

LOUISIANA PERSONAL INJURY LAW

A Guide for Victims



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A PRACTICAL GUIDE FOR VICTIMS

First Edition

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DISCLAIMER

The purpose of this book is not to give legal advice. Unless you have agreed to hire our law firm and we have agreed to represent you, our law firm does not represent you and will take no action on your behalf.

Should you have any legal questions or concerns, we recommend that you contact your attorney and discuss the specifics of your case with them immediately. Please be aware that there are often deadlines that may apply to your claim, and therefore, it is important to act quickly!

In the event you do not currently have legal representation and would like to set up a free consultation with an attorney at our firm, you may call our toll-free number **800-300-8300** or visit our website www.dudleydebosier.com to set up an appointment.

It is important to know that one attorney may act differently from another, but this does not mean that one is right and the other is wrong. Rather, this should be a reminder that when choosing legal representation, you must make a judgment call as to which attorney you think is the best fit to pursue your claim.

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FOREWORD

Welcome to Dudley DeBosier's *Louisiana Personal Injury Law: A Guide for Victims*. If you are reading this book, you or someone you love has probably been injured. Perhaps you are considering hiring an attorney but want to first do some initial research about the law and which firm you want to choose. Or perhaps you want to better understand the legal process and your claim. Regardless of your reasons, we have created this book to help provide you with the answers you are seeking and help guide you through this process.

People who have been in accidents need help. They need someone they can trust and who will provide the right answers and passionately fight on their behalf. At Dudley DeBosier, our mission statement is that we want to “change the way that people think about attorneys, one relationship at a time.” That concept is important to us because we know

that attorneys don't always have the best public image. There is no denying that some can seem "money-hungry," egotistical, selfish, and the like. However, just as every human being is unique, each attorney also has their own individual personality.

My partners and I got into the practice of law because we wanted to help people and we wanted to fight for those who have been harmed. It has been our goal to build a law firm that is made of attorneys and support personnel that are not only the best at what they do but care about people. Theodore Roosevelt once said, "People don't care how much you know until they know how much you care." We believe that to be true for the legal practice as well.

At Dudley DeBosier, we pride ourselves in staffing a great group of people that are excellent at what they do and love helping people. Our firm has helped tens of thousands of people with their legal matters all throughout Louisiana. We have fought for them, we have argued their cases, and we have done everything in our power to get them the best results possible. Over the years, we've found that many of our clients have the same questions about the legal process. In this book, we have created a compilation of answers to several of these questions we regularly receive. However, these answers are general responses to general facts. Thus, we recommend that you consult with an attorney to see how the rules apply to your specific case.

If you would like to set up a free consultation with one of our attorneys, do not hesitate to contact us at **800-300-8300** or via email at intake@dudleydebosier.com. Who knows, we may include your question in our next edition of this book.

Chad Dudley

Partner at Dudley DeBosier



Chad A. Dudley

A handwritten signature in black ink, appearing to read 'CD'. The signature is stylized and fluid.

INTRODUCTION

After an accident, most people have no idea what to do and have lots of questions. This can be a stressful and frightening time in which getting the proper medical treatment, not knowing the law, and missing time from work while steadily watching the bills pile up adds stress to this difficult process. At Dudley DeBosier, we tell our clients to focus on getting better and let us deal with the rest. In some cases, we can even help with the costs that have incurred as a result of an incident. Although we cannot change what happened in the past, we can change what happens next. If nothing else, we want you to at least take away from the book these three important points:

1. The insurance company is not on your side.

Immediately after an incident, representatives of the insurance company, which is responsible for your injuries,

will often appear pleasant and willing to cooperate. However, their job is to represent the interests of the insurance company that is responsible for your injuries. For this reason, we recommend that our clients refrain from giving a statement to the other party's insurance company.

2. Their goal is to settle your claim for as little as possible.

The insurance company's adjusters and attorneys have one mission: to resolve your claim for as little as possible. The less money that they pay out for a claim, the more profit the insurance company makes. Therefore, they will challenge every aspect of your claim, such as whether their client was at fault, how hard you were hit, how hard you fell, whether your injuries were pre-existing, whether your injuries are severe, and anything else they can find that may prevent them from having to pay you for your claim.

3. Time is on their side.

As a strategy, the insurance company attempts to cause as much delay as possible. They know that if you cannot work, you won't be able to pay bills or get your car fixed. So, they drag the process out for as long as possible in hopes that out of desperation you will resolve your claim for less. However, there are deadlines that the insurance companies must comply with, and there are things that can be done to keep them moving at a good pace. At Dudley DeBosier, we want to keep the insurance company on their toes and keep your case moving as quickly and as effectively as possible.

Remembering these three important points will not only help you understand how to view your claim but also indicate why it is beneficial for you to find someone to represent you and your interests. Having someone that knows the law and is fighting on your side will help you get the compensation that you deserve.

CHAPTER 1

YOU OR A LOVED ONE IS INJURED...WHAT NEXT?

Every day in Louisiana, people get injured due to someone else's fault. These injuries can happen: in the car, at the store, at work, at hospitals, and many other places. Depending on how the incident occurred and what facts are involved, there may be several types of claims that are available. For now, it is important to understand what you should do immediately after or in the days following an injury caused by someone else's fault.

I. The Aftermath

What should I do the day of the accident?

1. **Report the claim.** The first thing that you should do is report the claim to the proper authorities. If you have been injured in a car crash, you should call 911 and report the incident to the local police department. You should also report the claim to your insurance company. If you were injured at a business, you should report the claim to the supervisor on duty. If you believe that you suffered from improper care at a hospital, you should report the claim to the hospital. Regardless of how or where your incident occurred, you should insist that a written report be completed and that you be given a copy of that report. At the very least, you want to make sure that the event that caused the injury is documented in some form or fashion.

2. Get contact information from witnesses. If there were witnesses to the incident or people that you talked to about the incident, get their name and contact information. Also, if the accident was an automobile accident, exchange insurance information with all the parties involved. It is also a good idea to take a picture of the witness with your phone, or maybe a picture of their driver's license, to accompany their contact information you receive. It is better to err on the side of caution and get contact information from too many people rather than missing key information from someone that could help your case. These witnesses could be an important aspect of your case. If you do end up hiring an attorney, he or she will want to talk to these witnesses to get a better handle on the facts, and oftentimes, these witnesses help build a stronger case.

3. Take pictures. Take pictures of everything that you can—the other car, your car, the damage to your vehicle, the surrounding area, the place where you tripped, your cuts, bumps, bruises, etc. The more pictures you take, the better! In this day and age, almost all cellphones have the ability to take photos, so there is really no reason to not take a bunch of pictures. Again, it is better to have too much than not enough.

4. Get medical treatment. It is important to get medical treatment immediately after an accident. When you see a doctor, and communicate to him or her where you are having pain, those injuries are documented in your medical records. They will also be able to start the process of diagnosing and treating your injuries. However, if you suffer from pain but don't go to the doctor, not only will you not receive the treatment you need in order to help you recover, but it is often very difficult to prove your injuries to a judge or jury without medical documentation. Therefore, if you are hurt, get to a doctor. Do not let medical expenses prevent you from receiving the treatment you need. At Dudley DeBosier, we help our clients arrange all medical care and help them keep their out-of-pocket expenses to a minimum. But, there have been many instances where a person might not experience any pain or other symptoms right after the accident or even a few days after the accident. So, do not

think that if you fail to go to the doctor the same day of the accident, you don't have a claim.

What do I do if the insurance company calls and offers me a check?

Avoid accepting a quick check from the insurance company. Don't rush to settle your claim. It is the strategy of many insurance companies to reach out to the injured party shortly after the incident and offer them a check in hopes that the injured person will accept that check before they know the full extent of their injuries. If you accept that check, you can't go back and get additional money from the insurance company. This is true regardless of the severity of your injuries or whether you require additional treatment—once you settle with the insurance company by accepting payment from them, you no longer have a claim against them. Accepting a “quick settlement” is potentially the most harmful thing that one can do when dealing with an

insurance company on their own. One of the most depressing aspects of our job is when a client comes to us with a serious injury and then tells us that they have already accepted a check from the insurance company. At that point, there's nothing that we can do to help them any further.

Should I give a recorded statement?

There is no benefit in giving a recorded statement, and in fact, oftentimes, it will hurt your case. The insurance adjuster may contact you after an accident in order to get additional information. They may also offer to fix your car or pay for some of your bills. Although it appears they are looking out for your best interests, this is simply a tactic in order for you to let your guard down. They know the law and they are working to build a case against you. It is very important for you to remember this because if you give a statement to the insurance company, they will often twist your words and use

them against you in the future. Don't forget that they are not on your side, no matter how nice they may seem.

II. Health Insurance

I have health insurance, should I use it?

Yes. Even though the person who caused the injury may ultimately be responsible for the cost of your medical treatment, it is wise to use your health insurance while you are treating your injuries and not wait on payment from the responsible party. The responsible party may dispute whether they're at fault and/or the severity of your injuries, which may delay payment. You don't want your medical treatment to be put on hold while you wait for the dispute to be resolved. Get to the doctor and use your health insurance if you have it.

I don't have health insurance and can't afford to go to a doctor. What should I do?

If you have been injured and do not have health insurance or cannot afford a doctor, an attorney may be able to cover the cost of your medical bills so that you can get the treatment you need for your injuries. In Louisiana, it is legal for attorneys to advance the cost of medical care to their clients. Therefore, after you are injured, you should consult with an attorney. If your attorney determines that you have a valid claim for your injuries, he or she should be able to advance the medical costs for your treatment. These costs will only be repaid to your attorney from any money you recover at the end of your case.

III. Keeping Records

Should I keep track of my doctor visits?

Keep track of everything. Little facts can become a big deal later on in the case. It's important that you keep a detailed record of everything you can. Many of our clients, or their family members, use a notebook or folder to write down names of witnesses, doctors, facts about the accident, and so forth. They will store this document, and other documents related to the incident, in a safe place. Additionally, we recommend that our clients make notes about where they are having pain, what they are unable to do because of their injuries, and how the injuries are affecting their day-to-day living.

Should I keep my bills and receipts related to the incident?

If you incur costs for medical treatment or costs related to your injuries from the incident, keep these bills and/or receipts. Many of these costs can be recovered from the responsible party. Some of these potentially recoverable costs may be for household services in which you are no longer able to provide for your family or yourself. For example, perhaps you used to cut your grass every week, but because of your injuries from the incident, you are no longer able to do so and have to hire someone to take care of that for you. These types of costs may be recoverable, so keep records and receipts of everything.

I got a copy of the crash report or incident report...what should I do with it?

If you were involved in an automobile crash, the police will create a report that has a lot of information about what

occurred. This accident report is typically ready 10–12 days after the crash. It is also important to obtain an incident report even if you are not injured in a car wreck. You need to obtain this document and check it for accuracy. If any element of the accident report is wrong, it is important to identify this early. Sometimes the reporter obtains witnesses' names from the scene of the accident, and sometimes they don't. Again, this is why it is important to personally obtain the witnesses' information after the incident. If you do get their information, write it down and keep it in a safe place. If you hire an attorney, it is important that you immediately give this information to them, so they can decide whether or not they should obtain recorded statements from those witnesses. At Dudley DeBosier, we obtain the accident reports for our clients and go through it with them to make sure everything was accurately recorded.

IV. Filing a Claim

How long do I have to file a lawsuit?

In each state, there is a “Statute of Limitations,” which is the timeframe within which a person has to file a claim.¹ If that time limit expires and you have not yet filed a claim in a Louisiana court, you may lose the right to bring your claim. This is very important to understand, and one of the many reasons it is important to consult with an attorney early on. You do not want to miss this date and not be able to file your claim. In Louisiana, there are different deadlines for different types of cases. This is why we highly recommend talking to an attorney immediately so that you can be aware of the time limits that apply to your case.

¹ Steve Sheppard, The Wolters Kluwer Bouvier law dictionary: quick reference (2012).
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What happens when I file a lawsuit?

A lawsuit or “petition” is a legal document that your attorney will prepare and file in the appropriate court.² This petition essentially states your cause of action and asks the court to issue a remedy or render a judgment in your favor and against those whom you have alleged are at fault. The suit must be properly served on all parties in a manner and within the time period allowed by law. After the suit has been filed, the following will occur:

- **Answer:** Once the parties have been served with the lawsuit, they must likewise file an answer to the lawsuit. Their answer must state their position on the allegations you have made against them.

² Steve Sheppard, The Wolters Kluwer Bouvier law dictionary: quick reference (2012).
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- **Discovery:** Generally, after a lawsuit has been filed and answered, the parties will engage in a process called discovery. Discovery is just what it sounds like—a process in which the parties are trying to discover more information about one another. There are different forms of discovery, but the most common are written and oral. Written discovery may be a list of questions you need to provide answers to, whereas oral would normally be in the form of an oral statement like a deposition. The discovery process can be ongoing or have a fixed date at which the process and seeking of information must end.
- **Depositions:** A deposition is a form of oral discovery that is taken under an oath to tell the truth. It is basically a question and answer session between one of the parties and one or more of the attorneys involved, usually done in person. There is a court

reporter present to record and type a booklet of everything that is being said, and that booklet is called a transcript. The deposition transcript is usually admissible in court, and excerpts can be used in other legal pleadings that may be filed.

How long will my case take?

Each case is different. Some cases may take months; other cases may take years. The most important thing to know is that if you have an attorney, he or she is aggressively pushing the case forward. However, the process, when done right, can take time. There are several factors that can affect the amount of time it takes to resolve your claim. Some of these factors include: the defendants' dragging their feet, the severity of the injuries, the complexity of the case, and the flow of the court docket.

Defendants may attempt to delay litigation by denying responsibility for your injuries, even in situations where they are clearly at fault. They may also deny the severity of your injuries or claim that your injury pre-existed, that is, before the accident. All of these tactics can slow down the process. The severity of your injuries can also impact how long your case may take. For instance, a case involving a neck or back sprain injury that heals in three to four months will typically resolve quicker than one in which the plaintiff requires neck or back surgery. It simply takes longer for the doctors to treat the more serious injuries and for the experts to determine how those injuries will affect your life. These expert analyses are important for determining the amount of recovery you should receive. Complex cases may also slow down the resolution time of your case. These are cases with multiple witnesses and/or complex liability issues or facts, which can take more time than in cases where there is only one witness and one party clearly at fault. Finally, if the court

where the case is pending is overly burdened, it may take longer before your case can be heard by a judge or jury for trial.

Keeping these factors in mind, you may find comfort in knowing that only a very small percentage of cases actually go to trial, as several cases settle beforehand. Thus, your case could potentially settle at any time. For further discussion on settlements and resolving your claim, see Chapter 9.

CHAPTER 2

WHAT TYPE OF CLAIM DO I HAVE?

Contact an attorney to discuss your options. A single incident can result in many different types of claims. For instance, aside from the general personal injury claim, an automobile crash could include a product liability claim and/or a worker's compensation claim. In order to fully understand all your options and available remedies, you should meet with an attorney. The attorneys at Dudley DeBosier, like many other personal injury attorneys, will initially meet with you at no cost to carefully go through the facts of your particular case and give you an opinion regarding your potential claims. Potential personal injury claims are listed below.

General Negligence Claims. There are several types of “general negligence” claims that simply assert that someone was negligent, their negligence caused someone else injury, and they are therefore responsible for those injuries.³ Automobile crashes, trip-and-fall, and slip-and-fall injuries are all examples of general negligence claims.

Workers’ Compensation Claims. These are claims that arise when someone is injured in relation to their job. Workers’ compensation is a form of insurance that exists to provide lost wages and medical expenses to employees that have been injured in the course and scope of their employment. In exchange for these benefits, the employee gives up their right to sue their employer for negligence.⁴

³ La. C.C. Art. 3492

⁴ La. R.S. § 23:1307

Medical Malpractice Claims. These are claims against healthcare providers, in which it is asserted that an injury or death to a patient occurred as a result of the medical provider's treatment, which fell below the accepted standard of practice in the medical community.⁵

Product Liability Claims. When a product or device causes injury to another, that person may have a product liability claim.⁶ The manufacturer or the seller of that product may be held liable. These claims often allege that the product was defectively manufactured or defectively designed, or the manufacturer or seller failed to warn the user of the known dangers of the product. These claims can also be asserted against the manufacturers of pharmaceuticals, asserting that those drugs were defectively manufactured or designed, or asserting that makers failed to warn the users of the potential known dangers.

Premises Liability Claims. A premises liability claim arises when someone is injured by an unreasonable risk that is present on the property of another person.

Can my incident give rise to more than one type of claim?

Yes. We have had cases where someone was injured on the job and had a general negligence claim against one defendant, a product liability claim against another defendant, and a worker's compensation claim against the employer.

What happens if I only pursue one type of claim?

It is possible that you could lose your ability to pursue the claim if the time delays to bring a claim expire. For example, in the past, people have come to our office who were injured and filed a worker's compensation claim, but they did not file a general injury claim. They then missed the one-year deadline to file an injury claim and subsequently lost that

claim. This is why it is highly recommended to consult an attorney about your potential claim. Ultimately, it is your choice to decide whether and how to pursue your claim, but an attorney will be able to inform you of all the pros and cons of pursuing your decision on whether or not to do so.

CHAPTER 3

INJURIES

A person who is injured through the fault of another is entitled to recover money damages from the person who caused the injury. In order to establish the amount of damages that the victim is entitled to recover, he or she will have to prove, through competent evidence, the nature and extent of his or her injuries. This evidence is mostly shown through medical documentation, expert testimony, and by medical providers.

I. The Medical Provider

What is the doctor's role?

The doctors, who provide medical treatment to injured victims, play an important role in every personal injury case,

and because any part of the body can be injured in a wreck or a fall, many different types of healthcare providers may be involved in a case. The doctor's role in a personal injury case is two-fold. The most obvious and important role is to evaluate and treat the injured victim. Once the injured person's medical course has been established, the treating doctors help prove the nature and extent of injuries. They do so by providing medical documentation showing that the injury was caused by the accident at issue in a case. They also provide medical opinions as to the treatment and/or therapy that will be needed to either fix or help alleviate those injuries throughout the remainder of the victim's life.

Who is a primary care provider?

If an injured person isn't seen at an emergency room, his or her first treatment will come from a primary care physician. This provider will work to relieve soreness and stiffness by way of therapy and management of medication. Primary care

providers can include general physicians, physical therapists, and chiropractors. Whomever takes this role, the goal is to relieve any muscle spasms or pain the patient is experiencing, so the patient may return to his or her daily activities as soon as possible.

Initially, the provider will listen to the patient's complaints and perform a physical examination in order to make a proper diagnosis and create a "conservative treatment" plan. The primary care provider will also determine whether diagnostic studies are needed, and what type of study is needed, in order to get a closer look at any possible accident-related injuries to the spine and joints. These diagnostic studies, which can include X-rays, MRIs, CT scans, etc., may not be performed right away, depending on the doctor's determination. It is very common that the primary care physician orders diagnostic studies after the conservative course of treatment ends, as a last step before referring the patient to a specialist. In fact, before any specialist will

consider seeing an injured person, a patient must first undergo “conservative treatment.”

Which doctors are specialists?

Specialists are physicians who treat specific areas of the body. They will analyze the results from a patient’s MRI scans or other diagnostic studies to determine whether a more specialized treatment is needed in order to fix or help the source of the patient’s pain. Specialists who typically get involved in falls or crash-related injuries include interventional physicians, sometimes called pain management specialists, and orthopedic surgeons, who may further specialize in specific parts of the body involving the spine, joints, or extremities.

II. Treatment

What kind of treatment can I expect?

It's important to remember that every injured person's treatment is unique, but treatment usually includes at least one of the following:

Initial evaluation at an emergency room

Most people who are injured in a wreck or a fall are taken from the scene of the injury to an emergency room. The emergency room physician will look for critical injuries such as head injuries, spinal injuries, fractured bones, and other issues that may require immediate surgery or other immediate intervention at the hospital. The physician may order diagnostic tests like CT scans, MRIs, or other scans to rule out these types of injuries. Once completed, the physician will typically prescribe medications such as muscle relaxers, anti-inflammatories, or pain relievers, and

will usually advise the patient to follow up with his or her primary care physician within a few days.

Imaging

A person injured in a crash should take all steps to investigate the damage that the crash has done to his or her body. Plain X-rays taken at a hospital or in a primary care provider's clinic can only show bones, not the other "soft" connective and supporting tissues surrounding the bones and joints. Particularly, in the case of an injury to the neck or back, more detailed testing is needed to be able to look at the spinal cord, the condition of the discs between the vertebrae, and the nerves that leave the spinal cord and pass through and along the spine on their way out to our arms, legs, and other body parts. This can be done through MRI, CT scan, and other similar tests. Magnetic resonance imaging (MRI) provides doctors with the ability to see detailed pictures of the spine. The goal is to identify changes in the spine and

then compare those findings with the injured person's complaints and physical exam findings to determine the cause of the patient's pain. These tests are read by radiologists, who report their findings to the doctor that ordered the scans. If the test reveals a condition that correlates with the patient's pain, the primary care provider will usually refer the patient to a specialist to consider taking a more aggressive treatment approach.

After either or both of these courses of treatment have been pursued, a patient is typically given a referral to an orthopedic surgeon or an interventional physician. The orthopedic surgeon will evaluate the injured person to determine if surgery is necessary; however, most surgeons recommend the patient be treated by an interventional physician before surgery is performed. An interventional physician may treat an injured person by using methods such as epidural steroid injections, facet joint injections, nerve blocks, spinal cord stimulators, or pain pumps.

III. Physical Injuries

What are the different types of physical injuries?

When a person is involved in an accident, he or she may have common injuries such as a break or fracture of a bone or a more major injury such as head trauma. Below, we have listed injuries that we sometimes see in personal injury cases, starting with the more common injuries and ending with the more serious ones.

Soft tissue injuries

This innocent-sounding term, prevalent in accident cases, is typically used to describe muscle strains or sprains that last for a relatively short duration. These injuries generally go away with therapy and time. However, some soft tissue injuries, particularly ones to the tissues surrounding the spine, can be difficult to treat and may lead to chronic and disabling pain.

Intervertebral disc injuries

The spine is made up of several vertebrae, which are small bones joined together by facet joints and aligned in a column. Between each vertebra is a circular-shaped cushion, called a disc, which consists of an exterior lining filled with a gelatinous substance.⁷ These discs not only connect one vertebra to the next, but they also help absorb shock between them. The discs sit alongside the spinal cord and nerve roots that run through and are supported by the spinal column. In wrecks or falls, these discs can often become damaged, resulting in various defects that may include, but are not limited to, one or more of the following:

- **Bulging disc**

A bulging disc is either a disc that has become swollen, inflamed, or shifted out of

⁷ National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>
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its normal position.⁸ When this occurs, it can lead to further spinal issues, some of which are listed below.

- **Annular tear**

When a disc shifts, the fluid inside it begins to expand.⁹ As a result, a tear in the annulus (lining) of the disc may occur. When this happens, the fluid inside the disc will leak and often impact the surrounding nerve roots.

- **Hernia**

Herniation of the disc is a condition in which the material inside the disc actually escapes the lining of the disc and leaks out into the spinal column and spaces.¹⁰

⁸ National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>

⁹ National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>

¹⁰ National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>

- **Nerve compression**

This results when the disc material or bony growth fills the space through which nerves pass along the spine (foraminal openings) and compress or irritate the nerves that run through the space.¹¹

- **Cord compression**

This results when the disc material protrudes from the disc and presses into the spinal cord.¹²

¹¹ National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>

¹² National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>

- **Facet injuries**

This happens when the facet joints, which extend out on either side of the back of the vertebrae, are smashed together in a whiplash movement of the spine.¹³

Brain injuries

Injuries to a person's brain may range in severity depending on the area and impact of the injury. A concussion is generally less severe. This occurs when the brain is knocked around inside a person's skull, but it typically resolves within three or four months. However, when concussion-like symptoms persist after three or four months, the injury may be considered a mild traumatic brain injury. Symptoms of this type include: loss of focus, loss of memory, headaches,

¹³ National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>
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sensitivity to light, ringing in ears, nausea, and fatigue.¹⁴

Mild traumatic brain injuries are treated with therapy and medication, and they get better with the passage of time.

If a CT scan, MRI, or other diagnostic test shows a lesion on the brain, this injury is classified as a severe traumatic brain injury. This condition includes bleeding of the brain but may also diffuse injury to the very fine sheathing of vessels throughout the brain, causing axonal injuries. Severe brain injuries may be hard to identify on normal scans but can be very painful and sometimes life threatening.

IV. Emotional Injuries

How can I recover from an emotional injury?

A victim or a victim's family member may suffer from an emotional injury when they experience some sort of severe

¹⁴ National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>
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emotional distress as a result of an accident. It is very common for a person to experience this type of injury when an accident causes the death of a loved one. In such a situation, the surviving relative of the decedent will bring a wrongful death suit to recover from the mental pain and suffering of losing a loved one. That same person may also be able to recover damages on the behalf of the decedent in a survival action if the decedent experienced any pain and suffering before death. For more information on the specific damages one can recover in these types of suits, please see Chapter 6.

V. Pre-Existing Conditions

What is a pre-existing condition and how might it affect my claim?

A pre-existing condition is an injury that was present before the accident at issue.¹⁵ In order to avoid making a payment to the victim of an accident, the insurance company that is responsible for covering the damages to that victim will try to argue that the person's injury was pre-existing. If the condition was not pre-existing, this will be easily disproved. On the other hand, if the victim does have a pre-existing injury, he or she must show that the condition was aggravated by the accident.

¹⁵ National Library of Medicine - National Institutes of Health, U.S. National Library of Medicine, <https://www.nlm.nih.gov/>
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How do I prove that my pre-existing condition has been aggravated?

The law requires a person injured in a collision or fall to prove that it is probably more true than not that his injuries were caused by that event. This is often shown through the use of expert witnesses. An expert witness is someone who specializes in a particular area. Their role is to show the judge or jury what harms and losses were caused by the wreck or fall. For example, let's say a victim had a back injury prior to the accident at issue. However, after the accident the victim starts experiencing nerve pain that he did not experience before but that is associated with the pre-existing injury. In this situation, an expert witness, such as a neurologist, may be used to show how the wreck has caused a greater injury to the back resulting in the present nerve pain. This can be achieved by use of medical documentation and testimony.

CHAPTER 4

AUTOMOBILE ACCIDENTS

This chapter addresses the type of damage that is likely to be incurred in an automobile accident, a general description of how other types of claims often or can arise in an automobile accident, and how an automobile accident with an 18-wheeler can differ from a normal automobile accident.

I. Property Damage

My car was damaged in an automobile crash, what are my rights?

The first question is whether the car was “totaled.” If the cost to repair the car is more than the car’s pre-accident value, the insurance company will determine that the car is a “total loss” and offer the pre-accident cash value of the car. If the

car is not “totaled,” the insurance company will pay what it costs to repair the vehicle.

Am I entitled to a rental car while my car is being repaired?

Yes. If your car needs to be repaired, you are entitled to a rental car of equal or lesser quality of the car that is being repaired. If your car is deemed a total loss, you are entitled to a rental car of equal or lesser value for 30 days after it is deemed a total loss. This 30-day period is intended to give you adequate time to replace your totaled car.

Can I pick the location where my car is repaired?

Yes. You can take your car to the repair shop of your choice and get an estimate for repairs to submit to the insurance company.

II. Product Liability Claim

My airbag didn't deploy at impact. Do I have a claim against the manufacturer of the vehicle?

Possibly. Depending on the severity of the impact and where the impact occurred, you may have a claim against the manufacturer of the vehicle if the airbag didn't deploy. In order to investigate these claims, it is important that you hire an attorney immediately so that they can investigate the claim and have an expert examine the vehicle. If the vehicle is lost or destroyed, it can greatly limit your ability to bring this type of claim.

The vehicle didn't function properly on the road and it caused me to crash. What do I do?

If there is anything that relates to how the vehicle operates, for example, if the brakes are not working, the vehicle could roll over, the gas pedal could get stuck, or a variety of other

mechanical defects could arise, then you may have a claim against the manufacturer, seller, or person who performed maintenance on the vehicle. Again, it is important to get the vehicle to an expert as soon as possible so that they can inspect and document the defect that caused the vehicle to function improperly.

III. 18-Wheeler Claims

How is a claim involving an 18-wheeler different from other claims?

The difference lies in who the victim (claimant) is. If the claimant is injured by a driver of an 18-wheeler, his or her claim will proceed as all other automobile accidents do. On the other hand, if the claimant is the driver of an 18-wheeler, he or she may not only have a claim against the person that caused the injury but may also be able to file a workers' compensation claim against his or her employer. However,

this will depend on specific facts of the driver's employment, as some drivers are not covered under workers' compensation. For more general information on workers' compensation, please reference Chapter 9 of this book.

IV. Other Questions

What are some challenges that I may face with the insurance companies?

Insurance companies are known for challenging every aspect of a claim. The challenge they most often make is that a person's injury is pre-existing. For instance, they may claim that because an accident was not severe, it could not have possibly caused the victim's injury. However, the severity of the collision is not always related to the severity of a person's injuries. We have seen serious injuries from collisions with very little property damage to the vehicle and vice versa.

How much time do I have after an auto accident to file a claim or lawsuit?

As mentioned earlier, all personal injury claims in Louisiana are subject to a statute of limitations based on the type of claim. Generally, an automobile accident in Louisiana is subject to a one-year statute of limitations.¹⁶ This means that you have one year from the date of the accident to file a claim in a Louisiana court of law against the person who caused the accident.

What if I don't have car insurance?

Louisiana has a no pay/no play policy with regard to auto insurance coverage. That means that in order to recover for your damages related to an auto accident, you must have the legal minimum amount of auto insurance coverage. This means that even if the other driver is at fault, an uninsured driver will have to cover medical costs up to \$15,000 and car

¹⁶ La. C.C. Art. 3492
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repairs up to \$25,000.¹⁷ But it may still be possible for you to recover for your injuries even if you don't have the minimum amount of coverage, depending on the severity of your injuries.

What if the person who caused the accident doesn't have car insurance?

If you have an uninsured motorist insurance policy (UM), you may still receive compensation for your losses even though the other driver doesn't have insurance coverage. UM is intended to protect you in the event that an uninsured motorist injures you. UM covers pain and suffering, medical costs, and lost wages related to the accident.¹⁸ However, "Economic Only UM" covers accident-related costs such as medical expenses and lost wages but not general damages such as pain and suffering. However, if you don't have UM

¹⁷ La. R.S. § 32:866

¹⁸ La. R.S. § 22:1295

coverage and the person at fault doesn't have insurance, you could be out of luck when it comes to recouping any damages, losses, or expenses you incurred from the accident. It is important to consult with an attorney to make sure that all avenues of insurance coverage are explored.

CHAPTER 5

PREMISES LIABILITY CLAIMS

A premises liability claim is a claim to hold a property owner responsible for an injury that occurred on that person's or company's property due to an unsafe or defective condition.¹⁹

I. General Law

When is an owner responsible for my injury?

Generally, a property owner is responsible when an injury is caused because they failed to use reasonable care in connection with the property. However, the mere presence of the risk does not necessarily impose responsibility on the owner or custodian. Whether or not a person may recover

¹⁹ La. C.C. Art. 2315
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from his or her injuries sustained on the property of another depends on several things such as where the injury occurred, who are the parties involved, what type of circumstance caused the injury, whether or not that circumstance was known, and others. For this reason, it is important to discuss your claim with an attorney who can properly advise you on your premises liability claim.

What do I need to show in order to prove liability?

Whether or not one will be held accountable for the condition which caused the accident or injury will depend on many circumstances and differ depending on where and what happened. For example, if you are injured from a slip-and-fall at a grocery store, what must be proven will be different than if you slip and fall at a friend's house.

II. Liability

Liability, in the simplest terms, means someone has the legal responsibility for their acts or omission and if they fail to meet that responsibility, it can leave them open to a lawsuit for damages.²⁰

Merchant Liability

A merchant, in Louisiana, is one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. When a merchant opens a business, he or she may become responsible for an accident that occurs on the business's property. However, the merchant is not automatically at fault and will often try to shift the fault to the injured party. A merchant owes a duty to people who use his or her premises to exercise reasonable care to keep the aisles, passageways, and floors in a reasonably safe

²⁰ Steve Sheppard, *The Wolters Kluwer Bouvier law dictionary: quick reference* (2012).
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condition.²¹ This obligation includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage or cause injury. However, these types of claims can be challenging, especially when going up against a large company. These businesses have extensive resources at their disposal, and they may try to strong-arm an injured person into accepting a quick check. At Dudley DeBosier, we help ensure that your legal rights are protected and that any damages are as fully recovered as is possible under the circumstances.

Landowner/Custodian Liability

Although a landowner is free to exercise his or her rights of ownership, they are still obligated not to exercise those rights in a manner that someone else would be harmed. Therefore, a landowner has a duty to others to keep his or her property

²¹ La. R.S. § 9:2800.6
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in a reasonably safe condition, which includes the duty to discover any unreasonably dangerous conditions and either correct the condition or warn of its existence.²² However, this does not mean that a landowner is responsible to all hazards that exist on the premises.

The burden of proof for landowner liability is the same as that with merchant liability. However, the landowner's duty will depend on why the person was there. These types of differences are crucial when seeking a premises liability claim and can often determine whether or not there is a legal leg to stand on.

Are there exceptions to these rules?

Premises Liability Law is a very broad area of law that is full of exceptions. There are several situations and conditions that may provide relief to the responsible party or create a higher duty, and because there is no bright-line rule for

²² La. R.S. § 9:2795
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determining the outcome of these types of cases, every case is analyzed based on the circumstances of that particular case. For this reason, it is important to consult with an attorney who will be able to provide you with a legal analysis and opinion as to whether your claim has any legal standing.

III. Types of Claims

Different types of claims may come about on the premises of another person, which may extend liability to the owner or custodian, such as nuisance claims, swimming pool accidents, accidents due to a defective condition (mold illness, faulty wiring), and much more. However, the most common are slip-and-fall, trip-and-fall, and falling merchandise claims.

Trip-and-Fall

A trip-and-fall accident occurs as a result of tripping on some object or irregular surface. When a claim for a trip-and-fall is alleged, the court looks at different things to determine liability. These include, but are not limited to, the depth and height, condition of the object, location of the incident, and time of the incident, and if the merchant has been given warnings that such a condition is hazardous.

Slip-and-Fall

A slip-and-fall accident occurs when a person is injured as a result of slipping on a surface that is slippery, wet, or icy. Although the court looks many of the same issues as trip-and-falls, slip-and-falls often, but not always, occur as a result of a temporary condition. In fact, oftentimes these surfaces become slippery as a result of natural conditions such as rain or snow. Therefore, how the condition occurred will be an important aspect. Overall, an owner or a custodian

cannot be responsible for all falls as a result of a slippery surface, so courts may consider other factors such as whether safety precautions exist, whether an employee was in the vicinity of the condition, etc.

Falling Merchandise

A falling merchandise claim occurs when an injury or a fall occurs, not from a trip or slip, but from merchandise falling onto the victim. These cases are claims against merchants.

In these cases, the victim must prove the following:

- He or she did not cause the merchandise to fall;
- Another customer in the aisle at that moment did not cause the merchandise to fall; and
- The merchant's negligence was the cause of the accident (that is, either a store employee or another customer placed the merchandise in an unsafe position).

When is a merchant not liable?

However, in both trip-and-falls and slip-and-falls, the temporary presence of a foreign substance is not, in and of itself, a “defect.” In order to determine whether any condition creates an unreasonable risk, the court considers whether the accident in question would occur in the absence of negligence, without which liability would not extend to the owner or custodian of the premises. Some factors that the court considers in both cases are:

- Whether the condition has been caused by natural forces
- Whether the defendant actually has custody, control, or derived a benefit from the premises
- Whether the condition was “open and obvious”
- Length of time the condition was present
- Whether an alternative route was possible

As stated before, these factors are merely examples, and many other factors may be taken into consideration based on your particular claim. Not to sound like a broken record, but premises liability claims are determined on a case by case basis. Having a lawyer that knows the rules regarding liability and is fighting on your side will help you get the reimbursement that you deserve.

CHAPTER 6

WHAT KIND OF DAMAGES CAN I RECOVER?

The goals of awarding damages are two-fold. First, and most importantly, damages are meant to compensate an injured person. The second reason damages are awarded is to attempt to prevent others from acting reckless, negligent, or against the law.²³ When damages are awarded to punish wrongful behavior, these are called punitive damages and are only given in Louisiana for victims of drunk driving and criminal sexual conduct with children.²⁴ Listed below are different kinds of damages.

²³ La. C.C. Art. 2315

²⁴ La. C.C. Art. 3546

I. Special Damages

These types of damages must be specially pled or have a “ready market value.” In other words, this type of damages is based on a measurable dollar amount of an injured party’s actual loss. Special damages can include past and future medical expenses, property damages, loss of wages, and loss of earning capacity.

II. General Damages

These are damages that cannot be fixed nor determined with mathematical certainty. They are determined by a judge or jury and can include physical pain and suffering, mental anguish, physical disfigurement, physical impairment, loss of enjoyment of life, and loss of consortium. Loss of enjoyment of life damages are sometimes given when an

injury drastically changes a person's life or lifestyle in such a way that he or she is no longer able to participate in activities or pleasures of life that were previously enjoyed. Loss of consortium claim is by the injured victim's spouse or family member. It includes companionship, sexual relations, earnings, and other household services relied on by the family member.

III. Other Damages

Interest and Court Costs

Generally, each party pays for their own attorney's fees and court costs. There are some statutes that require the loser of a lawsuit to pay such fees; however, this is very rare. The interest of a suit is calculated by the court.

IV. Wrongful Death and Survival Action

What is a wrongful death and survival action?

A wrongful death action is where someone claims personal damages resulting from the death of their family member.²⁵

For example, if a husband dies, a wife sues for her own damages. In a survival action, the family member or representative is claiming damages on behalf of the deceased for the damages they suffered between the incident and the ultimate death of the victim. In other words, the family member has brought a claim that the deceased victim would have had if they had lived.²⁶ For example, if the husband dies, the wife may file a claim on behalf of the husband for his lost enjoyment of life, wages, medical bills, pain and suffering, or any other damages that the husband could have claimed.

²⁵ La. C.C. Art. 2315.2

²⁶ La. C.C. Art. 2315.1

Who can bring the claim?

Only certain family members are able to file a wrongful death or survival action and there is an order, by law, to who can make a claim.²⁷ This is where having an experienced attorney can be of great benefit because they can properly guide the person seeking to make a claim.

How long do I have to file a claim?

In a wrongful death claim, the claimant must file a claim within one year from the date of death.²⁸ This means that if the death is delayed, the claim may be many years after the injury-causing event. In a survival action, a claimant must make his claim within one year from the accident. However, if the person dies before that year ends, the one-year period begins anew, and the claimant would have a year to file the claim starting from the day of the death.

²⁷ La. C.C. Art. 2315.1

²⁸ La. C.C. Art. 3492

CHAPTER 7

PRODUCT LIABILITY

Generally, when an unreasonably dangerous or defective product has caused damage or injury to another, he or she may bring a product liability claim. The claimant may show the product was defective or unreasonably dangerous by relying on one of four theories. In Louisiana, these exclusive theories of product liability are found in the Louisiana Products Liability Act (LPLA).²⁹ In this chapter, we have attempted to give a general overview of the law based on each of these theories.

²⁹ La. R.S. § 9:2800.52
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I. General Law

What do I have to prove in a product liability claim?

Under the LPLA, in order to find liability, you must prove the following:

- An unreasonably dangerous characteristic of the product proximately caused damage during a “reasonably anticipated use” of the product.
- The product was unreasonably dangerous in construction, composition, or design; or because of inadequate warning; or because it did not meet an express warranty.
- The product’s unreasonably dangerous characteristic must have either existed when it left the manufacturer’s control or happened from a

“reasonably anticipated alteration or modification.”

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Who can I file my claim against?

A claim can only be made against the manufacturer of the product. The LPLA defines a manufacturer as a “person or entity” that manufactures a product to be placed into “trade or commerce.”

Who is not considered a manufacturer?

At times, this may be an issue that should be presented to the court to determine whether or not the defendant is considered a manufacturer.

What is considered a “product?”

This is basically any tangible item that is manufactured for placement into trade or commerce. This also includes any item that may be merged into another product.

What can I recover?

If a claimant proves his or her case and the manufacturer is found to be liable under the LPLA, the injured party can collect compensatory damages for specific types of past and future harm, including:

- Medical bills
- Lost wages
- Pain and suffering
- Emotional distress
- Wrongful death
- And more

CHAPTER 8

WORKERS' COMPENSATION

Workers' compensation is generally the sole remedy or form of recovery that you may pursue when you are injured at work.³¹ There are some exceptions to this general rule, so it is a good idea to run the facts of your work accident by an attorney who specializes in Workers' Compensation.

³¹ La. R.S. § 23:1032

I. Overview

What is workers' compensation?

Workers' Compensation is a type of insurance that employers are required to carry for all of their workers, with few exceptions. Workers' Compensation represents a balance resulting from the compromise of the interests of the worker and the employer. In exchange for a relaxed burden of proof and a system that encourages voluntary payment of claims by employers, the employee has limited rights and remedies available under the Workers' Compensation laws. Courts have very strictly enforced the "exclusivity" of workers' rights to benefits under Workers' Compensation laws and are very reluctant to allow workers to pursue claims outside of that system.

When does Workers' Compensation apply?

Anytime a worker is injured while in the course and scope of employment, that worker is entitled to compensation as provided by law. Generally, anytime an employee is on the premises of their employer, they will be covered under Workers' Compensation.³² An employee may even be covered under Workers' Compensation if they are on a special mission for their employer. An example of this would be if an employee was going to the bank for their boss to make a deposit.

What type of injuries are covered?

The injuries covered are those that arise out of an "accident" or injuries that are occupational in nature and caused over the length of the worker's employment. "Accident" means an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, with or without

³² La. R.S. § 23:1021(1)
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human fault, and directly producing at the time objective findings of an injury, which is more than simply a gradual deterioration or progressive degeneration.

What does it mean to be in the course and scope of employment?

Course and scope is a very broad concept that requires a factual legal inquiry. In fact, when an employer argues that an employee is not within the course and scope of his employment, its determination will be left for a judge or jury to decide. Therefore, it is highly recommended that you consult with an attorney to help clarify whether you are covered under Workers' Compensation for your injury.

II. Filing a Claim

When should I report to someone about my accident?

When you are injured, in the course and scope of employment, you must report the accident to your employer within 30 days. If an accident is not reported within that 30-day window, it is not fatal to your claim; however, after you are injured from an accident, you should at least immediately report the accident to your supervisor.

What happens after my accident is reported?

After your accident is reported to your employer, your employer is mandated to report the accident to the State through the “First Report of Injury or Illness.” After your employer and/or its insurer are put on notice of your accident, they have an obligation to investigate your claim.

This investigation may include sending you to their doctor, having you submit to a post-accident drug test, or make a

recorded statement. You should contact an attorney as soon as possible after an accident, as you may be asked to sign paperwork that can have a negative effect on your Workers' Compensation case. It is helpful to have your attorney present, if possible, for any statements that you may be asked to give concerning your accident.

III. Medical Treatment

Can I choose my own doctor?

Yes. Under Louisiana Workers' Compensation laws, you have the right to select your own treating physician as long as that physician accepts Workers' Compensation patients.³³

This choice is made by the submission of a "Choice of Physician form," which is publicized by the State and should

³³ La. R.S. § 23:1221
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be given to you by your employer or its insurer. Although your employer may choose a doctor for you, this may not be in your best interests. Therefore, it is a good idea to consult with an attorney about your rights to be able to fully understand what is in your best interests.

Who will pay for my medical treatment?

Unlike in other personal injury claims, Louisiana Workers' Compensation laws prohibit attorneys from paying for their clients' medical treatment. It is the insurance company's responsibility to approve and pay for your treatment. Generally, reasonable and necessary medical treatment is owed when a worker has an on-the-job accident. The State has issued a set of medical treatment guidelines that further govern what the appropriate treatment should be. The appeals process for the denial of treatment is complex, and your attorney can help you and your treating physician to navigate it.

IV. Unemployment

What happens if I cannot go back to work right away?

If a doctor has found that you are unable to work or that you are unable to return to work in the position you had when you were injured, you may be entitled to lost wage benefits, and depending on the extent of the injury, it may last for up to 10 years. The two primary types of benefits you may qualify for are Temporary Total Disability Benefits and Supplemental Earnings Benefits.

What is Temporary Total Disability?

Temporary Total Disability pays you two-thirds of your average weekly wage for any time period you are totally unable to perform any work due to your accident.³⁴ The benefits paid are subject to a minimum floor and a maximum

³⁴ La. R.S. § 23:1221
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ceiling, so you may not actually receive two-thirds of your lost wages.

What is Supplemental Earnings Benefits (SEB)?

Supplemental Earnings Benefits pay you two-thirds of the difference in the wages you are able to earn and the wages you were earning before your accident (if the former is lesser), if you are unable to return to your job after injury. You should consult an attorney, who can explain how your average weekly wage is calculated and how much you should be getting in lost wage benefits depending on the specific facts of your case.

CHAPTER 9

MEDICAL MALPRACTICE

Every medical care provider has a duty to provide certain standards of care. Substandard care is typically defined as care that falls below the level of care and skill of the average healthcare provider who practices in the same specialty. If you or a loved one has been provided substandard care by a medical provider, you may be a victim of a medical malpractice claim. Medical malpractice also has very specific laws that dictate legal action, which is why it is highly recommended to speak to an attorney who focuses on medical malpractice claims.

I. Overview

What is medical malpractice?

Generally, medical malpractice occurs when a patient is harmed by a doctor or another healthcare professional who fails to competently perform his or her medical duties.³⁵

Who is defined as a healthcare professional?

Healthcare professionals or healthcare providers are those entities or people that provide healthcare.³⁶ “Qualified” healthcare providers are those that have made premium payments into the Louisiana Patient’s Compensation Fund. All claims against a qualified healthcare provider go through the process expressed in Louisiana’s laws that govern medical malpractice claims.

³⁵ La. R.S. § 40:1231.1

³⁶ La. R.S. § 40:1231.1

II. Filing a Claim

Where is my claim filed?

Claims alleging medical malpractice must first be filed with a Medical Review Panel. The panel is made up of three doctors and one attorney. One of the doctors is selected by you as the patient and one is selected by the defendant doctor. The third doctor is jointly selected by the patient and the defendant doctor. All three of the doctors chosen for the panel should practice in the same field of medicine as the defendant doctor. They will be rendering an opinion regarding whether the defendant doctor provided substandard care. The attorney on the panel is selected by the attorney representing the patient and the attorney representing the defendant doctor. The panel attorney provides the panel doctors with guidance on the process of the panel and questions about the laws. The panel then reviews the evidence and then renders an opinion as to

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whether it believes that malpractice has occurred. Once the Medical Review Panel renders a decision, positive or negative, you can then file a lawsuit to pursue your claim.

How long do I have to file my claim?

In Louisiana, you have one year from the date that you knew or should have known of the act of malpractice to file your malpractice claim.³⁷ However, in all cases, a claim must be brought within three years of the date of malpractice. If the malpractice causes death, the family members must bring a claim within one year of that person's death.

For example, if a doctor commits an act of malpractice on January 1, 2016, and you knew of it that day, you would have until January 1, 2017 to file a claim. If you did not realize that malpractice was committed until March 3, 2016, you would have until March 3, 2017 to file a claim. However, under no circumstances, whether you were aware of the

³⁷ La. C.C. Art. 3492
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malpractice or not, could you file a claim any later than January 1, 2019.

If you don't file your claim within the proper time limit, you can possibly lose your ability to bring a claim. This is why it is important to talk to an attorney immediately if you believe you or a loved one has been affected by an act of medical malpractice.

III. Damages

How do I prove damages in my medical malpractice claim?

Medical records play a big role in showing the presence of medical malpractice. Medical records provide great details about the patient's diagnosis, recommended treatment, and the results of that treatment. Those records are retrieved and analyzed by the attorneys and often by medical experts.

Proving medical malpractice almost always requires the

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testimony of a medical expert. The expert is typically a doctor or healthcare professional that practices or is trained in the same areas as the defendant doctor. The expert reviews the healthcare that was provided and opines whether malpractice occurred. That opinion is then reviewed by the Medical Review Panel. The patient's attorneys also must prove "causation." Causation means that the attorney must show that not only did malpractice occur but that the malpractice caused the injury that the patient suffered.

How much could I recover for my damages?

In Louisiana, medical malpractice claims are capped at \$500,000, plus past and future medical expenses.³⁸ This cap was set back in 1975 and has not changed since that time! What does that mean? It means that even if the act of medical malpractice causes permanent injury, permanent disability, permanent disfigurement, or even death, the pain and

³⁸ La. R.S. § 40:1231.3
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suffering component of your damages is capped at \$500,000.

We strongly disagree with this law, but it is the law, and you need to be aware of it.

CHAPTER 10

RESOLVING THE CLAIM

This is the step of the process everyone has been waiting for—settling their claim and finally having closure on the matter. It is very important to remember, however, that not all claims settle. This chapter will focus on what happens when you have completed your medical treatment, how we present your case to the insurance company, and what happens when settlement negotiations break down.

I. Creating a Demand Package

How will my claim become resolved?

Once you have completed your medical treatment, your attorney can begin requesting your final medical records,

medical expenses, and trying to resolve your case. There are generally two ways in which you can complete your medical treatment. In some cases, you will have made a full recovery from your injuries, have been released by your doctor(s), and are completely pain-free. More commonly, you have reached “maximum medical improvement” or “MMI,” which means the doctors and therapists have done everything they can do to make you feel better, and even though you still have some degree of pain or immobility, there is nothing more they can do medically to improve your condition. Usually, a person at MMI still has pain or other medical issues and will have future medical needs and/or expenses that also need to be addressed while resolving the claim.

As soon as your attorney has a complete set of medical records, billing statements, narrative reports, and anything else they may need to effectively resolve your case, they will write a demand letter on your behalf. The demand letter is a

summary of the facts of the accident, your injuries and medical treatment, and what the attorney is asking the insurance company to do for you. In most cases, the attorney will ask them to pay you a sum of money to compensate you for your injuries, damages, and losses. This is sometimes referred to as an “all-inclusive” settlement, meaning it is meant to compensate you for all of your damages, medical bills, attorney’s fees—everything associated with your case. In addition to the demand letter, your demand package can also include anything relevant to your case, including the crash report, medical records and bills, pictures, expert report, and anything your attorney feels will help bolster the value of your case.

II. Negotiations

When will my case settle?

Although your attorney is likely a skilled and effective negotiator, this does not always guarantee that your case will settle. Cases are usually negotiated through a series of settlement offers and counteroffers with the goal being to reach a settlement figure that satisfies and fairly compensates the client.

A case's value is driven by judges and juries. On a weekly basis, judges and juries throughout Louisiana decide the value of injuries in particular cases. Those decisions help determine the settlement amount of similar cases. For example, let's say you have a soft-tissue injury to your neck in which a doctor has determined that you will reach full recovery within 6 months. In order to determine how much your case is worth, we will then look at previous cases in

which those same circumstances exist to see how much those cases settled for. When we tell our clients what we think their case is worth, that estimate is based on what we have seen judges and juries do in similar cases in the past. This is also how we give our clients recommendations on whether we believe the defendant or defendants in their case have presented them with reasonable settlement offers. With that in mind, you still have to wait for the doctors and other experts to give their opinions about the nature and scope of your injuries and treatment before you can really evaluate the value of your claim. Sometimes that takes time. When we have a clear picture of what your injuries are and how they have affected your life, then we are in a better position to discuss the value of your claim. Anyone who tells you that they know the value of your claim early in the case is not being truthful or realistic with you.

What happens if I don't receive a fair settlement offer?

If a settlement cannot be achieved through the negotiation process, the client is faced with a decision to either accept the last offer from the insurance company or file a lawsuit to seek a better result. Mediation may also be a choice. Mediation is a form of alternative dispute resolution, which just means it is an opportunity to attempt resolving your case before trial. This process involves hiring a mediator to help the parties reach a settlement agreement. A mediator is an impartial third party, who normally is also a lawyer, but does not work for either side. The mediator attempts to get the case resolved for both you and the defense. In a typical mediation setting, the parties will gather together and review the strengths and weaknesses of their respective cases and will then break away into separate rooms with you and your attorney in one room and the defendant, the defense attorney, and sometimes even the insurance adjuster in another room. The mediator will visit each room and bring offers and

counteroffers back and forth along with other useful information. The goal of mediation is to reach a settlement agreement prior to trial. One advantage of mediation is that there is very little risk involved. If the case does not settle, you can still move forward to trial and have the judge or jury decide the case. If the case does settle, you have eliminated the need to go to trial on the matter.

What happens if my case settles?

Once a lawsuit has been filed, if the case settles before trial, the parties involved must draft and file a dismissal of the lawsuit. A dismissal is a legal document signed by the attorneys on behalf of their clients that tells the court the matter has been resolved and the suit can now be dismissed and removed from the court's docket. This process ends the litigation, and the matter is considered closed from that point forward.

III. Trial

What happens if my case goes to trial?

In Louisiana, you can have either a “bench trial” or a “jury trial.” A bench trial is one in which the case is simply tried to the judge, and the judge will be the trier of fact and make all decisions. In a jury trial, you will need to seat a jury of community members to observe the trial and make decisions on who prevails. At the end of the trial, the judge or jury will draw certain conclusions from the evidence and then render a verdict in favor of a particular party.

CHAPTER 11

WHY CONSULT AN ATTORNEY?

Experience with similar claims

This includes knowledge of the law, insurance company strategies, and knowing how the system works around personal injury claims. A personal injury attorney has experience with these types of cases. You won't have to worry about doing a lot of research, because a lot of it has been done in past cases. Your lawyer will know what to do every step of the way until your case is settled.

No fee unless we can recover for you

Most personal injury lawyers work on a contingency fee basis, which means you don't owe fees if they don't win for you—and if they do win, the fees will come out of the settlement, so no payment is required up front.

You can focus on getting better

After a personal injury, you are injured and should be able to focus on healing. An attorney will spend the time requesting medical records, police reports, and communicating with the insurance company.

Professionals work with other professionals

It is a personal injury attorney's job day in and day out to speak, negotiate, and correspond with other attorneys, insurance adjusters, and doctors. We know the lingo and can speak it for you.

Alternative Resolution Options

We understand that sometimes when adjusters will not offer a fair settlement that alternative methods of dispute resolution are necessary—and we are willing to handle your mediation or even go to trial to make sure you are compensated fairly.

GLOSSARY

Accident: An event that occurs without the intent of a human agent

Answer: The pleading containing a response to a claim in a complaint

Attorney: One who is licensed to practice law on behalf of another person

Bench Trial: A trial decided by a judge

Burden of Proof: The obligation to prove one's assertion

Concussion: Temporary unconsciousness caused by a blow to the head. The term is also used loosely for the aftereffects such as confusion or temporary incapacity

CT/CAT scans: Special X-ray tests that produce cross-sectional images of the body using X-rays and a computer

Damages: An award, typically of money, to be paid to a person as compensation for loss or injury

Decedent: A person who has died

Deposition: The testimony of a witness, given out of court but under oath, subject to cross-examination, and memorialized in an official transcript recorded by an authorized court reporter

Diagnostic Studies: An examination or test to identify an individual's specific areas of weakness and strength in order to determine a condition, disease, or illness

Disc: The soft pad positioned in between each of the vertebrae of the spine

Discovery: The process through which attorneys acquire evidence in a case prior to trial. Discovery describes the process by which attorneys learn of the evidence known or held by other parties before trial

Expert Witness: A person who is permitted to testify at a trial because of special knowledge or proficiency in a particular field that is relevant to the case

Facet Joints: A set of synovial, plane joints between the articular processes of two adjacent vertebrae

Fault: Legal responsibility for harm or damages

Injury: A broad term for the damaging results of a harmful action

Insurance: Contract by which an insurer promises to pay for protection or benefit after a specified event, in return for a premium paid by the insured

Insurance Adjuster: Employee of the insurer who evaluates a claim to assess the value of a loss, the risks, and potential liabilities, and sets an initial valuation of the valid claim that is owed

Hernia: Condition in which part of an organ is displaced and protrudes through the wall of the cavity containing it

Jury: A body of people sworn to give a verdict in a legal case on the basis of evidence submitted to them in court

Lawsuit: A legal proceeding in a court of justice

Lawyer: One who is licensed to practice law on behalf of another person

Liability: The responsibility that may be enforced under the law for ensuring the performance of some duty of action or omission, or for making good the injury of those harmed or threatened by not doing so

Magnetic Resonance Imaging (MRI): A diagnostic technique that uses magnetic fields and radio waves to produce a detailed image of the body's soft tissue and bones

Maximum Medical Improvement (MMI): When an injured employee reaches a state where his or her condition cannot be improved any further or when a treatment plateau in a person's healing process is reached

Mediation: A form of alternative dispute resolution, which just means it is an opportunity to attempt resolving your case before trial

Medical Malpractice Claims: Claims against healthcare providers in which it is asserted that injury or death to a patient occurred as a result of the medical provider's

treatment that fell below the accepted standard of practice in the medical community

Merchandise: Goods to be bought and sold

Merchant: One whose business is to sell goods, foods, wares, or merchandise at a fixed place of business

Negligence: A breach of a legal duty that harms another

Negotiation: Discussion aimed at reaching an agreement

Personal Injury: Physical injury inflicted on a person's body

Petition: A legal proceeding in a court of justice

Premises Liability Claim: Arises when someone is injured by an unreasonable risk that is present on the property of another

Pre-existing condition: An injury that was present before the accident at issue

Primary Care Provider: Healthcare practitioner who sees people that have common medical problems on a regular basis

Product: Basically, any tangible item that is manufactured for placement into trade or commerce.

Product Liability Claims: When a product or device causes injury to another

Settlement: The reconciliation of a bill, claim, or dispute

Specialist Doctor: Physicians who treat specific areas of the body

Statute of Limitations: A time limit established by legislation designating the longest time after which an action occurs that a claim may be brought under the law

Supplemental Earnings Benefits: Supplemental Earnings Benefits pay you two-thirds of the difference in the wages you are able to earn and the wages you were earning before your accident (if the former is lesser), if you are unable to return to your job after injury

Survival action: A lawsuit that is brought on behalf of a decedent's estate for injuries or damages incurred by the decedent immediately before dying

Temporary Total Disability: Pays you two-thirds of your average weekly wage for any time period you are totally unable to perform any work due to your accident

Traumatic Brain Injury (TBI): An abuse to the brain, not of a degenerative or congenital nature, but caused by external physical force that may produce a diminished or altered state of consciousness, which results in an impairment of cognitive abilities or physical functioning

Underinsured Motorist Coverage: Is designed to provide the injured party with compensation above what is allotted by the at-fault party's policy

Uninsured Motorist Coverage: Is insurance that protects you if you're in an accident with an at-fault driver who doesn't carry liability insurance

Vertebrae: Series of small bones forming the backbone, having several projections for articulation and muscle attachment, and a hole through which the spinal cord passes

Workers' compensation: A form of insurance that exists to provide lost wages and medical expenses to employees that have been injured in the course and scope of their employment

Wrongful death: A claim against a person who can be held liable for a death

X-Ray: A photographic or digital image of the internal composition of something, especially a part of the body