D'ORAZIO PETERSON | WHITE PAPER

The Consumer's Guide to Injury Cases in New York

518-308-8339 • doraziopeterson.com

D'Orazio Peterson LLP | 193 Lake Avenue | Saratoga Springs, NY 12866

Contents

Introduction

We can't blame you for thinking that you need a lawyer.

Everywhere you look you're constantly being reminded that you probably do. Sides of buses, television, radio, yellow pages (does anyone keep these anymore?), online. You name it and our profession has it covered. We may be second only to the auto industry in telling you how much you need us.

And, frankly, there are many times when you do, in fact, need a lawyer. Generally speaking, you probably should not buy a house, put together an estate plan, buy or start a business, file for bankruptcy, child custody or defend a criminal ticket without hiring or at least consulting with a lawyer. They (the good ones) are specially trained and often bring quite a bit of specialized knowledge and experience to the table. A good lawyer, like any good professional, can help guide you through a complex process.

But there are also situations which do not, necessarily, call for a lawyer. Handling a routine parking ticket, obtaining a passport, even filing papers for a partnership or LLC – these do not always require the services of a lawyer, and with a little bit of homework can be handled on your own.

Then there is the case where you have suffered a serious injury. This situation may be different, for a few reasons.

First, there's the fact that injury lawyers are the most likely to be seen

on the side of a bus, on television, billboards or anywhere else where advertising is available. This is because they want you to believe that you need them if you've suffered the slightest injury and, generally, in advertising, he or she who shouts loudest, wins.

We have some news for you:

You may not need them (or us).

Truth be told, and this should come as no surprise, there are many situations in which we highly recommend hiring a lawyer for an injury case. The types of cases that we handle, for example (severe injuries following car accidents, medical malpractice and employment discrimination), often involve complex legal issues, significant expert witness fees, procedural pitfalls and lengthy litigation. These are not cases in which you would want to represent yourself. In these cases, it is worth it to pay a highly focused lawyer to represent your interests (more on how to choose that lawyer later). Not only will doing so ensure that the case proceeds appropriately and correctly, it will also allow you to try and move on and focus on other things (such as getting treatment or looking for a new job).

Sometimes, however, a lawyer may not be the right answer. Don't get us wrong, many lawyers will tell you they're always the right answer. No matter how small your injury, or how minor your problem at work, you can always find a lawyer who takes your case and either takes one-third of your settlement or charges you several thousand dollars.

But let's say you're different. You're someone who doesn't mind doing a little bit of homework and doesn't necessarily want to pay someone a lot of money if in the end it will not be worthwhile. We get it, and that's why we've written this book. We believe that our profession is furthered when people receive the actual help that they need and, maybe more importantly, do not receive help when they do not need it.

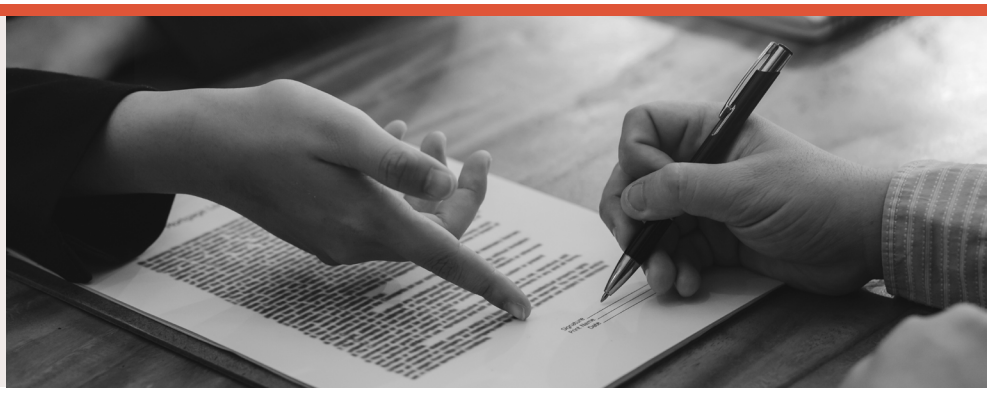
So, if you or your family member have suffered a serious injury (or death) because of another person's carelessness, you may want to call a qualified lawyer (we're happy to help). If, however, the injury or workplace issue is not so severe, but warrants further action, you may very well find that you don't need a lawyer after all. Either way you may benefit from reading this book first.

A Note on This Book

This book is not meant to be a comprehensive guide to assessing or handling your personal injury. It is intended to give you guidance into how these cases work in a complex system.

If there is ever any question in your mind whether you need an attorney, contact one. While we can't speak for all firms, we will tell you quickly and (generally) free of charge whether you should hire an attorney.

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.



Section 1

An Overview of the Processs

Beyond buying a house, writing a will, or contesting a traffic ticket, most people have no idea how the legal system works.

This is a good thing.

It means that they've never been tangled up in a complicated world that operates in a completely different way than their day to day life.

The legal system is slow, meandering, confusing, and frustrating. It's rare to find a straight line between point A and point B, especially if point A is you and point B is something you want.

Why is it so difficult, you ask, for someone (or their family member) who has suffered a life-altering accident or injury to obtain a fair and adequate recovery for that injury?

The answer is not one specific thing. It is the system. It is the combination of lawyers, insurance companies and courts. And it can be immensely frustrating, both for the individual being introduced to the system for the first time, as well as for the lawyer trying to help that person get what they deserve.

The personal injury or negligence case is a lawsuit that is filed on behalf of a victim, or in the case of death, the executor or administrator of the estate of the victim. It is typically filed in what is known in New York State as the Supreme Court or Federally as the District Court – which are the trial level civil courts.

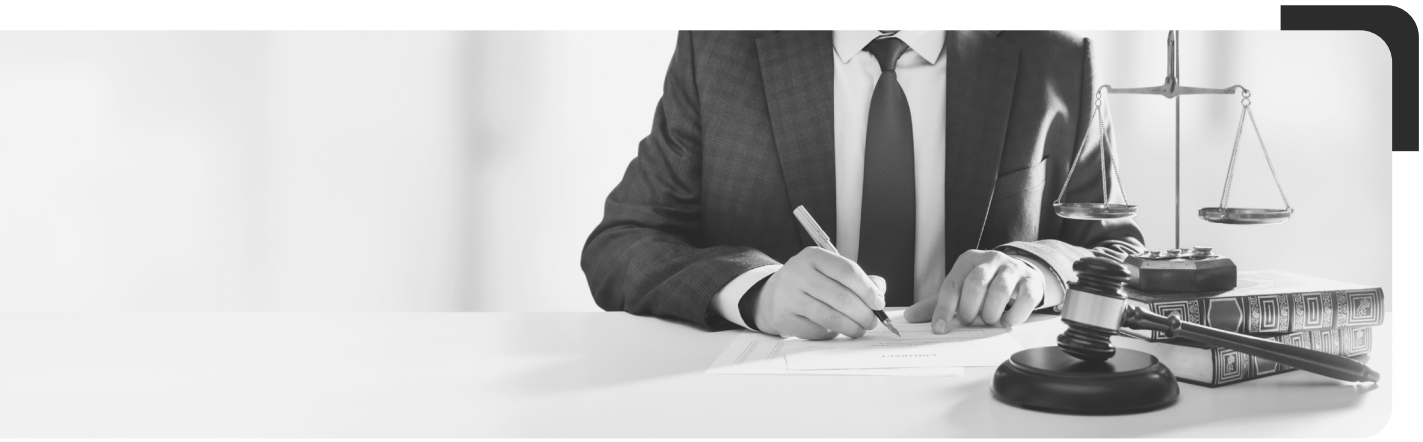
PART 1.1
Do I even need an attorney?

If you are planning on filing a lawsuit in New York State or Federal Court, we strongly recommend that you engage the services of a qualified and experienced attorney.

The civil litigation system in New York can be a minefield of procedural pitfalls, and it can be quite difficult for a layperson to navigate his or her way through the process.

This does not mean that everyone who suffers because of the negligence of another needs to hire a lawyer, and in fact that is certainly not the case. Throughout this book we will be discussing those situations in which it may not be necessary for you to hire an attorney. Those individuals with relatively minor injuries can and often do negotiate resolutions with insurance companies.

If, however, the case involves severe injuries, claims against physicians, hospitals or nursing homes, or claims against large companies, we strongly recommend that you contact a qualified and experienced attorney prior to signing any papers or entering into any formal settlement. Large companies, physicians, hospitals and nursing homes have extensive resources to hire very competent attorneys, and can easily overwhelm an individual with little or no training or experience in the field.



PART 1.2
Defining an Injury

Let's put first things first.

Despite what you see on TV, if you've been injured in an accident and have not suffered a significant injury, the fact is that you may not need a lawyer. This is not always the case and, if you feel that you would like the help, by all means call a lawyer (just please do your homework first).

The unfortunate reality of the legal system is that lawsuits – personal injury and medical malpractice lawsuits in particular – are expensive and time consuming. Between court costs, fees, expert fees and other necessaries, case costs are often in the tens of thousands of dollars. For this reason, law firms generally, and ours in particular, are not able to accept every case In fact, we intentionally limit the number of cases in our practice at any given time, in order to allow us to devote sufficient time to those clients whom we feel we can best serve.

Generally speaking, we represent victims or family members who have suffered very severe, life changing injuries (or death), because serving victims or families in these cases allows us to truly help. This requires us to say no to many individuals, but in the end our clients are better served.

Well-Known Case Studies

Sometimes you can't blame the public for disliking lawyers. In fact, lawyers routinely make the "Top Ten Disliked" list of professionals, up there with politicians, "stock traders" and, oddly, dentists. But then you see some of the stuff that lawyers are doing and you can start to understand why.

I Wanted More Napkins!

Sometimes a lawsuit makes the news that leaves you scratching your head. Like the guy in Los Angeles who sued McDonalds because he said they would not give him more than one napkin. We get it – we have kids and one napkin is nowhere near enough. But the lawsuit seems like it's probably not worth the time, and whether the man sustained a "serious injury" is probably up for debate. This is also the sort of thing that people read, roll their eyes, and continue to have the legal system and lawyers in general.

*This case should not be confused with the poor guy in Wisconsin who filed a lawsuit accusing a chef at the "Texas Roadhouse" restaurant of cutting open his steak and intentionally inserting a clump of his hair into the food." Remember, significant injuries are not only physical, but can be emotional as well.

The Hot Coffee Case that Sparked a Revolution (sort of)

Many of us remember the McDonalds "hot coffee" lawsuit that was filed in the 1990's. If you don't you may want to stop and read about it, it has its own Wikipedia page.

The case was brought by a 79-year-old woman who suffered 3rd degree burns to her pelvic area after spilling a cup of hot coffee on her lap. After trial a New Mexico jury awarded her nearly $3 million. (The case was subsequently settled for less than $1 million).

The case sparked a national outcry against the legal system, and personal injury lawsuits in general. The outcry against "frivolous lawsuits" were significant.

But the fact in that case was that the victim suffered very severe burns when the coffee spilled, and her attorneys presented a credible argument that fast food places were simply serving the coffee too hot. As a result of the case and public fallout (HBO produced a documentary, Hot Coffee, several years later) McDonalds claimed that it did not reduce the temperature of the coffee, but did increase the number of warnings associated with ordering the product, and maybe saved some others from being hurt.

PART 1.3
How Long Does the Case Last?

Personal injury or negligence claims in New York typically last anywhere from nine to eighteen months, and involve several stages including paper discovery (exchange of paperwork and investigation materials) and depositions (questions under oath of the parties and witnesses).

Some cases get settled after this point, and some go to trial. It is important that if you speak with an attorney you discuss the likely timing and flow of the case in advance, as well as set very clear expectations regarding settlement, trial and costs and fees. Attorney-client relationships are built upon trust, so it is absolutely crucial that both attorney and client be open and honest with each other from the outset of the relationship.

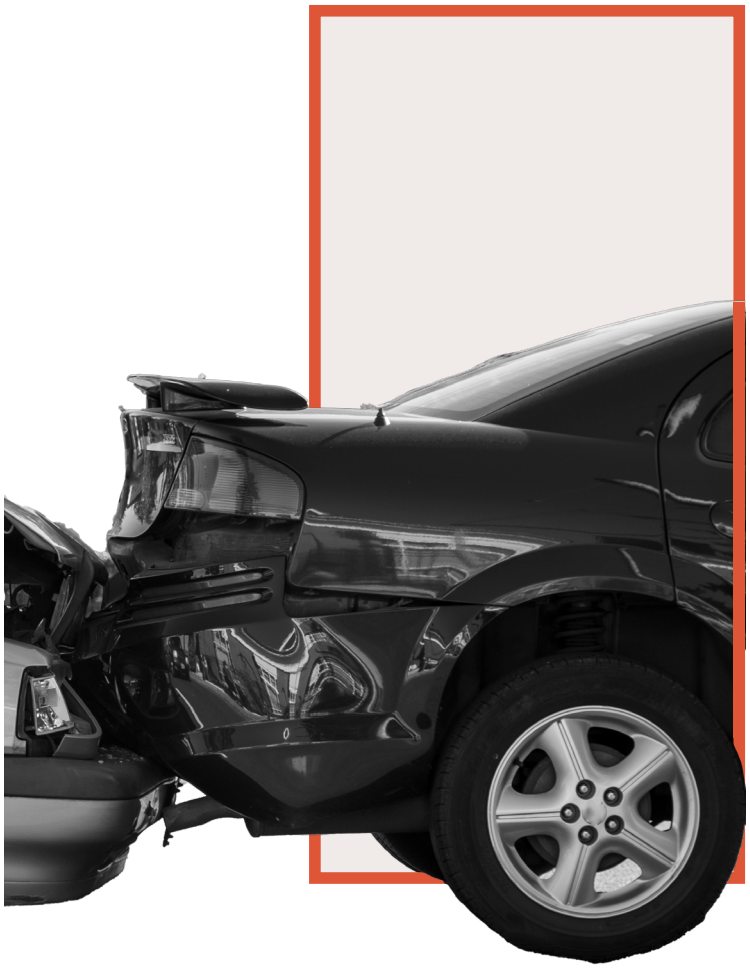
In the end, the decision to hire an attorney is not one that should be taken lightly. Nowadays people research things like computers, cars, televisions and books ad nauseam before they buy them, so why not their attorneys and physicians as well? Ask around, do some reading, see what type of reputation the attorney or firm has. We can assure you – because we have been on the other side – that if the attorney or firm has a poor reputation, or is considered a "mill" that just settles claims and never actually litigates, defense lawyers and insurance companies will know this and will take advantage of it. If, on the other hand, the attorney or firm is respected, and known to aggressively fight on every case, defense firms and insurance companies will take note of this as well, and, we believe, it will serve you well to have this type of attorney or firm on your side.

In the end, the decision to hire an attorney is not one that should be taken lightly. Ask around, do some reading, see what type of reputation the attorney or firm has. We can assure you – because we have been on the other side – that if the attorney or firm has a poor reputation, or is considered a "mill" that just settles claims and never actually litigates, defense lawyers and insurance companies will know this and will take advantage of it.

PART 2

The Real Players in a Lawsuit

(Hint: It's Not the Wrongdoer)



A personal injury or negligence lawsuit in New York is almost never brought against an insurance company directly.

Instead, it is brought against the party who caused the accident, or the physician, hospital, facility, nursing home, etc. which is alleged to have been at fault.

In most cases, however, the party has some type of liability insurance, which is a good thing. In the United States civil justice system, monetary recovery is the primary method by which people can resolve disputes, and it is important to know that the wrongdoer has something (i.e., an insurance policy) that can pay to make you "whole" again.

This means that the first step in the legal process is often determining whether sufficient insurance coverage exists to even resolve a claim in the first place. In our practice, for example, it is very rare that we accept a case where sufficient insurance does not exist to satisfy a potential judgment. From a realistic perspective it simply does not make sense – to us or the client – to spend a year or more litigating a case and incurring costs associated with that case, if there is no one who can potentially pay at the end.

This brings us to the actual party in the case – the insurance company for the wrongdoer. If you elect to proceed on your own this is who you'll be dealing with. They may even take the first step in contacting you following the injury.

continue...

When you've been in an accident and are badly injured, you will look to the insurance company for the wrongdoer to make you whole.

This could be an automobile insurance carrier, like Geico, State Farm or some other in the case of a car accident; a homeowner's insurance company in the case that you are hurt in an accident at someone's home (or by their pet); a business insurance company if you were hurt at a store, construction site or some other business; or a medical liability insurance policy if you were hurt because of the negligence of a doctor, hospital or nursing home.

What each of these have in common is that they are there to pay claims when their insured (whether a driver, homeowner, business or medical provider) causes an injury because of their own error, or negligence. So, if you have been hurt, you would think that you could just make a claim, establish your injury, and be paid damages commensurate with that injury.

Insurance companies are in business.

Except, however, that almost without exception, insurance companies are in business to make money. They are "for profit" companies. Which means that a perfect year for them, business wise, would be paying zero dollars in claims.

Do you see the problem?

Insurance companies are not in business to pay claims; they are in business to save money (and, by extension, make money for themselves) by paying as little as possible on claims.

What does this mean for the average person who has suffered a life-altering injury? It means that it is very, very unlikely that the insurance company for the wrongdoer will simply pay you what you think you're entitled to.

Insurance companies are big.

Another factor is that insurance companies tend to be big, as in they employ hundreds if not thousands of people, and write insurance policies in many cases throughout the country if not the world.

Because of this they are often bureaucratic and inefficient. There are many levels of management; there are computerized programs to evaluate claims, and to "value" injuries (yes, a computer program will tell an insurance adjuster how much your injury is worth); there are matrices to evaluate claims. What this means for you is that the process does not simply involve one decision maker; instead it often involves many, and the more severe your injury and damages, often the more complicated it becomes.

RULE #1

Remember that. Say it to yourself again.

And keep it in the forefront of your mind if you elect to move forward representing yourself, because they will try to make you think they are your friend. They will do what they can to make you feel comfortable. But make no mistake – their only goal is to pay as little money as possible to resolve your potential case.

Second, with the first rule in mind:

Do not give a recorded statement to someone else's insurance company. 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. Your own insurance company may want a statement and, under your policy, you may be required to comply. Try to find your obligations before you do anything.

After the Initial Call

Let's say that you've made your way through the initial call with the insurance company. Now the insurance adjuster is asking you for medical authorizations. This is okay, mostly, but how far back do you go? Adjusters will often want to look deep into your medical history. This is not because they want to get to know you better. Keep in mind rule number one. This is because they want to find something in your history that they can use against you, such as a prior injury.

Once the adjuster has obtained all of 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 "lowball" you. They want to pay you as little as possible to sign a release and go away. What's a release, you ask? We'll cover that in detail below but, in short, 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 can handle it yourself, but in our opinion you should be very careful if you choose to do so.

It's also been our experience 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).

Case Studies
Insurance Companies Acting Badly

EXAMPLE 1: D'Orazio Peterson client gets low-balled, then wins at arbitration.

We had the pleasure of representing a young woman who received very severe injuries after being kicked by a horse during grooming. She was disabled for several months after the injury, which could have been prevented if the horse's owner had simply warned her that the horse was in the habit of "barrel kicking" (kicking with both hind legs in an aggressive manner).

When the client contacted us (through another lawyer who thought we may be able to help), the insurance company had taken the position that there was no fault because the victim was a "horse woman" and should have known better.

The insurance company dug in, offering a few thousand dollars to the victim. We took over, hired a "horse expert", and a year later received a more than six figure award from an arbitrator. Needless to say, the insurance company was not too happy.

EXAMPLE 2: The Private Investigator gets caught.

If you did not know that insurance companies will hire private investigators to follow you around, you've now been warned. Some insurance companies will do whatever they can to diminish the damages in a lawsuit, and this includes getting photo and video evidence that the victim is not as injured as they claim.

This can be very effective, unless of course the investigator is not good at his job.

We had some involvement in a case several years back that involved a 40-something man who had been injured at work. He suffered severe back pain and had difficulty carrying groceries, moving between his house and car, etc.

The insurance company thought that he was exaggerating his injuries, so they hired a private investigator to go to his house and take pictures of him. The problem was that the house sat on approximately five acres of land near the woods.

The investigator apparently did not see the private property signs, or simply ignored them, and staked himself out under a pile of leaves on the property. He had himself a good hiding spot, until the victim's son and his friends literally tripped over the investigator while tossing a football around.

Needless to say the investigator took off running – with his camera – upon being discovered, and the insurance company was forced to apologize to the victim for its improper conduct (that is, after all, trespassing).

The Role of the Lawyers

If/when a claim cannot be resolved directly with an insurance company, the next step in the process is to file a lawsuit against the wrongdoer.

Keep in mind, this action does not eliminate the role of the insurance company – they are always there in the background because, remember, they will ultimately be responsible for paying the bill if you are successful.

But when you file a lawsuit, the insurance company moves to the background, and in come the defense lawyers. These lawyers are hired by the insurance company to defend the interests of their insureds – the wrongdoer against whom you have filed suit. Yes, you read that right, they are hired by and their bills are paid by the insurance company, but they represent the person who caused your injury.

Why does this matter?

Because the person who caused your injury may very well say, "I'm at fault here, pay this person what they are entitled to."

Except the insurance company does not make money by doing that, nor do the lawyers that they hired to defend the person who caused your injury. And so the process goes on. And the lawyers who have been hired by the insurance company (who are mostly good people) are also in business, except in their business they get paid by the hour to defend lawsuits. And if they resolve those lawsuits quickly? They make less money.

So the lawsuit drags on, and the lawyers sometimes make absurd arguments, and file papers with little to no chance of success. And slow down the process. And because of this, we (the lawyers who represent the injured person), try to use the only thing we have to move things along and toward a resolution. The court.

The Role of the Court

The judicial system set out to allow people to resolve their disputes civilly. This is, of course, better than the alternative of dueling with pistols every time we have a disagreement.

The problem is that there are a lot of disputes, and because of that the system can become clogged and can get backed up.

If you've ever had the misfortune to have had to appear for a ticket in a New York City courtroom, you'll understand.

Practically, this means that once a case gets into the judicial system, it automatically slows down. And, unfortunately, this is where some of those efforts by the defense can really grind a case to a halt. Judges have lots of cases at any given time, and for the most part every time someone makes a formal request (known as a motion) for something, the judge (and his or her clerk) have to research the law, look at the facts, and make a decision, in writing. You can see how this could quickly become backlogged. While there are generally rules about how long a judge can take to decide, practically it can take many months (and sometimes a year or more) to get a court to rule on a decision that is necessary to move a case forward.

And of course this becomes infuriating to the injured person, who wants nothing more than to be adequately compensated for her injuries. We have these conversations with clients all the time. And while there are some tricks of the trade that we use to move cases forward as quickly as possible, to some degree the timing of things is outside of our control.

PART 3
Putting a Number on Pain & Getting to a Settlement

If you or someone you care about has been injured (or worse) in an accident, the last thing you are generally thinking about is "what is the dollar amount that would fairly and reasonably compensate us for the damages."

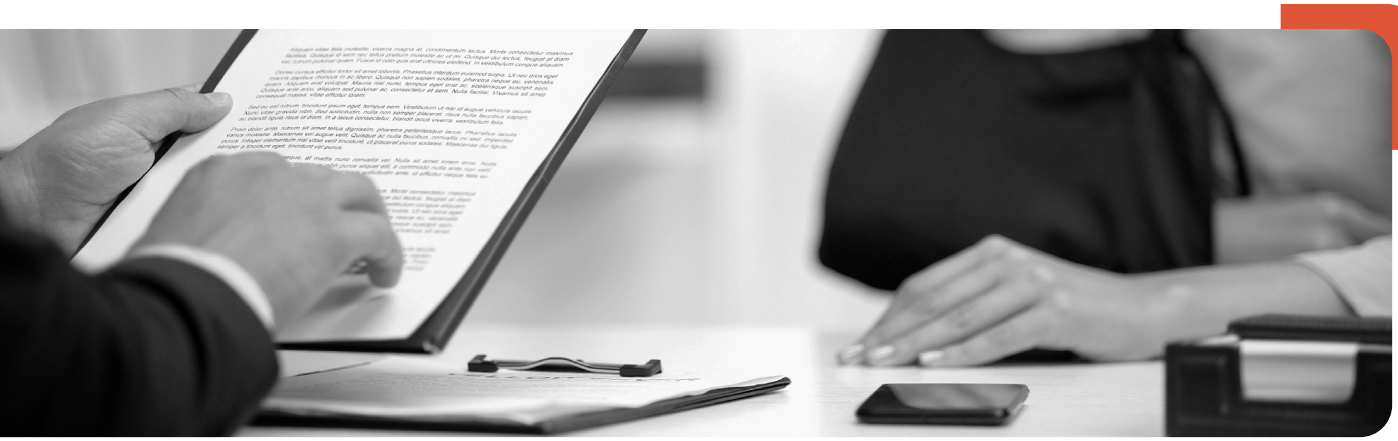
That's normal and, frankly, if money were the first and only thing you thought about, you aren't our type of client. You should go call the lawyer that you see on TV.

The reality, though, is that we only have one system for resolving these sorts of disputes. And, in that system, the only way to make a person or family "whole" following an accident/injury is by awarding them money.

So if you plan to go it alone you'll need to consider this – what is the amount of money that we should ask for?

Let me start with a secret that most lawyers and insurance companies won't tell you – there is no magic formula. They may try to make you think that there is, but they're wrong.

The reality is that each and every single case and injury are different. People come to the table with very different backgrounds, obligations, body types and medical histories. They heal differently. You get the picture.



So if there's no magic formula, then how does one put a number on pain?

Well, first, the number is not just on pain alone. When you are injured because of someone else's negligence, you are entitled to recover for your loss. This includes not only your physical pain and suffering, but your emotional pain and suffering, your economic loss, and potentially the loss to your family.

This is where things become a bit complicated. If John – a 20-year-old single man – suffers a broken foot that requires one surgery and a six-month recovery, this is somewhat straightforward.

> **"...while the calculation can be a simple one, often it is not."**

If, however, John is killed in the accident and he is a 45-year-old father of two, husband, and one of two working parents, well now things have become more complicated. Now John's family has suffered in addition to his own damages. And this must be included in the calculation.

When we represent victims of accidents we consider several things in arriving at a "number" for the case value. These include the physical injuries, lost income, loss to the family, etc. But they also include our personal experience in these cases (what have similar cases resolved for?), as well as research into other settlements throughout the state and what juries have historically awarded in cases with similar injuries that went to trial.

We also look at potential for future medical problems, as well as whether there are lost benefits including, for example, lost retirement benefits, based upon the lost time from work following the injury (this is particularly true in the case of state and federal government employees). In many cases, we bring in expert economics, physicians and vocational experts to help value the damages.

So, needless to say, while the calculation can be a simple one, often it is not. If your injury is more than "basic", it might make sense to talk with someone about valuing the potential case.

Case Study

A severe injury gets worse.

We had the fortune to meet a very nice, dynamic and talented young man who came into our office a few years ago. At the time of our first meeting this young man had been suffering with a foot problem as a result of a missed diagnosis by his doctor. Assuming there was in fact a misdiagnosis, his damages were fairly straightforward.

Fast-forward one year, and the situation was infinitely worse, as the missed diagnosis had allowed a cancerous mass to progress. Needless to say this news was devastating to the family.

We help this young man's family work through this extraordinarily difficult time, and in so doing the assessment of the damages as a result of the misdiagnosis changed dramatically. This highlights the importance of working with someone with experience, rather than trying to go at it alone.

Getting to a Settlement

If you watch television (and in particular the commercials), you might think that getting to a settlement is easy. And, frankly, in some cases it is.

If, for example, you've been hurt in a car accident, have a couple of bruised ribs and no other major injuries, you might be able to resolve your case in one or two phone calls with the insurance company.

You might even get a "good" result. Depending on the insurance company, they may offer you $5,000, $7,500, even $10,000 based upon the severity of your injuries. In some cases – remembering that this is generally tax free – this is a good result.

The sticky part comes when you have either 1) sustained more severe injuries; 2) you have sustained injuries which could lead to further complications down the road; or 3) you have sustained injuries that have limited your ability to work and have, as a result, caused you to suffer economic loss (including lost retirement benefits). If you fall into any of these categories and you settle your case quickly or for a low amount of money, you are doing yourself and your family a disservice.

Our advice, without hesitation, is that if you fall within any of the three scenarios above, you strongly consider hiring a lawyer to handle your case. Assuming you hire the right lawyer, it will generally work out to your benefit in the end.

If you do not fall within one of those scenarios, you may very well wish to negotiate on your own. If this is the case, there are a few points to remember.

1. **FIRST -** as we've said before, the insurance adjuster is not your friend. Keep that in mind throughout the negotiation. His/her job is to pay you as little as possible to settle your case.

2. **SECOND –** and this is generally the case in any negotiation – start higher than you want to end up. If you think you'd like to end up with $15,000 in your pocket, don't start your negotiation by demanding $15,000 (or even $17,500). This will ensure that you don't get to where you want to be because the adjuster will take this starting demand as an indication that you will settle for somewhere around 50% or less.

3. **THIRD –** go into the negotiation with an idea of your "bottom line." Now this is, of course, where it's helpful to have some experience negotiating these sorts of things, but if you don't have a realistic bottom line expectation you'll be less likely to get the case settled.

4. **FOURTH –** never accept the first offer. That is, unless they offer you what you've demanded, in which case you probably did not demand enough. (Hindsight is always 20/20).

5. **FIFTH –** Be prepared to argue about the severity and extent of your injuries. They will try to downplay them – this is what they do.

If you follow these five concepts, you'll be in a much better position out of the gate than most. And, worst case, if you cannot reach an adequate settlement you can contact an attorney for help.

Case Study

Low first offer turns into great client result.

A D'Orazio Peterson client had been victimized by severe sexual harassment at work. She made complaints, and dealt with the bad behavior until she simply could not take it any longer.

When the client came to us she was out of work and dealing with the fallout of the harassment. Her former employer claimed that the conduct was not significant, and was "locker room talk." They refused to pay her a dime.

We were hired and shortly after the former employer made a "take it or leave it" offer to the client of a few thousand dollars.

We declined, and moved forward with a lawsuit, where we fought tooth and nail with the employer to get internal documents, and threatened to take depositions of numerous current and former employees.

Fast forward eight months and the client received a settlement in excess of half-a-million dollars.

The point here is not to brag about a client's recovery. It's to illustrate that many times a victim will not be adequately compensated unless and until she shows the other side that she (and her lawyers) are willing to go the distance in a lawsuit. In these situations, the choice between going it alone or going it with a lawyer is simply not a choice at all.

Signing the Release

When you negotiate on your own one of the most critical factors to keep in mind is that if you reach a settlement you will be asked to sign a release in exchange for payment. This release is a "general" release, which in effect means that you are releasing the wrongdoer (and, often, the insurance company) from any and all claims whatsoever that you had or may have had against them. Ever. Up until the date that you sign.

If you're going to sign this release without an attorney be sure that it limits itself to any claims occurring up to the date that you sign it – and not after. The last thing that you want is to sign a release that prohibits you from ever pursuing a claim in the future (if, for example, the same person hit you again with their car).

You'll also want to be sure that you are aware of and have addressed any liens that may exist, as the release will likely include some language stating that you will indemnify the insurance company if Medicare, Medicaid, or anyone else should come after them down the road claiming that you failed to pay off your liens.

Case Study

The minor injury that wasn't.

Generally speaking, if you're hurt as a result of the actions of a private individual there are three years to start a lawsuit. Now, in most cases we would not recommend waiting that long. There is, however, some benefit to waiting at least long enough to determine the extent of the actual injury before resolving the claim.

We have seen too many instances of an injury victim who comes to us after having signed a release against the insurance company and wrongdoer. Some injuries simply take longer to manifest, such as a traumatic brain injury, for example, and if you settle the case within a month or two after the accident you will be stuck with the result even if you end up having a very severe injury in the end. Don't make this mistake.

Section 2

The Most Common Questions from Victims

Part One: The Accident or Negligence Case

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 "lowball" 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).

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.

Question #3

What is a "serious injury"?

Under the New York Insurance Law (commonly known in this situation as the "No Fault" law), if you've been in a car accident 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?

- **Death;**
- **Dismemberment;**
- **Significant disfigurement;**
- **Fracture (the most common);**
- **Loss of a fetus;**
- **Permanent loss of use of a body organ or member;**
- **Permanent consequential limitation of a body organ or member;**
- **Significant limitation of use of a body function or system;**
- **Medically 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.

continue...

Question #3 (continued)

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.

Keep in mind the "serious injury" threshold only applies to car accident cases. That being said, the thought process behind whether you need to hire a lawyer is similar. If your injury is relatively minor you may be better off making a claim yourself or, in some cases, not at all.

If you have been in a car accident but have not sustained a "serious injury", you may not need a lawyer. The fact is that, if you did bring a lawsuit, it could potentially be dismissed and "soft tissue" cases, as they're commonly known, can often be resolved directly with the insurance company for the wrongdoer.

Now, an important point to remember here is that, in cases involving private drivers, you generally have three years to file a lawsuit in New York. This means that you should be absolutely sure that you have, in fact, suffered a soft tissue injury before settling your case. We strongly recommend talking with your doctor (even getting a second opinion in some cases) to ensure that you are not at risk for future exacerbation (or worsening) of the injury. The last thing you want is to settle your case early, sign a release (more on that later) and later realize that your injury was worse than you thought. Because at that point, you are really out of luck.

Keep in mind that if the driver who hit you is not a private person, but an employee of a municipal entity, for example, the time to file a lawsuit is much shorter and often requires that you notify the municipality of the potential claim. This is called a "Notice of Claim" and, while we will not cover it in detail here, you should be aware of its existence.

If your injury is not "serious" as defined in New York, you may want to consider whether you can handle the resolution of the claim on your own. Examples of soft tissue or non-serious injuries include: minimally sprained ankle or wrist, contusions, bruising, whiplash (in some cases), short term headaches that resolve, generalized back pain that resolves. Each of these could, of course, amount to a "serious injury" depending upon their length and treatment needed but they often do not rise to the level of "serious" under New York law.

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.

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.

Question #6

What is SUM insurance 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 drive 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.

Section 2

Part Two: The Nursing Home or Medical Malpractice Case

The healthcare system in the United States is, in large part, based upon trust.

Sure, there are websites that rate physicians, and those that list complaints against medical facilities, but, in the end, when the average person is faced with the major decision of where to send a loved one or receive treatment themselves, it always goes back to trust.

Picture the typical situation in which a New York resident – let's call him John – finds himself faced with the decision of where to send his wife/mother/spouse/family member or himself for major surgery and recovery. Faced with the harsh reality that is the serious medical condition of a loved one – and all of the associated emotional and practical implications – John's conversation with the physicians or healthcare providers typically involves a lot of "listening," limited questions, and ultimately a substantial amount of deference to the provider with respect to what should be done to treat the condition, when, where and by whom.

Although the conversation between John and his physician would – ideally – involve a significant back and forth dialogue regarding the treatment and facility options available to the patient or his family member, it often does not. In fact, more often than not John walks out of that meeting with more questions than he had going in, and often left unanswered are the questions about the facility itself. The answers to these questions, which people like John almost always forget to ask, can give significant insight into the quality of care that John or his family member can expect to receive before and during the procedure, as well as during recovery, or in the case of the elderly, during a prolonged post-procedure stay.

This brings us back to trust. While in an ideal world John would have the time, resources and wherewithal to research a proposed facility well in advance and have an educated conversation with his physician about the location, we do not live in an ideal world. John is – much more often than not – left with nothing but the trust that he has in his physician, and, ultimately, in the facility that the physician recommends. And while there is no question that the great majority of physicians and facilities have good intentions, and in most cases live up to the expectations of families, occasionally that trust is broken, whether by John's physician, a member of the hospital or nursing home staff, or someone else. When this happens John or his loved one – who sought protection from the "system" – is now faced with a situation that is much, much worse than before, often with nowhere to turn.

The Common Questions

The common questions that we receive from victims of hospital and nursing negligence, or their families, are, inevitably:

- **“What happened?”**
- **“How did this happen?”**
- **“What can we do about this?”**
- **“How do we make sure that this does not happen again?”**
- **“Where do we go from here?”**

The answers to these questions are often very difficult for family members to hear, and are not always right on the surface. Often, after a serious event or death at a facility, family members find themselves shut out from answers. Facility apologists and defense lawyers will blame this frequent lack of cooperation on “plaintiff’s lawyers,” or “trial lawyers,” but the bottom line is that, more often than not, when family members come to us they do so because they feel they have nowhere else to turn to find the answers that they are rightfully seeking.

This publication cannot answer the specific questions that each victim has following an incident of hospital or facility negligence. Rather it is intended to serve as a guide for victims or their family members, in order to help them on their initial journey following such an incident, and to provide them with some guidance about what they can expect along the way.

Question #1
What happened?

Instances of hospital and facility negligence often present themselves in one of two ways: either as an "isolated" incident or as a pattern of conduct on the part of the physician, nursing staff or hospital staff which demonstrates a lack of due care. It is important to note that "isolated" incidents are often anything but, and can in fact be the culmination of multiple failures by the facility or staff to recognize a problem that was or should have been readily observable. Let's look at examples of some of the more common "isolated" incidents that were anything but isolated.

Case Study

Patient Sandy

Patient – we'll call her Sandy – is a 75-year-old woman who has been living on her own at home for the past several years. She presents to the facility with pneumonia, and during intake she is noted to have questionable underlying delirium. Through the course of her stay, the nursing staff members make several notes in the chart which suggest that the patient may be confused, agitated, and unable to fully assess her surroundings. On the seventh day, after exhibiting continued and increasing signs of confusion, Sandy tries to get out of her bed and falls to the ground, breaking her arm and hip.

Typically in a situation such as Sandy's, the hospital or nursing staff will document her fall as an isolated incident. In fact they may, after the fall, take some measures to ensure that it does not happen again such as restraints, a one-to-one assignment with a member of the nursing staff, or increased monitoring. Sandy's family members are left to wonder, "What happened?" The last they knew Sandy was okay, and it does not make any sense to them why she would simply fall as she did. This brings us to the first important lesson: always request a complete, certified copy of the medical chart for the patient – immediately.

If Sandy's family did not have an opportunity to obtain and review the medical chart, they would be resigned to wondering what happened, and to take the facility at its word that this truly was an "isolated" incident. The chart, however, may and often does present an entirely different picture. In Sandy's example, the chart would show that the facility had clear indications from day one that Sandy presented a risk to fall, yet failed to take any measures to ensure that she was adequately protected. These failures may constitute negligence – or the failure to act reasonably under the circumstances – for which the hospital or facility may be liable. By obtaining a complete copy of the medical chart early on, Sandy's family may be one step closer to the answers that they need.

Case Study

Patient Gary

Patient – we'll call him Gary – is a forty-five-year old male with moderate obesity, type II Diabetes and symptoms of blockage in his arteries. Gary's primary physician refers him to a specialist, who determines that he will need to undergo a bypass procedure. The surgery – performed at a reputable hospital – is a success and, after several days in recovery, Gary is transferred to a local rehabilitation facility to continue his recovery. At the time of his transfer, Gary is noted to have developed a "small" decubitus ulcer (otherwise known as a "bedsore") on his right buttock, which is at Stage I (the weakest). This is also noted on admission to the rehab facility.

The rehab facility accepts Gary, performs an intake, and notes the presence of the ulcer. They do not, however, create any formal plan to address and treat the ulcer, other than applying a topical ointment daily. During the course of the next two weeks, Gary's ulcer multiplies, and the primary sore becomes septic. When Gary's sister – who is from out of town and visiting him for the first time – notices a foul odor in his room, and realizes that Gary has not been moved from his position in two days, she immediately alerts the nursing staff. Gary is diagnosed as having multiple Stage IV ulcers, and is transferred back to the hospital where the surgery was performed for emergent surgery to attempt to clean out the sores. He is left with a severely prolonged recovery, three additional months in the hospital with extreme pain and discomfort, and is forced to wear a drainage/cleansing product on his body for the first three months post-release.

When Gary's family questions the hospital and rehabilitation facility about what happened, they are told that Gary was "at risk" for the development of sores, and that they "did what [they] could to prevent them from forming."

What Gary's family is not often told, however, is that there are very strict regulations in New York State which apply to treatment of patients in rehabilitation facilities and that, in truth, the staff of the facility failed to timely and appropriately put in place a plan to effectively prevent the original sore from increasing in size and severity and multiplying. As with Sandy's family in Example A, Gary's family – absent some industry specific knowledge – would have no reason to doubt that the rehab facility did what they could, and that Gary's condition was unavoidable. Their question of "What Happened" would be answered with "it was a rare situation that could not have been avoided."

The reality, however, is that if Gary's family were to obtain Gary's medical chart and have it read by someone with experience in these situations, the reader would immediately recognize that the "what happened" was not nearly as simple or straightforward as the rehab facility led them to believe. This information could help the family with the question of "What Happened", but absent some specialized knowledge by one of the family members, they would most likely not take any further steps beyond the initial conversation with the facility manager or nursing staff member.

Getting an answer to the initial question of "What happened" is often the first critical step for victims and family members, and it is a step that frequently requires the assistance of someone with specified knowledge.

More often than not, the description by the hospital or rehabilitation facility is the correct one, and is supported by the medical chart. Less frequently but often enough to warrant concern, however, the "what" as exemplified in "A" and "B" above, is not nearly as clear as the family or victim is led to believe, in which case the next question becomes, "How did this happen, and should it have happened?"

Question #2
How did this happen?

The family members of Sandy and Gary have significant questions about what happened. They have taken the first step and obtained a certified copy of the medical chart, and have reviewed it with an experienced individual – often an attorney who practices in this area of law. The initial review of the chart suggests that the "What" is not nearly as clear as the hospital or rehab facility made out, and now the family wants to know "How."

If the victim or family has not yet started discussing the care and treatment of Sandy or Gary with an experienced attorney, now is the time to do so. While they may certainly be capable of reviewing certain aspects of the medical chart, it is unlikely – based simply on their lack of experience – that they will know the key portions of a medical chart to review in trying to determine the "how."

The key at this point is to conduct a very thorough review of the notes from members of the hospital or facility nursing staff, to determine exactly what actions were taken (or not taken) at what time. In both Sandy's and Gary's examples there are more often than not recognized steps that are required or generally accepted practice when patients present with specific symptoms. In Sandy's case, for example, a formal psychological examination might have been required and, pending its results, the staff may have been required to increase the monitoring of Sandy, institute risk-to-fall safety measures including restraints, or otherwise take some specific action. In Gary's case, the nursing staff may have been required to put a formal written plan of care in place to address Gary's ulcers, which would include frequent specified rotations of the patient, application of medication and possibly early surgical intervention.

A detailed review of the medical chart is, however, only the first step in determining the "how." At this point the victim or family – possibly working with an experienced attorney – will likely need to consider consultation with a medical expert. There are multiple reasons why consultation with a medical expert is both helpful and often necessary. Initially, the expert will be able to help the family answer the remaining questions relating to "how," by identifying and discussing the specific failures by the hospital or staff which led to the patient's current state or condition. Secondarily, in the event that the hospital or facility did in fact fail to act reasonably in its treatment of the patient, the review by the medical expert will allow the family's attorney – if they desire – to move forward with commencing an action against the facility, and file a Certificate of Merit (see below). A good experienced expert will also help point the family and the attorney to relevant medical literature regarding what should have been the appropriate care and treatment, and can often be a great resource for family members looking for answers.

continued...

Retention of a medical expert, just as an attorney, however, should not be taken lightly. The family should perform research on both the attorney and medical expert before hiring either. There are lots of attorneys out there, many of whom hold themselves out as having the answer to any legal question. The law, however, like medicine, is frequently becoming more specialized, and the family should consider hiring someone who specializes in representing victims in general, and hospital and facility negligence victims in particular. The family should also review the credentials of the expert – who will more often than not be recommended by the attorney, if he or she has the appropriate level of experience – to ensure that they are comfortable with the person who will be reviewing the intimate details of the medical chart of their loved one.

One significant point: there will often be a fee for hiring the expert, as they do not work for free. Many attorneys require that the family members incur this initial expense, and family members should be cautioned against hiring the cheapest expert available. A clear and honest review by a medical expert is absolutely necessary, and the family wants to avoid, at all costs, hiring someone who is going to simply gloss over the chart and tell them what they want to hear. It will not serve them in dealing with the issue on a personal level, and it will most certainly not help them in dealing with a potential malpractice or negligence case against the facility.

Question #3
What can we do about it?

As we said before, the civil justice system in the United States and New York allows, generally, for victims or their loved ones to recover monetary damages where they have been injured or killed as a result of the negligence of another.

In New York, hospital and nursing home negligence cases are typically brought under two different theories, negligence and violations of the public health law. Negligence means, generally, the failure to act as a reasonable person would act under the circumstances.

Using our examples again, in Sandy's case, the theory would be that the hospital was negligent because a reasonable person under the circumstances would have considered Sandy's condition, and her history, and would have taken some further measures to ensure that she was not left unattended or permitted to fall. In Gary's case, a reasonable person would have taken further precautions, given his history, to ensure that ulcers either did not develop in the first place, or were not allowed to advance.

If the victim or family member can prove that the hospital or facility failed to act "reasonably," they may be entitled to recover damages, which may include money for physical and emotional pain and suffering, as well as costs for medical treatment, lost wages, and other expenses. Much less frequently, courts permit awards of punitive damages, where a defendant is required to pay – often a significant amount – as a result of what is considered to have been egregious conduct, or conduct that was completely and totally beyond decency.

The Public Health Law – A help for victims.

The New York Public Health law has a number of sections that can help a victim in a hospital or nursing home negligence case. This law often comes up where the facility failed to follow its plan, or otherwise "deprived" the victim of reasonable and expected treatment. The benefits of these laws (in particular Public Health Law §2801-d) are that they allow for another layer of recovery – which includes attorneys' fees – and can often help spark settlement discussions.

Question #4
How do we make sure this does not happen again?

Many, many victims or family members tell us that, above all, they want to be sure that what happened to them or their loved ones does not happen to anyone else. With that, understandably, comes the question of "how do we make sure this doesn't happen again?"

Unfortunately there is no easy answer to that question. Yes, we can contact the Department of Health, if they have not already been contacted; and yes, in some cases we can contact the Attorney General, if the conduct was extremely severe and arguably criminal. But ultimately, in New York, the best available way to make a point is by hitting the hospital, facility or nursing home where it hurts, which is in their wallet. This does not make the victim feel better, it does not stop the pain nor does it ease the loss of a loved one. But in our society, it remains the most common and legal method by which to "punish" a wrongdoer.

What about "taking the case to the media"?

We often have clients ask us if we can or should "take this case to the media." While some cases are ripe for media attention – and we often receive calls from reporters inquiring about cases – media attention can be a positive or negative for a case, depending upon the circumstances. We are therefore careful about sharing information that could, in the long run, negatively impact our client's position.

"But I see lawyers in the paper all the time."

Yes, you do, including us. But remember our firm philosophy – THIS IS NOT ABOUT US. Too often, in our opinion, lawyers are quick to try and springboard off of their clients for their own professional gain. That is not our practice.

Question #5
Where do we go from here?

When you or a loved one has suffered severe or catastrophic injury or death at the hands of a negligent hospital, facility or nursing home, there are often more questions than answers. We hope that this book has helped provide some guidance, and has answered some of those questions. If further questions remain, or if you believe that you need to contact an attorney about your case, we encourage you to do so, but to keep in mind what we have said here. You have a complicated problem, which likely has a complicated answer. Do yourself a favor and think about whom you really want handling your case.

Case Study

Physical and Sexual Assault

While the more common types of hospital and facility negligence cases revolve around an injury suffered as a result of a fall or improper or faulty medical procedure, cases also often involve victims of physical or sexual assault at a hospital or nursing home. Two examples will illustrate the most frequent of these, and will provide some insight into possible remedies.

"Susan"

Susan is a 27-year-old woman with a mental disability that, in essence, allows her to communicate and comprehend at the level of a five-year-old child. Susan has spent the majority of her adult life in an assisted group home setting, where she lives with other individuals and has access to around the clock care and supervision. Her group home setting is gender separated, which is important, as Susan is unable to comprehend an "adult" sexual relationship. Susan has expressed in the past that she wants to have a boyfriend, however she does not actually understand sexual intercourse, or its implications.

One afternoon Susan, as she is occasionally prone to do, has a manic episode, during which time she threatens herself and others. For her own safety Susan is taken to a local hospital, and is admitted as an inpatient on the mental health unit. At the time of her admission Susan's father specifically asks the staff to keep an eye on her around men, describing her desire to have a boyfriend, but also conveying her lack of understanding about the subject. The staff acknowledges the request, and agrees to watch over her (as it is legally obligated to do).

At around the same time that Susan is being admitted a male patient by the name of Greg is also being admitted. Greg has a history of admissions at the facility, and the staff is well aware of him and his problems – among them his interest in women.

continued...

Case Study continued

Over the course of the next three days the staff observes Greg and Susan spending a lot of time together, and sees them in and out of each other's room. The staff warns them, and puts a "limited contact" rule into place – by which they warn Susan and Greg (two mentally disabled individuals) to remain several feet from one another.

Not surprisingly one night when the staff is looking the other way Greg sneaks into Susan's room and they start to have sexual intercourse. Susan, realizing what is going on, tells Greg to stop and attempts to push him off, but he does not. Greg's actions are only stopped when a nursing staff member realizes that the door is closed, tries to get in and finds it blocked. When Greg moves the chair and opens the door the nursing staff member observes Susan running into the bathroom.

Susan's parents are not told about this incident for weeks, and when they finally hear about it, from Susan herself, they are livid. They ask for a meeting with the hospital staff but are essentially stonewalled, which leads them to contact us.

By using all of the elements of the judicial system available we are able to get Susan's parents answers to each of the five most common questions. We are able to find out that while the facility had "procedures" in place to prevent exactly this sort of thing from happening, it had become lax in its enforcement. We also find out that the record keeping – often a problem – was poor at best, which led to oversight by the staff.

As a result of our investigation we were able to obtain a significant settlement for Susan's family. As importantly, we were able to send a serious message to this facility that it needed to revisit its policies and its training, in order to ensure that this sort of thing never happened again.

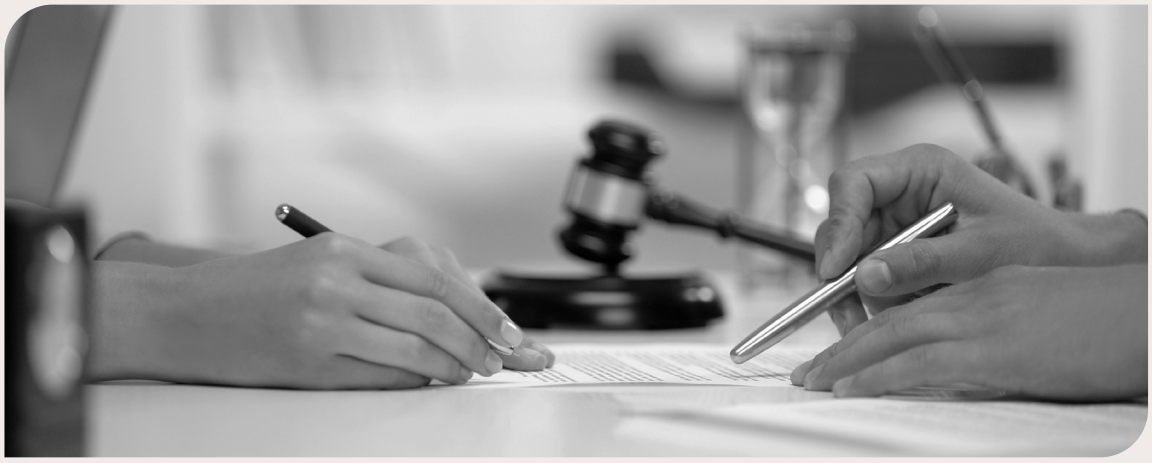
Bonus Section

How to Select a Lawyer

We hope that you have found some of this information helpful in guiding you towards the decision of whether to hire a lawyer. This is not an easy decision and it's one that you should not take lightly.

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. And with all of the advertising and "ranking" sites out there, it has become more difficult for the consumer to filter through the noise.



Ask the Potential Lawyer/Firm Questions

If you read this book and decide that you need a lawyer, do yourself a favor and ask the 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?
- Are they a small firm or a big firm? This matters. Do they have a high volume practice, or do they focus on a small number of cases? There may not be a "right" answer here, but there is certainly a difference, and you should find this out early.

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. We are not a "volume" practice and, in fact, we limit the number of cases that we handle at any time. Again, this is not the only way, but it is the way that we have decided to practice.

Good luck in your decision making process. Please let us know if we can help.

About the Authors

Scott M. Peterson

Scott M. Peterson started out his legal career representing insurance companies, physicians and hospitals. After growing very weary of the civil defense litigation world, he decided to follow his true desire and represent plaintiffs. Since departing the world of civil defense, Scott has devoted his practice primarily to representation of victims in significant personal injury cases; hospital, facility and nursing home negligence cases; and employment discrimination cases. Scott writes many articles for publication, is often quoted by various media outlets, and has been recognized by, among others, Super Lawyers as one of the top 5% of lawyers in Upstate New York in the field of Plaintiff's Personal Injury Litigation.

Giovanna D'Orazio

Giovanna D'Orazio started out her legal career with a prestigious Albany, New York law firm, concentrating her practice in general civil and commercial litigation and employment matters. Like Scott, after several years working primarily on the defense side of things, Giovanna now devotes her practice to representing victims of negligence and employment discrimination. She has also been named as a Super Lawyers "Rising Star", an award honoring less than 2.5% of attorneys statewide.

Please visit www.doraziopeterson.com to learn more about the firm, its history and successes, or to otherwise educate yourself or others.