



## **5 BURNING QUESTIONS FOLLOWING AN ACCIDENT, AND HOW TO PREVENT MORE PAIN...**

A Special Report by D'Orazio Peterson LLP

# INCREASING POWER THROUGH KNOWLEDGE

Seeking out a lawyer really is not about the lawyer. At least it shouldn't be. We find that some lawyers are too concerned with their own credentials and awards, when they should be more focused on their clients' questions and concerns. Yes, we have years of "combined" experience, lots of "favorable" results, accolades and offer "free consultations" just like the other firms, but we do not think that talking about any of that really helps you when you are looking for answers.

The reality is that we may not be able to help. We are an intentionally small firm, and we intentionally handle a small number of plaintiff's severe personal injury and employment discrimination cases at any

given time. We do this because clients deserve to have the full attention of their attorneys, and we are quite simply less effective if we are trying to wear too many hats.

We believe in providing our clients and potential clients with information, thereby increasing their power through knowledge. In the end, information is really why you are looking for an attorney in the first place. If you are reading this, it is likely that you have been injured or a loved one has been injured or killed as a result of the negligence of another person, and you have many questions. So please read on, and we hope that you will find some of the answers to your questions.

## FORWARD

I cannot tell you the number of times a prospective client has called or walked into my office furious following an accident, and with multiple questions. Their questions, and more importantly the answers to them, are the reason for this special report.

If you are reading this, it is likely that you have some of those same questions and have not been able to find the answers. The hope here is that you will be able to take some information learned in this report and decide what to do next. While in some cases that may be hiring an attorney, it may also be reaching out to the insurance company to try and handle the claim yourself. In some cases, it may be nothing at all.

Whatever you ultimately decide, you should make your decision after having gained some level of understanding from someone who receives (and answers) questions like yours far too frequently.

In the event that you decide to hire an attorney, you should also keep a few things in mind before making your decision.

Scott M. Peterson  
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# HOW DO I FIND A GOOD ATTORNEY?

If you decide to hire a lawyer, do your homework. While there are still some “general practitioners” left out there, the law has increasingly become more specialized.

Ask the lawyer questions:

- Have they handled these or similar type cases before?
- Do they have associates or paralegals who will work on the case? If so, how much work will they do?
- Will the lawyer that you hire be the lawyer to take depositions, appear in court, and conduct the trial?
- What do their peers think of them?
- Do they have any ratings? Are they listed in Super lawyers?
- Do they represent both plaintiffs and defendants in negligence cases? Do they see this as an issue? Are they really sympathetic to your situation, or is this just a way for them to make some money?

If you read this report and decide that you need a lawyer, do yourself a favor and ask the questions above. Too often lawyers try to be too many things to too many people, and while some are very good at wearing multiple hats, others are not. Our personal firm philosophy on this point is simple – we wear one hat, the plaintiff’s. We fight for plaintiffs because we believe that victims are often further victimized by large companies and facilities, whose primary purpose is too often their own bottom line.

## DISCLAIMER

Please remember: this book is not intended to serve as legal advice, nor are we, by sending you this book, your attorneys. Retaining our firm is accomplished after a formal meeting, during which a formal written agreement is executed by the client and the firm. Please also remember, every case is different and dependent on its own unique set of facts, and our prior results do not and cannot predict any future outcomes.



# BURNING QUESTION #1: CAN'T I JUST DEAL WITH THE INSURANCE COMPANY ON MY OWN?

The insurance company. That big, bad, cheap corporation on the other end of the phone/mail. The conversation usually starts in a friendly way.

You've been hurt in an accident. You file the police report and notify your insurance company. A few days later you receive a call from a nice adjuster from the insurance company for the driver who hit your car.

He seems nice, asks how you're doing, asks about your condition.

Asks for a recorded statement.

**Rule number one. Do not be mistaken. The insurance company for the other driver is not on your side.** They have one, and only one, objective – to spend as little as possible to resolve your claim. This is it. Period.

**Second, with the first rule in mind, do not give a recorded statement.** You may not recall things properly, you may be goaded into saying something that is not entirely accurate, you may downplay unknown injuries. Many, many more things can go wrong than can go right.

So let's say that you've managed to make your way through the initial call. Now the adjuster is asking you for medical authorizations. This is okay, mostly, but how far back do you go? Keep in mind rule number one.

Once the adjuster has the medical records she may "want to discuss a resolution." This sounds promising! A quick result! Well, generally there's a reason for that.

They want to "low ball" you. They want to pay you as little as possible to sign a release and go away. What's a release, you ask? It's the document that the insurance company is paying you to sign. The one that says that you will never, ever, bring a lawsuit against their insured for damages arising out of the accident.

This means that if a month after signing it you realize that your headaches aren't as minor as you thought – too bad. It means that if a month later you realize that you actually do need surgery to repair your leg – too bad. You get the point.

The bottom line when it comes to dealing with an insurance company is that sure, you could handle it yourself, but in our opinion you should be very careful if you chose to do so.

In our experience the fact is that often insurance companies simply do not take a situation as seriously where a) there is no lawyer involved; or b) there is a lawyer involved but it's one with a reputation for settling every single case that they have.

**(Tip: if an insurance company knows that the lawyer will not file suit and, ultimately, go to trial if necessary, they will undervalue the case. It's like dealing with kids – if they know you won't follow through they'll be less likely to listen to your threats).**

## BURNING QUESTION #2: WHO WILL PAY FOR THE DAMAGES?

If you've been in an accident you know that the word "damages" can mean several different things. It can mean damage to your car or property, damage to your body, damage to your mind, or all three. The question is, who pays for those?

Let's start with the car. Assuming you have auto insurance (and you'd better), your insurance company will pay for any damage as a matter of course. If it turns out that someone else was ultimately at fault, your insurance company has the right to pursue what's known as a "subrogation" claim against the other insurance company. You need not worry about this.

No-fault will also pay for your damages up to a threshold of \$50,000. If you exceed that threshold you may apply for additional no fault benefits if you have them available under your insurance policy (they're commonly referred to as "PIP" coverage).

Once you get beyond the no-fault threshold it may be time to look to the driver of the other vehicle. You should have already made a claim with the other driver's insurance company (by simply sending them a letter notifying them of the accident and your potential claim you will trigger a new "claim" under the policy). If liability (fault) is clear they may pay your bills or offer you something to settle the case (keep in mind that your own carrier may still be paying the bills at this point). If you have a "serious injury", however, you may want to think twice before settling the claim. Which brings us to number 3.

## BURNING QUESTION #3: WHAT IS A "SERIOUS INJURY?"

Under the New York Insurance Law (commonly known in this situation as the "No Fault" law), your recovery is limited to no fault benefits unless you can establish that you have suffered a "serious injury". Now, what New York defines as a serious injury and what practically constitutes a serious injury are two completely different things. We've known lots of people who have suffered severely, but because they did not fit into one of the "boxes" of serious injury they could not pursue a lawsuit.





So what, exactly, constitutes a serious injury under New York law?

- a) Death;
- b) Dismemberment;
- c) Significant disfigurement;
- d) Fracture (the most common);
- e) Loss of a fetus;
- f) Permanent loss of use of a body organ or member;
- g) Permanent consequential limitation of a body organ or member;
- h) Significant limitation of use of a body function or system;
- i) Medical determined injury of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 out of 180 days immediately following the injury.

As you can see, this list was clearly written by lawyers or politicians, and tends to make things more complicated than they likely need to be (isn't that always the case?). The bottom line is that in order to have suffered a "serious injury" in New York you must have either had a fracture of a bone or be severely limited in your ability to perform day to day tasks.

If you have a "serious injury" you are permitted to bring a lawsuit against the wrongdoer – this is important because this is how you are able to get to the wrongdoer's insurance policy to help pay for your damages and pain and suffering.

## BURNING QUESTION #4: IF I MISS WORK, CAN I RECOVER?

When you miss work following an accident you really are adding insult to injury. On top of the physical damage to your car, and likely to your body, you are now either forced to burn through your benefits/vacation, or simply not show up to work and not be paid.

The good news is that any lost wages that you lose as a result of the accident become an element of the damages in your lawsuit or claim, and if you prove that you were not at fault, you would be entitled to be reimbursed for those damages.

Keep in mind as well an unrelated legal protection (that we happen to also have experience with in our employment law practice), which is that if you work for a large enough company (more than 50 employees) you may be entitled to have any medical leave protected under the Family & Medical Leave Act ("FMLA"). This would mean that if you sustained an injury that resulted, for example, in hospitalization, this would likely constitute a "serious medical condition" which would give you FMLA protection. In other words, if you were in the hospital for surgery/recovery, your employer would have to hold your job.



If you work for a smaller employer and have an injury that limits your ability to work at a full rate (or requires some modification/limitation) on return, you should ask the employer for an accommodation. To the extent that your injury constitutes a temporary “disability”, you may be entitled to some legal protections under both New York and Federal laws relating to disabilities.

## BURNING QUESTION #5: IF I’VE BEEN INJURED BEFORE - DOES IT MATTER?

The short answer is – maybe. If you have not already realized, the primary goal of the insurance company is to pay you as little as possible. They will pick through your medical records with a fine toothed comb, and if they find any suggestion that you may have sustained some prior injury that could reasonably have made the current situation worse, they will jump on it.

The conversation typically goes something like this: You (or your attorney) send your medical records to the claim adjuster for the insurance. A few weeks later you receive a call or letter, stating that they’ve “noticed in reviewing your medical records that you sustained an injury to the right shoulder in 1991. Please provide any and all records of treatment from that condition.”

Now, look, we get it. Insurance companies do not stay in business by paying more than they should on claims. That being said, many will cling to anything that they can to try and diminish your claim. There are two ways to handle this.

The first is to simply tell them that the two injuries are clearly not related, you’re not giving them the records, and if they don’t like it you’ll file suit and they can pay

for a defense. This may or may not prompt further negotiation, but if you know for a fact that the injury is entirely unrelated it may be the right approach.

The other option is to provide the authorizations/ records but take the firm position that you are not considering this prior (unrelated) injury in your settlement evaluation. Keep in mind that while this approach may lead to further negotiation, it is ultimately going to be difficult to remove the “pre-existing” injury from the conversation all together. Your best bet is to continually take the position that it’s entirely different, unrelated and, most importantly, point to the lengthy period of time since the last treatment for that injury (assuming this exists) and the fact that prior to this accident you had been enjoying a normal life.

What if, however, your prior injury does in fact relate to the injury you’ve suffered in the accident. We see this most commonly with shoulder and knee injuries, for example when someone has had a lingering shoulder problem for which he has been getting treatment on and off for several years. This has limited the individual only slightly, but following the accident the shoulder injury is much more pronounced and now the individual cannot lift his

arm over his head. This may require surgery, perhaps some kind of rotator cuff repair. The insurance company will certainly focus on this prior injury to diminish the damages.

The best way to deal with this situation is to be sure to highlight the ways in which both the injury and

its effects have changed your life. Oftentimes the difference is clear and in some ways measureable, and being able to clearly identify the differences is the key to navigating around the negotiation.

## BURNING QUESTION #6: WHAT IS SUM COVERAGE?

SUM, or underinsured coverage, is like any other insurance. You hope you'll never need it, but if you do you'll be very, very happy that you had it.

In fact, did you know that if you were injured in a car accident that wasn't your fault it is possible that you could get left with very little recovery?

It's true. And it happens to people every day (I know because they come into my office frustrated because they won't be made whole because the other driver was underinsured).

There is a way to ensure you don't get left with a serious injury and no recourse, it's called SUM or underinsured coverage.

SUM stands for "supplementary uninsured motorist." SUM is a part of your car insurance that requires your insurer to pay for any excess damages that you sustain from a car accident where the other driver is uninsured or underinsured. So, for example, if you are hit by a car that only carries \$25,000 in coverage but suffer \$100,000 worth of damages, if you have SUM coverage your policy could be looked to for the balance.

New York requires a minimum of \$25,000 in SUM coverage, which may sound like a lot, until you need more. Just an extra few dollars a month for significantly more SUM coverage could save you thousands of dollars, hours of your time, and a ton of frustration.





# CONCLUSION

So there you have it, six common questions from victims of accidents. We hope that by reading this report you've learned something about how to help yourself. If you still have questions, or feel that you need a lawyer, please feel free to give us call. We're always happy to answer more of your questions.

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