The Personal Injury Victim's Bible

Your Guide For Treatment, Evidence, and Negotiations

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Introduction

Every year, thousands of Californians are injured in accidents due to the carelessness of another person. Drivers who pay attention to their cellphones rather than the road, landlords who leave broken steps in disrepair, and dog owners who fail to prevent their dogs from biting pedestrians are among those who are responsible for personal injuries.

Injury victims are entitled to compensation if they can establish that their injuries were caused by another person's negligence. When an accident victim's injuries are severe, a personal injury lawyer can help the victim maximize the compensation that he or she receives from the negligent party's insurer. In some cases, particularly those in which compensation is likely to be limited, accident victims decide to settle their personal injury claims without the assistance of a lawyer. This book is intended to guide those victims to a fair settlement.

Accident victims will find helpful information about personal injury law and settlement strategies in this book. Keep in mind that the book discusses California law. It should not be relied upon as a description of the law in any other state. Also keep in mind that this book is meant to provide general information, not legal advice. Every personal injury case is different. You can only get legal advice by explaining the details of your specific situation to a lawyer. Reading this book is not the same as being represented by a lawyer.

Do I Need a Lawyer?

There are significant advantages to having representation by a personal injury lawyer. Personal injury attorneys have experience determining settlement values, negotiating with insurance adjusters, overseeing accident investigations, working with expert witnesses, preparing cases for trial, and persuading juries to return favorable verdicts. In a case that is likely to produce substantial damages, the benefits that an accident victim will gain from professional representation far outweigh the contingent fee that will be deducted from the victim's compensation.

In some cases, however, a personal injury victim might want to negotiate a settlement without the assistance of a lawyer. When physical injuries healed quickly without the need for extensive medical treatment, the relatively small settlement value of the case might make it difficult to attract a lawyer. If damages will be substantially reduced because of comparative negligence (a concept that is explained later in this book), the reduced settlement value might again make the case unattractive to lawyers.

Keep in mind that if an insurance adjuster refuses to pay your claim or will not pay what you think the case is worth, your only option is to sue. If you are willing to accept the limits for which you can sue in small claims court, you might want to handle the case yourself. In California, you can typically seek damages of up to $7,500 in small claims court. If the settlement value of your case is substantially more than $7,500 and a lawyer is willing to represent you, hiring a personal injury lawyer is the best way to maximize your compensation while avoiding the hassle of trying to settle your claim yourself.

Principles of Negligence Law

Liability

All persons and corporations within the State of California have a duty to exercise reasonable care to avoid injuring others. When careless actions cause harm to another, those actions are said to be negligent.

Negligence is the legal principle upon which personal injury liability is based. Liability means legal responsibility. You establish another person's liability in a personal injury case by proving that the person's actions or omissions were negligent and that the negligence caused your injuries.

Many accidents, including nearly all car accidents, are the result of negligent acts. Making a careless lane change without noticing that another vehicle already occupies that lane is a negligent act. The driver's negligence leads to liability if the lane change results in a collision that causes an injury.

A negligent omission is the failure to act when it is foreseeable that harm will result unless some act is taken. People have a duty to prevent harm when they have created the potential for harm and in certain other circumstances. When a store employee sees water on the floor and fails to warn customers of the hazard or to mop up the water, that negligent omission creates liability if a customer slips and falls on the wet floor.

Although it is possible to bring a personal injury claim for injuries that were caused intentionally, insurance rarely covers intentional misconduct. Liability in those cases, known as "intentional torts," are covered by legal principles that are beyond the scope of this book.

Damages

Damages are the measure of compensation to which you are entitled for injuries suffered as the result of another person's negligence. Damages can be divided into two categories: monetary and nonmonetary.

Monetary damages include the expenses you incurred or the money you lost as a result of another person's negligence. Medical bills, prescription costs, and the amount you spend to buy crutches are examples of expenses you incur. Lost wages that result from an inability to work due to your injury are another example of monetary damages.

Nonmonetary damages include the compensation to which you are entitled for pain, suffering, and emotional distress or mental anguish. Those damages cannot be measured with the precision of monetary damages but you are normally entitled to be compensated for pain, suffering, and emotional distress if you were physically injured. We discuss how nonmonetary damages are valued later in this book.

Comparative Negligence

You are entitled to recover damages from all persons whose negligence was a contributing cause of your injury. For example, suppose Driver 1 collided with the rear of Driver 2's vehicle, pushing that vehicle into the rear of your car. Driver 1 was likely negligent for rear-ending Driver 2, setting in motion the chain of events that caused Driver 2 to collide with your car. Driver 2 may also have been negligent if Driver 2 was tailgating you, at least if the collision with your car could have been avoided by maintaining a prudent distance between your vehicles.

In California, comparative negligence principles determine responsibility for payment of noneconomic damages when negligence is shared. In the example above, suppose Driver 1 was 80 percent at fault and Driver 2 was 20 percent at fault. Driver 1 would be responsible for paying 80 percent of your noneconomic damages and Driver 2 would be responsible for the other 20 percent. You can collect all of your economic damages from either driver, but the combined compensation for economic damages paid by the two drivers cannot exceed your total economic loss.

If your own carelessness was a contributing cause of your injuries, your damages will be reduced in proportion to your responsibility for those injuries. Assume that your vehicle and another driver's vehicle entered an intersection at the same time. If you had the right of way, the other driver's fault for the ensuing collision was probably greater than yours. If you

should have seen the other driver and could have avoided the accident by paying greater attention, however, your own negligence was a contributing cause of the accident. If you were 25 percent at fault, you will only be able to recover 75 percent of your total damages.

California's law of comparative negligence (unlike the law in most states) allows you to recover damages from another negligent party even if your negligence was greater. That means you can recover 10 percent of your damages from a person who was 10 percent at fault for an accident even if you bore 90 percent of the fault.

Treatment for Your Injuries

The key to maximizing your recovery for personal injuries is to obtain treatment from doctors, physical therapists, and other healthcare providers. Insurance adjusters rely heavily upon medical records when they evaluate injury claims. If they see that ongoing reports of pain have been documented in your medical records, they are more likely to believe that your pain was real. Even if they doubt the validity of your pain and suffering claim, adjusters understand that juries normally accept the testimony of doctors who testify that a patient made credible reports of pain over an extended period of time.

In addition, as we discuss later in this book, insurance adjusters tend to equate larger medical bills with more severe pain and suffering. The more often you obtain treatment, the more substantial your medical bills become. That increases the settlement value of your claim.

This is not to suggest that you should "run up" bills by seeking treatment that you do not need or by fabricating symptoms you do not have. Rather, we stress the importance of obtaining treatment because so many injury victims get tired of seeing doctors or give greater priority to other activities and fail to follow through on their treatment recommendations. The biggest mistake that accident victims make is to stop treating before they are completely healed.

Ending physical therapy before being released by the therapist is the most common example of an accident victim's failure to continue treating until the injury has healed. Physical therapy is time consuming. It is common for therapists to ask patients to participate in therapy sessions three times a week for several weeks. Many patients would rather endure their pain instead of making the commitment of time that physical therapy demands. In addition, the exercises that physical therapists recommend may seem more painful than the injury. That also motivates patients to discontinue physical therapy before the therapist releases them.

As soon as an insurance adjuster sees that you stopped going to physical therapy or stopped seeing your doctor, the adjuster will assume you were

cured and free of pain. You can explain your reasons for ceasing treatment but you will have no medical records to substantiate your continuing pain and suffering. Most adjusters will not be swayed from their insistence that your pain and suffering ended when your treatment ended. Discontinuing treatment before you have healed therefore reduces the settlement value of your injury claim.

Document your injuries

Every time you see your doctor, you should explain in detail the pain and suffering that you have experienced. If your injuries are affecting your life in other ways — if you cannot sleep, feel depressed, or have difficulty working because of your pain medication — explain those difficulties to your doctor. Don't be shy. Your doctor cannot make a record of the problems you are experiencing if you do not tell your doctor about them.

You might want to make a checklist of your symptoms before you see your doctor. Make notes of the kind of pain you are feeling, the location of the pain, and the hours of the day in which you experience pain. If the nature of the pain changes during the course of the day, make a note of those changes. Take the checklist with you when you see your doctor so that he or she has a full understanding of your condition and can document that condition in your medical records.

If your physical therapist asks you to do stretches or other exercises at home, keep a record of the days on which you exercise and the amount of time you spent doing each exercise. If the exercises were painful, make a note of that as well. Keep a copy for yourself and give a copy to the physical therapist so that your diligence can be noted in the therapist's records.

When should you stop treating?

Continue treating with a physician until you are free of pain. Follow your doctor's advice about the frequency with which you should obtain more treatment. If the doctor says "come back in six weeks if your symptoms persist," make sure you return in six weeks if you are still in pain. If you do

not, the insurance adjuster will assume that your injuries completely healed during that six week period.

If your doctor refers you to a specialist, see the specialist. If you doctor refers you to physical therapy, make an appointment and follow through. Doing everything your doctors and therapists ask you to do will not only help you heal, it will maximize the recovery you receive for your injuries.

In some cases, injury victims reach a healing plateau. In other words, their doctors say that they have reached their maximum state of improvement and that they will always have some degree of pain and disability. It is important to have your doctor document that opinion in your medical records before you stop treating. If you have a permanent or long-term injury, however, you should seriously consider having a lawyer handle your personal injury claim.

Treatment mistakes that accident victims commonly make

Accident victims must walk a fine line between treating too much and treating too little. Here are four mistakes that accident victims commonly make that hurt their personal injury claims:

1. ***Not finishing treatment***

As we emphasize above, you will not receive all the compensation to which you are entitled unless your pain and suffering is documented in medical records. That means getting the treatment that you need. If you have no health insurance and cannot afford to see a doctor, work out a payment arrangement with the billing department. Assure the doctor's office that they will be paid from your settlement proceeds. Give them a lien against the settlement if they require one. If you do not have time for treatment, make time. If the treatment is painful, endure it. In the end, treatment will help you heal and will maximize your settlement.

2. ***Over-treating***

If you obtain treatment you do not need simply to increase the size of your medical bills, your tactic will be obvious to the insurance adjuster. That is a

particular risk if you are receiving chiropractic treatment. Insurance adjusters are skeptical of chiropractic records that show treatments two or three times a week for several months without evidence of improvement. Just focus on getting better by following your healthcare provider's advice. If your medical bills reflect legitimate treatment, they will become the key component of a fair settlement.

3. ***Claiming treatment that isn't medical treatment***

Some people swear by herbal medications and holistic remedies. Insurance adjusters are unimpressed. If you include a list of expenses for herbal remedies and alternative healthcare as treatment expenses, you are more likely to weaken your case than to strengthen it. By the same token, massages might make you feel good but insurance adjusters do not regard them as medical treatment. If you want to include massages as part of your medical expenses, make sure that your medical records document a physician's recommendation that you receive massage therapy.

4. ***Faking injuries and malingering***

It is never a good idea to pretend to be more injured than you actually are. Keep in mind that insurance adjusters sometimes hire a private investigator to follow accident victims if the adjuster suspects the victim is lying about an injury that never happened or is pretending to be bothered by an injury that has healed. If you claim you were confined to bed during a time when a private investigator sees you mowing the lawn, you jeopardize your chance of winning any settlement at all.

Gathering Evidence

Before you can submit a claim for compensation to an insurance adjuster, you will need to gather evidence in support of your claim. This section tells you what you need to do.

Accident Report

If your claim is based on a traffic accident, the police officer who responded to the accident probably prepared an accident report. In California, accident reports are a matter of public record. You can obtain a copy of the officer's accident report by making a public record request to the police department that employs the officer who wrote the report.

You should also request any additional reports that were prepared with regard to the accident investigation. For example, the officer who investigated may have taken statements from witnesses who observed the accident. You should obtain a copy of those statements and any other investigative materials the officer prepared.

You will need to provide the date and location of the accident, your name, and the name of the other driver. That should be enough information to permit the department's staff to locate the record. Under most circumstances, a copy of the record will be provided within 10 days of your request. You will be charged a fee for the cost of copying the record.

Some police agencies allow accident reports to be requested or purchased online. Check the website of the police department that responded to your accident to learn the local procedure for requesting an accident report. Remember that there may be additional police reports in addition to the accident report. You should ask the police records custodian whether any such reports exist rather than relying solely on the information you find online.

Once you obtain the accident report, review it carefully. Officers occasionally make mistakes when they prepare reports. For instance, the officer might record damage to the passenger side of your vehicle when the

impact was actually on the driver's side. If you notice a mistake that could affect a determination of liability for the accident, contact the officer who prepared the report and ask the officer to file an amended report that corrects the mistake.

The officer may have a different perception of the facts than your own. You cannot force a police officer to change a report merely because you have a different understanding of the facts. If there is clear evidence of a mistake (such as photographs of damage to your vehicle) or if the officer acknowledges the mistake, the officer will probably be willing to amend the report. Since insurance adjusters tend to place great weight on accident reports as proof of how a collision occurred, you will want the report to be as accurate as possible.

Witness statements

If fault is a disputed issue, you may need to obtain statements from witnesses who observed the accident, assuming the investigating officer did not do so. The accident report will list the names of witnesses who were known to the investigating police officer. You may be aware of other witnesses because you observed them on the scene. If you think there may have been additional witnesses but are not sure how to locate them, a private investigator may be able to help you.

Some witnesses are unlikely to help you. For example, a passenger in the vehicle of the driver who collided with yours will probably side with that driver, not with you. It generally makes no sense to get statements from people who are likely to be hostile to your position. Neutral witnesses who will make truthful statements that support your view of liability are the best sources of witness statements.

If the recollection of a witness is consistent with your own or otherwise favorable to your case, you can ask the witness to write a statement describing the accident. The statement does not need to be formal or lengthy. Ask the witness to write it as if he or she were writing a letter. The statement should be signed and dated. It does not need to be notarized.

You can also obtain letters to document your pain and suffering. Someone who saw you suffer on a daily basis, such as a spouse or adult child, may be able to give an objective description of the impact that pain had on your life. The best letters describe your pain and suffering in clear, unemotional language that is nevertheless vivid and detailed.

After you have collected witness statements that support your position, you can include them with your demand letter to the insurance adjuster. Demand letters are discussed in more detail later in this book.

Photographs

If you were in a car accident, take pictures of the damage to your car. That is particularly important if the damage was extensive. While even a low-impact collision can cause a serious injury, insurance adjusters are more likely to believe that your injuries were significant if they can see that damage to your car was extensive.

Medical records

Make a list of every treatment provider who treated you for your injuries. You will need to get medical records from all of them. That list might include:

- ***Ambulance records***. Paramedics prepare records concerning each patient they transport. The ambulance company can provide you with those records.

- ***Hospital records***. Emergency room doctors are employed by the hospital so their notes will be part of the hospital records. You will not receive X-rays unless you specifically request them. In most cases, you will not need X-rays since other records will contain an interpretation of the X-rays.

- ***Physician records***. If you were admitted to the hospital and were seen by physicians outside of the emergency room (such as an orthopedist or a surgeon), you will want to contact the offices of those doctors directly to obtain a copy of your medical records.

If you saw your own physician after you were discharged from the hospital or if you were referred to specialists, you will need to contact the office of each physician who examined or treated you to request a copy of their records.

● ***Physical therapy records***. If you were referred to physical or occupational therapy, you will need to contact the office where the therapy provider is located to obtain your treatment records.

● ***Mental health records***. If you obtained treatment for anxiety or depression that you associate with the accident, you should obtain records from the psychologist, counselor, or other mental health provider who treated you.

● ***Dental records***. If you were treated for injuries to your teeth, mouth, or jaw by a dentist as a result of the injury, request a copy of those treatment records.

● ***Billing records***. In addition to requesting your medical records, ask for a complete copy of your billing records from each healthcare provider that treated you. Do not rely on bills that you received in the mail as treatment progressed because you may have overlooked or misplaced some of those bills.

Each hospital, clinic, or doctor that provided treatment has a medical records custodian. You can send a written request for your medical records to the attention of each medical records custodian. You must sign that request. California healthcare providers are required to respond to the request within 5 business days of its receipt. They are also entitled to charge you a reasonable clerical fee for record retrieval and a copying fee that cannot exceed 25 cents per page.

You will need to specify the dates of the records you are requesting. Unless you are certain of the date on which your treatment ended, you may want to ask for all records from the date of the accident to the present. You can always cull records for treatment that is unrelated to the accident when you submit the records to the insurance adjuster. Keep in mind, however, that you will be charged a fee for copying the records. If you know that you

received substantial treatment unrelated to the accident, you may want to exclude those records from the request so you are not charged for records you do not need.

You are entitled to inspect your records at no charge. If you are concerned about the copying fee, you can use that inspection to decide which records to copy.

The records custodian does not handle billing records. You will need to submit a separate request to the billing department to obtain your billing records.

Proof of wage loss

If you missed work because of your injuries, you will need to submit documentation of your wage loss. You can do that by asking your employer to prepare a statement that includes:

- the dates on which you missed work due to the accident or medical treatment;
- the number of hours you missed and your hourly wage if you are paid by the hour;
- the number of overtime hours you missed and your hourly overtime wage if you paid by the hour; and
- the deduction that was made from your compensation due to missed work if you are not paid by the hour.

If you lost your job because you missed too much work, have your former employer write a letter confirming that your employment was terminated because of your inability to work after the accident. The letter should state the wages or salary you were earning prior to the accident and should confirm that you would have earned those same wages or salary (or more, if that is the case) if you had been able to continue your employment.

When Should You Settle?

Most accident victims want to get the settlement process over with as quickly as possible so they can move on with their lives. Settling too soon can be a serious mistake that will cost you money. On the other hand, waiting too long can jeopardize your ability to bring a claim in court if that becomes necessary.

Finish treating before you settle

Suppose you were rear-ended in a collision. You were released from the emergency room with headache medication and instructions to follow up with your physician if your condition worsens or persists. You wake up the next morning feeling fine. Hours later, an insurance adjuster shows up at your door and offers to write you a check on the spot to resolve your claim. Should you settle?

Any settlement you make is final. Signing a release in exchange for a settlement check will end your right to make any additional personal injury claim arising out the same accident. The adjuster will not give you a check until you sign a release. If you find out days after you settle that you will need more treatment or if you begin to experience ongoing pain, you will be entitled to no additional compensation for your suffering or medical bills. You gave up your right to increased compensation as soon as you signed the release even if you did not know the full extent of your injuries.

The severity of some injuries, particularly soft tissue injuries, is not always apparent immediately following an accident. Sometimes neck, shoulder, or back muscles will begin to feel stiff days after the collision occurs. Sometimes muscles or tendons are weakened, leaving them susceptible to further injury. You might not know that until you go running or engage in vigorous activity that triggers pain you would not normally have.

Although insurance adjusters often contend that pain is not real if it does not occur immediately, the delayed onset of pain in muscles and tendons after a car accident or other traumatic event is well documented in medical literature. If you obtained minimal treatment and felt fine, you should plan

to wait a month or two to be sure you are symptom-free before you consider settling.

As a general rule, you should not settle until after you have finished treating. That means you have done everything you were asked to do and all of your physicians and therapists have released you from further treatment. If you followed your physician's advice and feel that your injuries have healed, you should rely on your doctor's opinion as to whether your healing is complete.

If you have a permanent injury, you may never finish treating. In that case, you do not want to settle until your injury has reached a plateau. An injury reaches a plateau when, at least over the course of the next several years, it is unlikely to get any better or any worse. Your physicians can tell you when your injury has reached a plateau. If you have a serious permanent or long-term injury, however, you probably have the kind of case that should be handled by a lawyer.

Be Aware of the Statute of Limitations

A "statute of limitations" is a law that limits the time in which you can file a lawsuit. For most personal injury lawsuits based on negligence that are filed in California for injuries that occurred in California, the statute of limitations is two years from the date the injury occurs. In most cases, the injury is deemed to have occurred on the date of the accident that caused it.

Once the statute of limitations expires — in other words, after two years have passed — you lose your right to bring a lawsuit. Since you no longer have a claim that can be enforced in court, insurance companies will not settle with you after the two year period ends. If you want to obtain compensation, you must therefore settle or file a lawsuit within two years of the date of your accident.

There are a few exceptions to the two year statute of limitations that apply only in unusual situations. Injuries from exposure to asbestos and claims against the government (such as a collision with a county vehicle driven by a county worker in the course of that person's employment) are examples of cases in which a different statute of limitations applies. If you are in doubt

about the statute of limitations that applies in your case, you should get legal advice.

Don’t Feel Pressured to Settle

Insurance adjusters want injury victims to settle as quickly as possible. Since a settlement cuts off the right to receive additional compensation, insurance companies save money by settling cases before injury victims understand the full extent of their injuries.

Never feel pressured to settle with an insurance adjuster. As soon as you are contacted by a claims adjuster, you should say “I will send you a demand letter when I am ready to negotiate a settlement. Until then, I do not want to talk to you.”

The insurance adjuster might want you to give a recorded statement that explains the accident from your perspective. You are not required to give a statement. You can tell the adjuster that you will explain the accident in your demand letter. The adjuster might reply that no settlement offer will be made unless you give a recorded statement. That tactic may or may not be a bluff.

If the insurance company refuses to settle, you can always file a lawsuit, but you can be compelled to give a deposition (which is a form of recorded statement) as part of your lawsuit. Since you may need to give a statement eventually, you might want to agree to give a statement if the adjuster insists that you do so. Before that happens, however, you should review the accident report and be sure that all the facts are clear in your mind so that you can give the statement without making any mistakes about the facts. You might also want to delay giving the statement until you have a better idea about the severity of your injury. You don’t want to say “I feel fine” when you give your statement only to experience the onset of back pain the next day.

Writing the Demand Letter

A "demand letter" is a letter that presents an initial settlement offer. Lawyers refer to that offer as a "settlement demand" but your offer to settle your claim for a certain sum of money should be considered a proposal rather than a demand. As the next section of this book explains, you can expect to receive a counter-offer and to engage in a process of negotiation before you reach a settlement. For that reason, the offer made in your demand letter will be higher than the amount you are willing to accept to settle your case.

Your demand letter should contain four components:

- Introduction
- Liability
- Damages
- Settlement demand

If you have not already resolved any claim you have for property damage, you can add a fifth section requesting compensation for vehicle damage. Include estimates for bills for repair costs. If the market value of your vehicle is less than the repair cost would be, your damages are the market value of the car less salvage value. You can find the car's market value online using Kelley Blue Book or Edmunds.

Introduction

Begin the letter by telling the insurance adjuster why you are writing. You might say something like this:

> I am writing to present a settlement demand concerning the injuries I sustained when your insured driver collided with my vehicle on [*insert date*]. I have finished treatment and am now in a position to resolve this claim. If we cannot reach a

> settlement in the near future, I am prepared to [*retain a lawyer* or *file a lawsuit*] to protect my interests.

The balance of your letter will explain your settlement demand.

Liability

In this section of the letter, you will explain why you are entitled to compensation. You want to persuade the adjuster that your injuries were caused by the negligent acts or omissions of the insured person.

Describe the accident in a concise paragraph or two. Explain exactly why the person responsible for your injuries was negligent. For example, if you had the right of way at an intersection, explain that you entered the intersection first and that the other vehicle failed to yield. If the other driver violated a specific traffic law (for example, by running a red light), refer to that violation as proof of negligence. If an officer wrote the other driver a ticket, mention that as additional evidence of negligence.

You should point to facts that you can prove by evidence other than your own statement whenever possible. Making reference to facts that are described in the accident report or witness statements will help the adjuster understand that there is evidence to support your version of how the accident occurred. Mention that you are enclosing copies of documents that you rely upon to support your claim.

You do not need to address comparative negligence in your demand letter. The adjuster will raise that issue in support of the company's counter-offer. You will have an opportunity during negotiations to make comparisons of your own negligence (if any) to the negligence of the insured party.

Use forceful language. If the accident involved two vehicles, use words like "collision" and "sudden impact" when you describe the accident. While you want to prepare a powerful description of the accident, you should avoid melodrama.

Damages

This is the longest section of your letter. You should answer these questions:

● What happened to you at the moment the accident took place? For example, you might explain you were thrown forward, restrained by your shoulder belt, and bounced backward, causing your head, neck, and torso to move rapidly in different directions. Or you might explain that you were thrown to the side, jamming your shoulder into your vehicle's door. Explain as best you can the cause of every physical injury you suffered.

● How did you feel at that moment? Did you feel pain instantly or were you numb? Did you lose consciousness? Were you afraid or disoriented? Many accident victims are shocked by the fact of the accident and only begin to feel pain minutes or hours later.

● Were you able to leave the accident site on your own or were you transported in an ambulance? If you were examine by paramedics, emphasize the portions of their notes that support your claim. For instance, if paramedics made note of the fact that you were in pain, call attention to that fact in your demand letter. If you were placed in a neck brace and transported on a backboard, highlight those facts.

● What treatment did you receive? Go through each doctor's visit in detail, stressing the symptoms you were experiencing and the treatment you received for those symptoms. Describe your visit to the emergency room, each visit with your treating physician, visits with any specialists to whom you were referred, and any physical therapy you received. Rely on your medical records to support your recitation of those facts.

● Did you take medication? Mention the medication that was prescribed to you. Call attention to any problems you had with the medication. For example, many pain medications make people groggy and impair their ability to work or to drive. If your life was inconvenienced because of prescribed drugs, explain that to the adjuster.

● Was treatment painful or burdensome? Physical therapy, in particular, can be a painful experience. Exercising injured muscles causes short-term pain during exercise sessions. The pain is usually worse a day or two later. If that was your experience, make sure you explain that in your demand letter.

● How did you feel between doctor's visits? It is not unusual for accident victims to feel improvement for a few days after seeing the doctor, only to decline in the following weeks.

● What was the impact of your injuries on your personal life? Apart from the difficulty of enduring pain, injuries often make it difficult to sleep and to function normally during the day. It may have taken you longer to get dressed because it hurt to move your shoulder. It might have been difficult to drive because moving your neck to look for traffic in other lanes was painful. You may have been forced to rely on others to do basic household chores that you would have preferred to do yourself. If you were unable to spend time with your children or friends, missed attending a party or other event, or could not enjoy sexual relations with a spouse or partner because of your injuries, describe each of those difficulties.

● What was the emotional impact of your injuries on your life? Did your injuries make you irritable and grouchy? Did that create problems with your spouse and family members? Did you feel guilty because you were not able to give your family the help and support that you normally provide? Did you feel anxious or depressed as a result of your injuries? Think about how the injuries affected your mental status and describe those feelings as best you can.

● What was the economic impact of your injuries? You should itemize and provide documentation of:

    ○ All of your medical expenses, whether or not they were covered by insurance.

- All of your out-of-pocket expenses, including the cost of crutches and prescription medications.

- Your wage loss.

- Any other expenses you incurred as a result of your injuries, such as taxi fares because you could not drive or hiring a cleaning service because you were unable to perform your usual household chores.

When you describe your injuries, be as vivid as possible without being overly dramatic. Instead of saying "I felt pain," try to describe the pain. Was it a dull ache, a nagging soreness, or a sharp stabbing? Was it constant or intermittent? Was it worse when you woke up after a period of inactivity? Did certain activities, such as prolonged sitting, cause your pain to worsen? Make sure you give the adjuster a good sense of how the pain affected you throughout the day.

Settlement demand

This section does not need to be long. You merely need to offer to settle the case for a specific dollar amount. A settlement demand might use language like this:

> As you can see, I endured a difficult six months as the result of your insured's negligence. To provide appropriate compensation for my physical pain and suffering, stress, emotional trauma, medical expenses, and wage loss, I am prepared to settle this claim for the sum of $15,000. I look forward to your prompt reply.

Your settlement demand should be more than the amount you are willing to accept so that you have room to negotiate. On the other hand, it should be reasonable. The adjuster will not take an astronomical demand seriously. That will impair your ability to resolve the case promptly. A rule of thumb that many people follow is to ask for about twice the actual settlement value of the case.

Sign the letter and send it to the adjuster. If you do not receive a reply within 10 business days, politely inquire whether the adjuster received the letter and when you can expect a response.

Negotiating with the Claims Adjuster

The adjuster will respond to your settlement demand with a counter-offer. If you have assessed the settlement value correctly and have asked for twice that amount, the adjuster will probably offer half the settlement value. You may need to go back and forth with additional counter-offers until you arrive at a settlement.

Valuing your case for settlement

There is no magic formula that lets you determine the settlement value of a case. Economic damages, however, are easy to calculate. The total of your medical expenses, wage loss, and other out-of-pocket expenses are your economic damages.

Noneconomic damages can never be measured with precision. Lawyers use their experience resolving similar cases to help them place a value on pain and suffering. They also keep an eye on jury verdicts in their community get a sense of what a jury would do if the case went to trial.

Insurance adjusters are always skeptical of an accident victim's claim to have suffered pain or emotional distress. The more often you went to the doctor, however, the more persuasive will be your contention that you endured pain for a significant length of time. For that reason, the value of pain and suffering tends to be correlated with the amount of treatment you received. Treatment, in turn, is correlated with your medical bills. Higher medical bills generally result in higher compensation for pain and suffering.

Some adjusters use a "multiplier" as a rule of thumb to value pain and suffering. They take the total amount of your medical and pharmaceutical bills and multiply the total by a number. The highest number typically used as a multiplier is 5. Your medical records will need to make your pain and suffering clear before an adjuster will be persuaded to accept a high multiplier. The adjuster may also use a multiplier at the high end when the insured driver was drunk or was ticketed for reckless driving. A more typical multiplier in a routine accident is 3.

Some adjusters apply a multiplier to all your economic damages, including wage loss. When they do that, they generally use a smaller multiplier, such as 1.5 or 2.

Adjusters also keep in mind the length of time you experienced pain. While enduring pain for a longer time usually means more treatment and higher medical bills, that is not always the case. Sometimes a doctor will tell a patient to rest or to exercise at home until the pain is resolved. You need to point to evidence of physical or emotional pain in your medical records or letters you submit from friends or family members to establish the length of time you suffered.

Some adjusters value noneconomic damages by computing the amount you earn at your job each day. They multiply that amount by the number of days you experienced pain and suffering to arrive at a settlement value for noneconomic damages. That method of valuation is less common than the "multiplier" method. You might want to consider the results you receive using both methods when you determine the final value of your noneconomic damages.

Negotiating with the adjuster

The adjuster might respond to your settlement demand in writing or might give you a call. If the adjuster calls and you find yourself feeling intimidated, you should say you need to think about the counter-offer and will respond to it in another letter. You can also ask for further negotiation to take place via correspondence or email.

Insurance adjusters tend to challenge everything you say. The adjuster will present the facts in the best light for the insured. Adjusters will nearly always attribute some of the fault to you even if you feel you did nothing to cause the accident. As a practical matter, unless a driver was rear-ended and clearly could have done nothing to avoid the collision, juries tend to assess blame to both drivers in car accidents. That is particularly true when the collision occurred in an intersection. Even if you had the right of way, you should probably concede that you were 10 or 20 percent at fault for failing to anticipate and avoid the accident.

While adjusters occasionally grumble about “overtreatment” (particularly if you repeatedly saw a chiropractor), they cannot effectively argue against payment of your healthcare bills. They are more likely to attempt to minimize your pain and suffering. Adjusters typically belittle claims of suffering. They will tell you that the pain should have gone away soon after the accident. They will tell you that the pain was all in your head and that you have no proof that you actually suffered.

If you consistently told your doctor and other healthcare providers about your pain, your medical records will substantiate your entitlement to damages for pain and suffering. Simply refer the adjuster to those records. Adjusters know that doctors typically support their patients in cases that go to trial. If the doctor documented your complaints of pain in the medical records, the doctor probably believed those complaints were legitimate. As much as the adjuster might tell you otherwise, the adjuster knows that you are entitled to compensation for pain and suffering that is well established in your medical records.

The adjuster may want to wear you down by fighting a war of attrition. Each new offer the adjuster makes may be only slightly higher than the last offer. All you can do in that situation is to make correspondingly small reductions in your settlement demand until you arrive at a figure you can live with.

Keep a cool head when you negotiate. Losing your temper is counterproductive. If the adjuster thinks you are easily rattled, the adjuster will conclude that you would be a bad witness if the case goes to trial. If you feel yourself becoming upset, tell the adjuster you need time to think about the most recent counter-offer and will reply to it in writing.

Consider the arguments the adjuster makes in support of a low offer and refute them as best you can when you counter with a new offer of your own. Point to evidence in accident reports, witness statements, photographs, and medical records to support your position. The more you can rely on documentary evidence, the stronger your argument will be.

At some point the adjuster will give you a “final offer.” It may or may not be the real final offer. Some adjusters refuse to budge after making a final

offer. Others will continue to make slight improvements in the offer if they think a slightly higher amount will be sufficient to settle the case.

When you receive a final offer, you will know that you have received, or are close to receiving, the best offer you will get. At that point you need to decide whether to accept the offer, to continue your efforts to negotiate, or to file a lawsuit. When it becomes clear that no better offer is on the horizon, filing suit or accepting the offer are your only options.

If you are willing to accept $7,500 or less as compensation for your injuries, you can file a lawsuit in small claims court. The small claims courts in most California counties have websites that explain the procedure you need to follow.

If you decide to accept a settlement offer, write a letter or email that states the compensation you have agreed to accept in exchange for surrendering your right to sue. Keep a copy for yourself. The adjuster will want to meet with you so you can sign a release in exchange for the settlement check. The release is generally a standard form that states your agreement to accept a dollar amount as a full and final settlement for all injuries, known and unknown, existing now or arising in the future, that were caused by the insured party's negligence.

Handling Subrogation Claims

If your medical bills were paid in whole or in part by health insurance, you may need to reimburse your insurer for those payments. Your insurance contract likely contains a "subrogation clause" that requires you to pay your health insurer any compensation you receive for medical bills that your insurer paid.

Health insurers often send letters asking whether your injuries resulted from an accident when they begin to pay your medical bills. If that happens, you will probably receive another letter reminding you of the insurer's subrogation interest. Whether or not you receive that letter, you should read your health insurance policy to understand your obligation to pay a subrogation claim made by your health insurer.

The release you sign with the negligent party's insurance company will probably state that you are responsible for payment of subrogation claims. In other words, you cannot ask for more money in your settlement if you belatedly learn that your health insurer is asserting a subrogation claim. You must therefore keep your subrogation obligations in mind when you negotiate your settlement with the negligent party's insurance company.

The law of subrogation is so confusing that your obligation to reimburse your health insurer is not always clear. Even courts disagree about the rules that govern subrogation claims. In addition, since you will probably accept a lump sum to settle all your claims, it is often unclear how much of that sum is attributable to medical bills. That uncertainty creates doubt as to how much you must pay to your health insurer.

As a general rule, you are not required to pay subrogation claims unless you were "made whole" by your settlement. You are made whole if you receive the full compensation for your injuries to which you are legally entitled. If your damages exceeded the limits of the negligent party's insurance coverage and you accepted the policy limits as a full settlement, you were not "made whole" for your damages. In most other situations, your acceptance of a settlement is taken as evidence that you were made whole.

If you shared fault for the accident, the comparative negligence rules discussed earlier in this book probably reduced the amount of damages you would otherwise have been entitled to receive. Those comparative negligence rules apply to all your damages, including medical bills. If you were 30 percent at fault, the settlement reimbursed you for only 70 percent of your medical bills. Under those circumstances, your health insurer would be entitled to reimbursement of only 70 percent of the bills it paid. Subrogation rights do not permit the insurer to recover more than you recovered.

Since settlement paperwork does not usually specify the degree of your comparative negligence, you have room to negotiate with your health insurer if you shared fault for the accident. Assume, for example, that you conceded you were 10 percent at fault and the insurance adjuster said you were 40 percent at fault. Your acceptance of a lump sum of money to settle did not resolve that dispute. You can legitimately argue to your health insurer that you were 40 percent at fault and are therefore required to reimburse the insurer for 60 percent of the bills that it paid. Health insurers are generally willing to negotiate subrogation interests and will often agree to reduce their claims substantially when comparative negligence is an issue.

About The Author

Personal injury attorney Timothy J. Ryan graduated from Boston College in 1978 with a double major in Psychology and Political Science. He completed his J.D. degree in 1980 from the Southwestern University School of Law, which he attended under the S.C.A.L.E. accelerated legal education program. He has been licensed with the State Bar of California since 1981.

He is currently a member of

- The American Board of Trial Advocates (ABOTA)
- The Orange County Trial Lawyers Association (OCTLA)
- The American Bar Association (ABA)

- The Western Trial Lawyers Association
- The American Association for Justice (AAJ)
- The Consumer Attorneys Association of Los Angeles (CAALA)
- The California State Bar Association
- The Board of Governors for the Consumer Attorneys of California (CAOC)

A passionate consumer advocate, he believes in giving back to the community. Mr. Ryan is presently a chairman on the Board of Trustees at Huntington Beach Hospital, Board Manager of the Orange County YMCA, Editor of Forum Magazine (California Trial Lawyers Association), City of Huntington Beach Planning Commissioner (January 2011), served on the Statewide Liaison Panel for the State's Ford/Firestone Litigation and a chairman on the Board of Directors for SeaCliff County Club in Huntington Beach, California.

This past year (2012-2013), Mr. Ryan has been co-chair of the fundraising tournament, "The Greatest Save" at SeaCliff Country Club in Huntington Beach, which is part of the KinderVision Foundation presented by Tiodize. "The Greatest Save" is a prevention-focused program that teaches kids and teens how to recognize and avoid risks from predators.

Call (800) 838-6644 to obtain a free case evaluation from Attorney Timothy J. Ryan