case where an adult is injured, the injured party loses time from work. As stated above, the party responsible for causing the injuries is responsible for paying the wages lost by the injured party as a result of losing time from work.

Let's take a simple example. Using our friend Jane Doe, let's assume she is employed as a computer programmer at the time of the accident. She works a 40 hour week and earns \$25.00/hr. As a result of the injuries caused by the negligence, she loses one week from work immediately after the collision. She then loses additional time for doctor appointments and physical therapy sessions. All told, on 20 separate days she must leave work two hours early for each appointment. This results in another 40 hours of lost time from work. All this lost time is compensable. Therefore, the following calculation applies:

**Lost Wage Summary**

One week lost wages, 40hrs. @ \$25.00/hr.....	\$1,000
<u>40 hours total for leaving work early at \$25.00/hr.....</u>	<u>\$1,000</u>
Total lost wage claim.....	\$2,000

While the above example is pretty straight forward, there are several factors that can complicate lost wage claims. For example, let's say in the example above Jane Doe used her sick leave for the lost time from work and was paid the \$2,000 by her employer. In this case, it would be logical for the insurance company to argue that they shouldn't have to pay the lost wages because her employer compensated her for the lost time from work. But the law says otherwise. The law says that if the injury victim has the benefit of sick time, that benefit belongs to her and was earned as part of her employment agreement. As a result, the defendant should not receive the benefit of what the injury victim has earned for herself. This is known as the collateral source rule. Under the rule, the law recognizes that it would be unfair to let the wrongdoer benefit under these circumstances, so Jane Doe is entitled to the lost wages even though she received paid sick leave.

Another complication involving lost wage claims occurs when the injury victim is self employed. In these cases, the victim is entitled to compensation not for loss of gross revenue but,

for loss of net profits. An issue often arises when trying to distinguish the two. Many self employed people try to maximize expenses and minimize profits for tax purposes. In these cases, the insurance company will use the income tax returns to show that lost income was minimal. Sometimes the self-employed must hire someone to do their work when they are injured. In these cases, the amount the self-employed person must pay to their substitute worker can be included in the lost wage claim.

## Chapter 2

### Worker Compensation and Third Party Claims

The American workplace can be dangerous. Virtually every state in the United States has a system for compensating workers who are hurt on the job. It is called worker compensation. This Handbook will touch on worker compensation only to the extent that it involves third party claims. A third party claim occurs when a person is hurt on the job and the injury was caused by someone other than the employer, or in New Hampshire, a fellow employee.

In that case, the injured worker is entitled to worker compensation benefits under the worker compensation law. Also, the injured worker may be entitled to bring a negligence claim against the person that caused the injury. This second claim is called the third party claim. In legal parlance, the injured worker is the first party, the employer is the second party and the person responsible for causing the injury is the third party.

The reason why an injured worker may want to bring a third party claim in addition to the worker compensation claim is that there may be more damages available in the third party claim. Generally speaking, damages in worker compensation claims are limited to a percentage of lost wages, medical bills, vocational retraining and permanent disability payments determined by a fixed schedule. In contrast, the damages available for a third party claim may include total amount of lost wages, pain and suffering, an unlimited amount for disability and a separate amount for lost earning capacity. Medical costs are also covered. Damages available for tort and negligence claims are described in detail above. Consequently, a third party claim may have substantially more value than a worker compensation claim.

When an injured worker receives a third party recovery, the law requires that the amount paid in worker compensation benefits be paid back much like medical lines discussed above. In other words, a third party recovery will be reduced by a worker compensation lien that must be paid back to the employer or its insurance company. This is usually the amount of worker compensation benefits paid, less one third, which represents the employer's share of the attorney's fees.

When a worker sustains a serious work related injury, the experienced personal injury attorney will always analyze the case to determine whether there is a potential third party claim available.

## **Chapter 3**

### **How Insurance Companies Handle Personal Injury Claims**

The vast majority of personal injury claims involve insurance. The type of insurance that covers personal injury claims is called liability coverage. In most cases, it involves motor vehicle insurance and premises insurance including home owners' insurance policies. If you own a motor vehicle and have insurance, look at your policy. It will have a section on liability coverage that will pay claims against you in the event you are responsible for causing an accident. The amount of coverage is determined by how much you pay for that coverage. Typically coverage comes in two amounts, for example \$100,000/\$300,000. This means that you are covered up to \$100,000 for injuries to any one person in an accident and \$300,000 for all people injured in an accident.

In this section we will discuss how an insurance company processes a liability claim made against one of its insured. Let's go back to example one above. In this case, we'll call driver A Mary and driver B John. John's negligence causes personal injury to Mary and Mary makes a claim against John's insurance company. John's insurance company will assign the claim to a claims adjustor. The job of the claims adjustor is to settle the claim by paying the least amount of money the insurance company can get away with paying. This is a very important point to understand. It works like this.

The insurance company's purpose is to make profits for its owners and stockholders. The way the insurance company does this is by selling insurance policies and collecting premiums on those policies. The more premiums it collects, the more money it makes. The major cost of doing business for the insurance company is the paying of claims. The more it pays in claims the less profit it makes. So as a matter of pure business, the purpose of the insurance company employees is to settle as many claims as they can for the lowest dollar amount. Fairness to the person making the claim is not part of the analysis.

The insurance company knows that if they are too unreasonable in what they are willing to pay the claimant is likely to get a lawyer and may take the case to court. Accordingly, the insurance company will try to create the guise of fairness when settling a claim. The problem is

that the claimant generally has no idea what their claim is worth and the insurance company relies on this when negotiating a claim with a claimant who is not represented by a lawyer.

When an experienced personal injury attorney enters the picture, the insurance company loses its position of power. The insurance company claims adjustor now knows the company will have to pay a settlement that the lawyer finds reasonable or the lawyer may take the case to court. When this happens, the insurance company must then hire its own lawyers and pay them to defend the claim. However, it is very important to know that the insurance company will not be so inclined to pay a reasonable settlement if it knows that the lawyer hired by the claimant does not have a reputation for taking cases to court and a track record for winning cases in court. In fact, there is some controversy about whether lawyers who don't take cases to trial in court, and are unwilling to do so, should even be called personal injury attorneys. But it is not the purpose of this Handbook to discuss this topic in length. Suffice it to say, any personal injury claimant who hires a lawyer should only hire a personal injury attorney with a reputation, experience and track record for success in the courtroom. There is a section below that discusses how to find and choose an experienced personal injury attorney.

When an experienced personal injury attorney enters the case, the insurance company usually will pay more attention to evaluating the claim according to the proper legal elements of a personal injury claim that are discussed in detail above.

To a very real extent, claims adjustors for insurance companies are paid BS detectors. They are trained to sniff out whether a claimant is being truthful about all aspects of their claim. They are also trained to know when the claimant and the claimant's attorney are bluffing. They know that claimants represented by lawyers who do not go to court and try cases are bluffing and they evaluate cases accordingly.

The more sense the insurance company and its adjustor have that the validity of the claim is suspect, or the claimant's lawyer is bluffing, the less they will pay to settle the case.

## **Chapter 4**

### **How Cases are Processed**

When an experienced personal injury law firm accepts a personal injury case, there is a certain process of properly handling the claim. First, the client should personally meet with the personal injury attorney handling the claim. If this part is left to paralegals or assistants, the potential client would be well advised to think twice about hiring that firm. It is important that the attorney responsible for the case have a personal relationship with the client and this starts at the first meeting. On rare occasions, especially when the client can't come to the office, the attorney can't meet with the client in person right away. This is o.k. for unusual circumstances as long as the attorney personally meets with the client before the case is too far along.

I am often asked to lecture other personal injury attorneys on the proper way to handle personal injury claims. I do this at Continuing Legal Education seminars (CLE). In both New Hampshire and Vermont, the two states where my practice is focused, attorneys are required by law to take a certain amount of credit hours through CLE seminars to keep their licenses active. When I teach personal injury case handling, I usually break up the lecture into three parts. Part one is information gathering. Part two is negotiation and settlement. Part three is litigation. An entire course can be taught on each part, but what follows is a general summary to give the legal consumer an idea of what happens when their case is competently handled.

#### **Phase One – Information Gathering**

After the initial meeting with the client, and after the firm accepts the case, a retainer agreement is signed by both the attorney and the client. This spells out the fee relationship between the firm and the client. At the same time, the client will sign releases for information. The firm then uses these releases to obtain all the information necessary to process and evaluate the case. At this time, the firm will usually put the insurance company on notice that they represent the client in the personal injury claim.

The firm will use the releases to gather all medical records, reports and bills, and other medical information necessary to process the claim. Often, the firm will gather medical records for medical treatment before the accident. This is especially the case when there is a question of whether a pre-existing medical condition may have affected the injuries related to the accident.

As discussed in more detail above, the insurance company will often try to argue that a medical condition caused by the accident was really a pre-existing injury and not related to the accident at all. As also discussed above, insurance companies will go to great lengths and use a wide variety of ploys and arguments to avoid paying claims.

The law firm will also gather all necessary information relating to the accident itself, including police reports, witness statements and the like. If time is lost from work due to the accident, the law firm will also collect information from the employer to evaluate and prove a lost wage claim. Most often during this phase of the claim, the client is still receiving medical treatment. Once all the information is gathered, then the firm monitors the client's treatment until they reach a medical end point. This is when the medical professionals sign off on the treatment and say there is nothing else they can do. At this point, the firm requests a report from the medical professionals outlining in detail the nature and extent of the injury, confirming that the injury was caused by the accident, an overview of the treatment received and a detailed description of the nature and extent of whether any aspects of the injury may be permanent in nature. A thorough medical report from a treating physician is an important tool in negotiation a just and fair settlement.

### **Phase Two – Negotiating, Mediation, Settlement Demands**

After the client is finished with medical treatment, and the doctors have provided information on the nature and extent of any permanent aspects of the injuries, the case is ready for evaluation for settlement. Experienced personal injury attorneys rely on their knowledge and experience with similar cases to assess the value of the case. In more complex or unusual cases there is information available through several resources on settlement and verdicts of cases that compare favorably to the case in question. In our office we also “round table” cases. This means everyone in the office gets together, attorneys and support staff, and listens to a presentation of the case and each person provides their assessment of settlement. When the votes are counted, and if we all have similar evaluations, we know we are in the right ballpark for settlement. We then discuss the case with the client, explain our view of settlement, and come to an agreement with the client about the amount of settlement that is acceptable.

Next we send out a settlement package to the defendant's insurance company with our demand for settlement, together with a detailed explanation of why we feel the case should settle for the amount requested along with back up records and necessary information to prove the case. This usually begins a negotiation process involving back and forth communication, and give and take with the insurance company. If a settlement is agreed upon at that stage, the necessary paperwork is completed and the settlement is received and paid to the client.

If there is no agreed settlement, the case sometimes goes to mediation with a neutral third party. Mediation is really nothing more than an extended settlement negotiation with a neutral mediator who tries to bridge the gap.

If mediation does not settle the case, then it is usually necessary to file litigation. This is a point where it makes a major difference whether you have a real personal injury attorney representing you, or whether you are represented by, what we like to call, a "settlement mill." A settlement mill is a law firm that takes a lot of cases, usually through advertising, and then settles the case for whatever they can get without ever going to court. The insurance companies know which firms are settlement mills and will not pay fair settlements because they know there is no real chance that the case will go to court.

### **Phase Three – Litigation**

Litigation begins with the filing of the law suit with the court and the serving of the papers on the defendant. The litigation process includes a number of steps described in detail in another publication.

The important thing to know is that simply because a case is in litigation doesn't mean it will not eventually settle. Many insurance companies want to make sure that the injury victim and their lawyers have the courage of their convictions before they make a good faith settlement offer. Aggressive pursuit of the litigation process with an eye toward going to trial if the case does not settle often convinces the insurance company that they must pay a reasonable settlement or risk going to trial.

The time between the filing of a lawsuit and when the case actually goes to trial usually takes around one year. In most circumstances, during this time a court will order the case to go to some kind of mediation, referred to as Alternative Dispute Resolution (ADR). The case may settle at this time or at any other time during the litigation process prior to trial.

## **Phase Four – Trial**

If the case does not settle during the litigation process, then the final step of that process is trial. This is where the case is presented to the jury. The important thing to know here is that although many lawyers call themselves personal injury lawyers, in actuality they have little or no experience at trial. This creates a hardship for the client. Therefore, it is extremely important that the prospective client check the credentials of a personal injury attorney before hiring them. This includes their experience at trial. Chapter 6 below explains in more detail the process of hiring a personal injury attorney.

The trial of a personal injury law suit involves a multitude of skills and a wealth of preparation. This publication is not long enough to go into all the details of trial work.

Suffice it to say, by the time of trial the client and the lawyer should have a solid bond and be working in concert to bring the case to a successful verdict with the jury.

## **Appeals**

As noted above, the vast majority of personal injury cases are settled before trial. Even those cases that go to trial sometimes settle during the trial and before a jury can reach a final verdict. As a result, only a few cases ever result in jury verdicts. However, after a case is resolved by verdict there is an opportunity for appeal.

After a jury verdict, if one of the parties is dissatisfied with the result and feels that a legal error of some kind was made during the trial, they may file an appeal. The appeal is heard by the State Supreme Court.

If the Supreme Court agrees that an error was made, and that error may have changed the outcome of the trial, they may reverse the decision and send the case back to the trial court for additional proceedings. Often, this results in a new trial.

When an appeal is filed, both sides must file an appellate record and legal briefs supporting their position. This is often a time consuming and expensive process. Often, an entire transcript of the trial is necessary. This can cost additional thousands of dollars in costs.

Because the appeal process involves an entirely new set of time consuming and complicated work for the attorneys, often times, a contingency fee will increase if there is an appeal. A typical example is a fee increase from 33 1/3% to 40% if there is an appeal.

**Chapter 5**  
**Your Rights as a Personal Injury Victim**  
**and Why Personal Injury Law is Important**

In the previous sections we have described the personal injury legal process. One of the founding principals of the United States legal system is that every individual should have equal access to the court system. This is especially important when it comes to personal injury victims. Without going into too much detail, we note that the personal injury legal system, also known as tort law, is based on the English Common Law. Even before the founding of the United States, English citizens had a right to ask for redress in the court system against those that harmed them. This basic principle evolved into the tort law and personal injury law as we know it today. So, no matter who the victim is, and no matter how powerful the person or corporation who harmed the victim is, the victim has the right to seek relief in our court system.

Without this right, there would be no need for people to even have insurance, whether it be homeowners, automobile or any other kind of liability insurance. Without this right, we would live in kind of a free for all society where anything goes. Our system of tort law and personal injury law honors the concept that all people are created equal.

Consequently, when you are injured as a result of the fault of another, you have access to the legal system and the right to bring a legal claim against the party responsible for the harm done to you. In recent years powerful interests, including the insurance industry, the medical industry and other large corporations have used their influence with lawmakers to limit the rights of personal injury victims. They claim that personal injury lawsuits hurt business, make medical care more expensive and even cause harm to society. They call their actions of changing the legal system “tort reform.” But make no mistake, careful studies have shown that none of their claims are true. Our system of justice for personal injury victims works quite well and it is the best way to resolve personal injury claims. It is this access that gives the victim leverage to negotiate settlements with insurance companies.

## **Chapter 6**

### **How to Hire a Lawyer For Your Personal Injury Claim**

#### **Why You May Not Need a Lawyer**

When a personal injury victim decides to make a claim they must decide whether to hire an attorney to represent them, whether they try to resolve the claim on their own without the help of a personal injury attorney. It is a surprise to some that an attorney may not always be necessary to resolve a claim. This can arise in two instances. One, where the value of the claim is clearly in excess of all available insurance coverage and the party responsible for the personal injury has very limited assets, and two, where the injury is not serious and the insurance company is willing to settle the claim at or near its true value. It is my opinion, based on thirty years experience working both with and against insurance companies that they will not pay the true value of a serious personal injury claim. Accordingly, in a case that involves a serious claim, the personal injury victim is well advised to hire an experienced personal injury attorney with a track record and reputation for success in the courtroom with jury trials.

As stated above, the first case where an attorney may not be needed is where the liability is clear and the value of the case clearly exceeds all available insurance policy limits and the responsible party has limited assets. There are two very important matters that must be determined before the claimant should even consider settling a case without the help on an experienced personal injury one to make sure of the available of insurance and two to make sure that the responsible party has limited assets.

With regard to available insurance policies, it is sometimes the case that the responsible party has more than one policy to pay the claim or that the insurance company is not being forthcoming about the limits of the available policy. In either case, it is a mistake to assume that the insurance company will be open and honest about the available coverage. If the claimant cannot independently confirm the amount of the coverage available, then they should get help from an experienced personal injury attorney.

With regard to the assets of the responsible party, the same principal applies. Before a case is settled for policy limits when its value is higher than those limits, it must be ascertained independently that the responsible party does not have personal assets available to pay the claim.

Again, it is a mistake to assume that the responsible party or their insurance company will be open and honest about personal assets available to pay a claim.

Here's an example. A pedestrian is crossing the street at a cross walk with a green light and is struck by a negligent driver who went through the red light. The negligent driver is clearly liable but only has \$25,000 in insurance coverage. The injury is serious enough that it is clear the negligent driver's insurance company will pay the full policy amount to settle the case. It is also clear that there is no other insurance available to settle the claim and the responsible driver has no personal assets. In this case, it may be unnecessary to hire an attorney. However, it is very important to remember that issues regarding whether there is other insurance available to pay the claim can be tricky and complicated, and if there is any doubt at all the injury victim would be wise to contact an experienced personal injury attorney for advice. The same holds true for the issue of whether the responsible party has any personal assets to satisfy the claim.

There is one caveat related to this topic. We have heard of some unscrupulous law firms that will take a case on a full one third retainer knowing full well that the case will obviously settle for the policy limits with or without the involvement of an attorney. Although not technically illegal, we think it is unconscionable that a lawyer would accept a full one third retainer on a case that will obviously settle for the full policy limit with or without the involvement of the lawyer.

In the second case where the injury is not serious or permanent and the insurance company is willing to settle, the most important thing is to make sure the injury is completely resolved and the claimant knows all the elements of the loss before settling. In this case unless the settlement is less than two thirds of what the case would settle for with an attorney and there are no medical liens or other complications, the claimant may receive more net compensation if they go it alone.

Here's an example. John Doe is rear ended in an auto accident. The responsible driver's insurance company admits liability. John sustains a neck sprain in the accident. He has no other injuries and loses no time from work. John has one emergency room visit, a couple of visits with his primary care physician and some physical therapy. After three or four months his injury resolves. His medical expenses are around \$1,000 and these have been paid by his own automobile insurance company so there is no lien. The insurance company is offering \$4,000 to settle the claim. Should John hire an attorney? In this case, a fair settlement may be in the \$6,000

range. That being the case, if John hired an attorney and settled the case for \$6,000 the attorney's fee would be one third. The attorney would probably have some expenses, usually a couple of hundred dollars, in a simple case. So if John hired an attorney, the one third fee and expenses would be more than \$2,000 and John's net recovery would be less than the \$4,000 he could have recovered if he did not hire an attorney. There are many variables on this theme. Sometimes, the net recovery through a lawyer's effort in a small case might be a little more than what the accident victim could negotiate on their own. However, the victim may decide to accept the settlement to avoid drawing out the claim and a time delay. In any case, it doesn't hurt to contact an experienced personal injury law firm for advice. The top tier firms will be willing to give advice without charge and explain whether the case is one that might be handled without hiring a lawyer. In my firm, we are generally willing to meet with the accident victim to explain their options.

The bottom line is that in the vast majority of personal injury cases it is advisable to hire an experienced personal injury law firm to represent the victim. However, in the circumstances described above, in a small number of cases it might be o.k. to go it alone.

### **How Lawyers Charge Fees in Personal Injury Cases**

In most personal injury cases attorney's fees are charged on a contingency basis. That means the lawyer will take a percentage of the recovery as the fee. Usually, that percentage is one third. The contingency fee system has come under fire lately because it provides the average person with access to some very good lawyers that they would not otherwise have. Needless to say, the insurance companies, medical industry and big corporations don't like this. They would rather have it that only those who could afford to pay lawyers' big fees by the hour would have access to good lawyers. Because of the contingency fee system, some of the finest trial lawyers in the country are able to represent every day people in cases against the big insurance companies, corporations and the medical industry.

There is also a down side to the contingency fee system. If a lawyer or law firm is more interested in making profits than providing solid, high level legal representation to their clients then the contingency fee system can be misused. This is because most clients don't know the value of their personal injury cases and must rely on their lawyers for that advice.

This allows the questionable lawyer to settle the case for less than full value because the client doesn't know any better. In turn, this allows the lawyer to make, in some cases, a lot of money for a little bit of work. In our companion publication, **The Truth About Lawyer Advertising**, we discuss this matter in some detail. To get a free copy of that publication visit the website [www.truthaboutlawyeradvertising.com](http://www.truthaboutlawyeradvertising.com) or call toll free 1-800-409-1972.

In some cases, lawyers will charge more than a one third contingency fee. Sometimes, this is justified and sometimes it is not. There is no reason why the average personal injury lawyer should be charging more than a one third contingency fee for the average personal injury case. If the lawyer does this, it is the personal injury law equivalent to price gouging. The questionable lawyers can only get away with this if they are dealing with an uninformed legal consumer. The purpose of this and our other publications is to create informed legal consumers who can navigate their way through these kinds of problems when and if they ever need the services of a personal injury attorney.

On the other hand, in some cases charging a fee of more than one third can be justified. Where the case promises to be a difficult one, and the attorney is at the top of their field of practice and has high demand for their services, it sometimes makes economic sense for both the attorney and the client to agree to a contingency fee of more than one third, usually forty per cent, or else the attorney could not afford to take the case. In other situations, firms will charge more than a third depending on how far the case needs to go before it is concluded. Some fee agreements from reputable law firms charge a one third contingency for all work up and through trial. However, if the case is appealed before its conclusion, then the fee increases to forty per cent (40%) or sometimes more. This is because there is an entirely new set of complicated and time consuming work in representing a client in an appeal.

### **Why Some Lawyers May Be the Wrong Choice For Your Case**

The fact of the matter is that not all lawyers are created equal. Like any other profession, there are some excellent lawyers, some good lawyers, some average lawyers, some not so good lawyers and some bad lawyers. If you have a potentially serious personal injury claim you need an excellent personal injury attorney. As discussed elsewhere in this Handbook, most personal injury claims are paid by insurance companies. Insurance companies know who the excellent personal injury lawyers are and who are the "also ran" attorneys. They will not pay top

settlement dollar to a personal injury victim represented by an also ran attorney because they don't have to. Insurance companies know that many also ran attorneys will not take a case to court and so eventually will accept any settlement the insurance company wants to give them. Unfortunately many of the firms that do heavy advertising about their experience in personal injury cases are also ran attorneys. It is advisable to stay away from these attorneys and only select a lawyer or law firm to represent you in a personal injury case based on their experience, reputation and track record for success in the courtroom where it counts.

### **How to Find The Best Law Firm For Your Personal Injury Case**

If you want to hire the best firm for your personal injury case, you have to look past the ads and find out about the credentials of the law firm. This means their experience, track record and the types of services they offer. Some firms provide a shockingly low level of service to their clients.

#### **Section I**

##### **Make sure the firm you hire provides a full range of services.**

I once had a women call me who was already represented by a law firm in an automobile accident case where she sustained a head injury. She needed help right away because she couldn't get either her health insurance or automobile insurance to pay for the medical care she needed. She called me very frustrated because *the firm she picked to represent her from the yellow pages told her they "didn't take care of those kinds of problems and that she should get creative and handle it herself."*

To us this was outrageous. Here is a woman who can't even work because of a severe head injury and her lawyers are telling her to use her head and figure it out herself. Well, she got creative all right. **She fired that firm and hired our firm and two phone calls later the problem was solved and she was able to get the medical care she needed and the insurance company paid for it.** The kicker is the first law firm had the nerve to try and charge her a fee for the services they rendered.

*The very good personal injury law firms do not only try to settle your case but they also provide a full range of related services.*

## Section II

### Make sure the firm you hire has the necessary knowledge and experience to handle your case

I have been a practicing lawyer handling personal injury cases for over 25 years. Because of my experience and reputation, other lawyers often contact me with questions about their cases. Generally, this is a good idea. If you don't know the answer to a question, ask someone who does. *But what is alarming is that some lawyers ask questions that make it pretty clear that they don't know the first thing about the complexities of personal injury law.* I do my best to answer the questions, *but often think about the poor client relying on a lawyer who simply does not have the necessary knowledge base to properly handle the claim.*

The real scary thing is that I see big ads in the phone books advertising *these same lawyers* as personal injury attorneys. I am not referring here to the actual trial of cases. What I am referring to is *the general knowledge base of know how to process a claim just to achieve a successful settlement.* Again, this is not to say that all lawyers who have big advertisements are uninformed. What I am saying is that the legal consumer must be wary when choosing the right lawyer, especially if the case is at all complex.

## Section III

### Make sure the firm you hire is willing to take the case to trial.

Any lawyer can settle a case. The truth of the matter is that any lawyer can negotiate the settlement of a personal injury claim. *The question is whether they will settle the case for a fair and just amount or will they take whatever the insurance company offers.* Lawyers without track records and experience in trying cases to juries have no leverage with insurance companies and insurance defense law firms. **The insurance companies and insurance defense law firms know that many attorneys will not go to court; therefore, they are not compelled to offer anything close to a fair and just settlement. They know that if the personal injury victim is represented by a lawyer who doesn't go to court, that lawyer will have to recommend a settlement for much less than the full fair and just value of the claim.** If you have a law firm for a serious personal injury claim, make sure that law firm can prove to you that they have

**leverage based on their experience and track record.** Have them put you in touch with former clients who they have actually represented in a courtroom and gotten **jury verdicts** for.

*As we noted before, the only thing the insurance companies respect a law firm that has taken cases all the way through to jury verdicts successfully.*

#### **Section IV**

##### **Make sure the firm you hire has lawyers experienced in trying cases.**

Incredibly, many of the heavily advertising personal injury attorneys and law firms *have never tried a case to a jury*. They are completely without this courtroom experience. This is as if you ask a doctor to perform surgery who has never operated before. *Insurance companies know that a lawyer without experience in court is not likely to be as successful as an experienced lawyer and the settlement offer made by the insurance company will reflect this reality.*

Many of the heavily advertising personal injury attorneys who don't go to court will tell you that it is *not necessary* to go to court to settle your case as their reason why they don't go to court. Don't believe them. What they are telling you is not true. If they do not have successful track records in the courtroom where it counts, insurance companies have no incentive to pay for your settlements because *they know that ultimately that attorney will take whatever it is the insurance company decides to pay them*. In these situations, the insurance companies and defense law firms are in the driver's seat, not the plaintiff's attorney who doesn't go to court.

If an attorney handling your case has no experience in court, and the insurance company does not offer a fair settlement, there are only two options.

1. The lawyer for the first time tries the case before a jury, and has a real learning experience, the problem is it is your case he is learning with; or
2. He must refer the case to an experienced firm. The problem here is that then the lawyer has to give the experienced firm the lion's share of the fee. ***Some lawyers may put their economic interests ahead of the clients and convince the client not to go to court and take a smaller settlement, so they do not have to give up the majority of the fee.***

Presently, about 60% of the cases in our firm are referrals from other lawyers. Fortunately, we deal with referring attorneys with high ethical standards who put their clients'

interests first, even if they will earn a smaller fee by referring the case to an experienced firm after the insurance company fails to offer a fair settlement.

### Section V

#### Make sure the firm you hire has a track record for success.

First, we must define what success means. I know a lawyer who tried his first personal injury case to a jury. Before the trial, the insurance company offered to settle for \$125,000. Because this was his first trial, he didn't do as well as he thought he would, and the jury came back with an award of \$100,000. **This was \$25,000 less than what he could have settled the case for before trial! Incredibly, that lawyer publicized the \$100,000 verdict as if it was a great success, leaving out the fact that the insurance company offered \$25,000 more before the trial!** Since the average client doesn't know the story behind the story, it looked good on the surface. *To my knowledge that lawyer has never tried a case again.*

So what does success mean? There's an old story about the young lawyer who was anxious to make a name for himself. In his town there was an older lawyer with years of experience and a reputation for being very successful in the courtroom. The young lawyer went to the older lawyer and asked, "Sir, how can I get a million dollar verdict?" The seasoned lawyer answered "Simple. Just screw up a two million dollar case."

**The moral of the story here is: don't pay too much attention to the advertisements and the lawyer who brags about their million dollar cases. You need to know the story behind the story.**

## Chapter 7

### How to Check A Lawyers' Credentials BEFORE You Hire Them

We've spent a lot of time in this Handbook explaining the kind of lawyer you should avoid and the kind of lawyer you should hire. The question now is how you check on the credentials of the lawyer you are thinking of hiring. There are several ways to check a lawyer's or law firm's credentials. The most obvious way is to simply ask them. At the end of this Handbook, there is an appendix with a check list of questions that you can bring to a lawyer's office to ask before hiring that lawyer for your personal injury case. The checklist goes over many of the points we make in this Handbook.

Another way to check is to learn about the lawyer's reputation in the community. If you know anyone who works in a courthouse, ask them about the lawyer's track record in the courtroom. Notice I don't say general reputation. Reputation is one thing, track record is another. Many factors can impact reputation. If the lawyer is likable and courteous to the courthouse staff, he may be liked and people may say good things about him. But what has he done in front of juries? That's the question to ask. Has the lawyer gotten impressive results in jury trials? If yes, that's obviously a good sign. If no, be cautious about hiring that lawyer. Reputation among other lawyers is also a good sign, but again reputation for successful results in jury trials is what matters the most.

There are several organizations that offer certifications to lawyers based on achievement. The National Board of Trial Advocacy is one of those organizations. According to its website, [www.nbtanet.org](http://www.nbtanet.org) The National Board of Trial Advocacy (NBTA) is a non-profit organization located in Boston, Massachusetts. Founded in 1977, NBTA is dedicated to bettering the quality of trial advocacy in our nation's courtrooms and assisting the consumer of legal services in finding experienced and highly qualified trial lawyers. NBTA is accredited by the [American Bar Association](#) (ABA) to certify lawyers in the specialty areas of [civil, criminal and family law trial advocacy](#). No less an authority than the Supreme Court of the United States has endorsed NBTA as a valid certifying agency. In the case of *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 110 S.Ct. 2281 (1990) the Court stated:

"There is no dispute about the bona fides and the relevance of NBTA certification. The [Attorney Registration and Disciplinary] Commission's concern about the possibility of

deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment. Disclosure of information such as that on petitioner's letterhead both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys.”

The bottom line is that if the personal injury attorney you are thinking of hiring has been certified by the National Board of Trial Advocacy, the likelihood is that the attorney will be competent to handle your case. If the attorney you are thinking of hiring is not certified, then the question is why not.

Another credentialing agency is Martindale Hubbel. This agency uses a rating system with the highest being AV. A lawyer or firm with an AV rating has received very high reviews from other lawyers in the same geographic area.

Another organization that rates lawyers is Best Lawyers in America. This is an invitation only group. This group compiles lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers.

Remember the objective should be to hire the lawyer that is best suited to your case. Checking the lawyers or law firm's credentials is one way of finding that out.

## Chapter 8

### About Our Firm

The author of this publication and everyone in his law firm believes that the more knowledge the legal consumer has the more likely they will be to hire our firm for a serious personal injury claim. Additionally, we decided to create this separate section to explain who we are and what we do. Because the primary purpose of this report is not to promote ourselves, this section will be brief, but we do have another publication that explains our firm in greater detail, or you can visit our website at [www.vandornandcurtiss.com](http://www.vandornandcurtiss.com).

First, when we take on a case and represent a client, our goal is not to meet the client's expectations. ***Our goal is to exceed the client's expectations. The success of our firm is built on reputation, not on advertising.*** For years, we have been recognized as *one of the most successful personal injury law firms in both Vermont and New Hampshire*. We have received numerous awards and recognitions for our accomplishments. For example, in **2005 we received the New Hampshire Trial Attorney's Special Recognition Award for Dedicated Service to Our Clients**. Visit our website or see our other publication "About the Firm" for more examples of awards and recognitions.

Also, according to our surveys we have an extraordinarily high rate of satisfaction among the clients we have helped through the years. The proof of that is that *our former clients are a primary source of referrals to our firm.*

**We also have record breaking jury verdicts in three jurisdictions.** This includes a 1.6 million dollar jury verdict in a civil rights case, and a 2.1 million dollar verdict in a pit bull attack case.

In other cases, we have received jury verdicts far in excess of what was offered by the insurance company. In one automobile collision case, the insurer was Allstate Insurance Company. They offered our client a low ball \$8,500 settlement. That was their last and final offer. They would not pay more. We thought the fair value of the case was about \$35,000. After a one day trial, the jury awarded a \$100,000 verdict. Allstate doesn't low ball our clients anymore.

In another case in Warren County, New York, over by Lake George, our client had been bitten by a dog. Again the insurance company made a low ball offer. Again, the case went to trial

and the jury awarded a \$240,000 verdict; about 20 times what the insurance company offered to settle the case for. These are just samples of some of the results we've achieved. The bottom line is that if we take your case, and the insurance company doesn't make a fair settlement offer, we will take that case to trial and let a jury decide.

This is not meant to guarantee results for your case or any other case. Each case is different and each jury is different. Each case rises and falls on its own merits. What we do guarantee is that once we take your case, if the insurance company refuses to make a fair settlement offer, we will take your case to trial and let a jury decide. As we've said over and over again in this Handbook, willingness to take the case to trial, and your law firm's reputation and track record of success, is what gives you the greatest leverage in negotiating a fair and just settlement with the insurance company.

We have tried cases in six different states including New Hampshire, Vermont, Maine, Massachusetts, New York and New Jersey. We are widely respected (if not feared) by insurance companies, and the large law firms that represent them. We have a complete set of client testimonials, a brochure that describes our firm in more detail and other publications regarding the personal injury legal system.

## **Chapter 9**

### **Ethos, Pathos, Logos**

Ethos, pathos, logos. These are important words to experienced trial lawyers who are practicing at the highest levels. They are from the ancient Greek and roughly translated mean credibility, emotion and logic. They were originally used together by Aristotle in his work on Rhetoric. Today, they are understood as the way people come to believe in truth of something. First, the source of the truth must be credible. Second, it must have emotional resonance. And third, it must make sense logically.

When an experienced trial lawyer wants to convince the jury of the truth of an issue in a case, he will try to make the evidence appeal on ethical, emotional and logical levels. This is the way most people make decisions.

## **Conclusion**

The consequences of a serious personal injury can be heartbreaking for the victim and the victim's family. When the injury is caused by the fault of another, our legal system for hundreds of years has provided a process for relief in the way of money damages. The legal system cannot restore good health, but it can order the responsible party to pay reasonable monetary damages for the harm they cause. The personal injury legal system is not a lottery or a get rich quick scheme. The minority of clients and attorneys who exploit the system only make it more difficult for those who truly need the help and relief the justice system can provide. The author of this publication and his law firm will have no part in the unscrupulous methods of the few who bring ruin and disrepute to an honored system of legal redress that has served our country and its citizens since the very beginning of the union of the United States.