BARASCH MCGARRY SALZMAN & PENSON

LAW LETTER

WHAT IS MY PERSONAL-INJURY CASE WORTH?

Some wrongs are harder to make right than others. If you lend someone $1,000 and they don't pay you back, figuring out what they owe you is straightforward. On the other hand, putting a monetary value on something as imponderable as pain and human suffering does not lend itself to mathematical precision. As if that were not complicated enough, there are numerous other factors that bear on the question of what a personal-injury case is worth, some of them just as thorny.

What Are Negligence and Comparative Negligence?

We have found that there is a common misconception about personal-injury cases. To be clear, the fact that a person was injured in an accident does not necessarily mean that someone else is legally responsible to pay compensation. In order for liability to attach, the accident victim must show that the defendant had a duty to act with a certain level of care, and that he breached that duty, causing the injury. Sometimes this is a simple matter. Let's use a motor-vehicle accident as an example. Everyone agrees that a driver has a duty to pay attention to traffic around him. If he rear ends a car that is stopped for a red light, it's fairly obvious that he has breached a duty of care. But not every scenario is as straightforward, and when there are multiple versions of the accident, the issue of who is at fault is more difficult to untangle. The strength or weakness of the liability against the defendant bears upon the overall value of the case.

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About Us

Barasch McGarry Salzman & Penson is one of New York City's most prominent and respected personal injury litigation firms.

Our Areas of Practice

We represent clients in personal injury cases involving:

- Car Accidents
- Bike Accidents
- Bus Accidents
- Trip/Slip And Falls
- Construction Accidents
- Firefighter Law
- 9/11 WTC Zadroga Claims
- Medical Malpractice
- Product Liability

WHAT YOUR AUTO INSURANCE COMP

Lessons From a Pers

Most drivers depend upon their insurance agents to help them choose the right kind of insurance in the right amounts. But there are times when the interests of the insurance company and your interests are not aligned. When it comes to Supplementary Uninsured/Underinsured Motorist coverage (known as "SUM" coverage), consumers have to be on their guard. To explain why, we want to share the story of our client, J.B.

J.B. reached out to us after he had a very serious accident. His car was "t-boned" by a driver who blew a red light. There was no question that the other driver was 100% at fault for the accident. J.B.'s injuries were very bad. He had multiple fractures to his pelvis and hips, and herniated discs in his lower back. The driver who hit him had insurance, but only the bare minimum required by New York State, $25,000. That amount was insufficient given the severity of the injuries. Worse still, in order to recover the proceeds of the other driver's insurance policy, J.B. had to hire a personal-injury lawyer, further reducing the amount he would receive from the driver's policy.

LESSON 1: The mandatory minimum bodily-injury liability insurance coverage in New York State is $25,000 and there are millions of drivers on the road who have only the bare minimum. When they injure people, there is usually insufficient insurance to compensate the victims.

So, what can you do to protect yourself from underinsured drivers? Whenever a car-accident victim comes to us, we ask for the client's personal automobile insurance policy. One of the reasons we ask for this is that we want to see how much SUM coverage the client has.

What exactly is SUM coverage? If you have an auto policy, you have SUM coverage. Its purpose is to provide insurance coverage for you in the event that you are injured in an accident caused by a driver with minimal or no insurance. In order for the coverage to apply, your SUM

In addition to our personal injury practice, our firm is proud to represent and fight for members of the FDNY that are injured in the line of duty.

Recently, **Sara Director**, a senior associate with the firm, was featured on ABC News, speaking about the firm's decade long battle against the corporations responsible for the fatal Deutsche Bank fire, that took the lives of two firefighters and injured a hundred more.

> *"SUM coverage is mandatory in New York State - your insurance company must offer it to you, and you are entitled to purchase as much SUM coverage as you have in liability coverage."*

PANY DOESN'T WANT YOU TO KNOW:

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coverage must be higher than the negligent driver's bodily injury liability coverage. For example, the car that hit J.B. had $25,000 in liability coverage. If J.B. had $100,000 in SUM coverage, he would be entitled to collect $25,000 from the negligent driver's insurer, and an additional $75,000 from his own insurance carrier. If he had $250,000, he would be entitled to collect $25,000 from the negligent driver and $225,000 from his own insurer.

SUM coverage is mandatory in New York State - your insurance company must offer it to you, and you are entitled to purchase as much SUM coverage as you have in liability coverage. But here's the catch: the default amount of SUM coverage that the insurer must provide is $25,000. If you don't ask for higher coverage, you will probably not get higher coverage. Worse still, many insurance agents never explain this to their clients. Because SUM coverage is relatively cheap, it's not a money-maker for insurance companies, and it's not in their interest to sell more of it. Agents who care about you will take the time to explain it to you, and make sure your Bodily Injury liability limits and SUM limits are equal. But many will say nothing and simply give you $25,000 in SUM coverage. That's shameful.

LESSON 2: SUM coverage is meant to protect you if you are injured by an underinsured driver, and this coverage is extremely important. Your insurance agent will not necessarily talk to you about SUM coverage. You should ask your insurance agent for SUM coverage in an amount equal to your liability coverage.

So, how much SUM coverage did J.B. have? Unfortunately, he only had a policy of $50,000. What is so troubling about that is that he had $500,000 in liability coverage, and he diligently paid high premiums for this coverage. Because of that, he was entitled to purchase another $450,000 in SUM coverage, at only a fraction of the cost of liability coverage. But his insurance agent never discussed this with him. Because his SUM coverage was just $25,000 more than the other driver's liability coverage, J.B. could only recover $25,000 in underinsurance benefits.

LESSON 3: Don't assume that the fact that you pay high premiums means that you have adequate SUM coverage. Check your policy declarations page, and make sure that your SUM and liability coverage are the same. If they aren't, we recommend that you call your insurance agent without delay to remedy this. And you would be within your rights to point out to your agent that you expected better service!

If you have any questions about automobile insurance coverage, please feel free to contact our office for a free consultation.

This is the SEVENTIETH EDITION of the Barasch McGarry Salzman & Penson LAW LETTER... attorney advertising which presents topics of interest to our clients. For questions, additional copies, or more information about topics raised in this law letter, call or write:

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GETTING THE PICTURE:

Make Smart Use of Your Smart-Phone at an Accident Scene

We've all heard the old adage: a picture is worth a thousand words. That's certainly true in the courtroom, where pictures can be invaluable. It is no easy thing for jurors to form a clear understanding of a place or a thing or an event purely from a description. Lawyers can use photographs to help the jury understand the testimony of the witnesses. Pictures can also substantiate what a witness is saying. People's memories are imperfect, and sometimes (gasp) people lie on the witness stand. A photograph can shed light on what really happened.

With the advent of smartphones, most of us have a camera at our fingertips. After an accident, taking photographs might be the last thing that you are thinking about. But if you are able, taking pictures at an accident scene, or asking someone else to do it for you, is a smart thing to do. Here are some tips.

Car accident: If you are in a car accident, and it is safe to do so, either you or someone at the scene should take photographs of the damage to your car, as well as to the other car involved. Take photographs of the positions of both cars. Take a step back so that you capture the full scene. If you believe there was something that was obstructing the other driver's view, you should take a photo of it. After a car accident, cars are removed from the scene rather quickly, and these photographs could be the key to the case.

Trip/slip and falls: If you slip or trip and injure yourself, you can use a smartphone to show what caused the accident. Was it a raised or broken sidewalk flag? A broken step? Poor lighting? Something on the floor in a supermarket? Take a photo of it, or, better yet, several photos. Take a photo from the direction that you were walking demonstrating what you saw immediately before your accident; a photograph showing the height differential of the sidewalk flags; a photo of the surrounding area, etc. Whatever you think will help to show the problem, and how it was dangerous, should be photographed.

Broken steps and sidewalks can be repaired by the time you hire an attorney. Transient conditions like spills and rubbish on the floor may be cleaned up immediately after your accident. The photographs will show what it looked like on the day of the accident. Without your photographs, it is your word against the defendant's that the condition even existed.

Finally, if your injuries and scars are visible, asking someone to take a picture of you can help the jury understand what you went through. We cannot overemphasize how important photographs are to a personal injury case.

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The injured person may bear some part of the fault for his own accident. When this is the case, any jury verdict will ultimately be reduced by the plaintiff's percentage of fault. For instance, if Driver 1 in an auto accident claims that Driver 2 went through a red light, while Driver 2 maintains that Driver 1 was speeding, a jury might decide that Driver 1 is 30% at fault for the accident, and Driver 2 is 70% at fault. A $100,000 award to Driver 1 would be reduced by his percentage of fault to $70,000 ($100,000 minus 30% is $70,000).

No Two Cases Are Identical

Obvious factors that are relevant to the value of the case include whether the accident aggravated existing injuries/conditions or caused entirely new injuries to a previously healthy person, whether the injuries are permanent, whether the injured person is temporarily or permanently disabled from employment, how much medical treatment the injured person has received and will likely receive in the future, whether future surgery is likely, the client's age, and whether there are out-of-pocket costs for medical care and replacement services.

The occupation and earnings of the injured person are also important. For example, if a firefighter injures his knee and is disabled from returning to work, the value of his case is based on his pain and suffering *and* future lost income, including his prospects for promotion. On the other hand, a lawyer who suffers a similar injury to his knee might very well be able to return to work within weeks of his accident. There would be no claim for future lost income. Although the injuries are similar, the respective verdicts would necessarily be different.

> "*A good attorney will make sure that all sources of recovery are explored.*"

Credibility matters too. When jurors like and believe you, they are in turn more likely to want to see that you are fairly compensated.

Where the Case Is Brought Matters

Believe it or not, the particular county in New York where the lawsuit is brought actually matters. Some counties are reputed to be more generous to accident victims. Others, fairly or unfairly, are perceived to be more conservative. Although nobody can predict what any particular jury will do, insurance companies do pay attention to the venue, and it affects their valuation of the case.

You Can't Get Blood From a Stone

Finally, what you can hope to recover is necessarily dictated by what there is to recover. The old adage that you can't get blood from a stone certainly applies in the context of litigation. There are cases with clear-cut liability and devastating injuries, but inadequate insurance. In such cases, there may be no way to ever recover fair compensation for the injuries. On the other hand, a good attorney will make sure that all sources of recovery are explored.

If you are injured in an accident, we recommend that you speak with an experienced personal-injury attorney to learn your rights. A reputable personal injury firm never charges for a consultation.

Don't Take No for an Answer From Your Health Insurer

Just because your health insurance company says "no" doesn't mean you have to accept it. You have rights — take advantage of them. Every insurance company gives the insured the right to appeal the insurance company's denial. There are different levels of appeals. Insurance companies are counting on the fact that you won't appeal their refusal to pay. And even if you do, the worst thing that can happen to them is that an independent doctor who reviews your appeal will force them to reimburse you or pay the bill. This costs them nothing, but it costs the patient a lot of aggravation. To avoid this, many patients don't bother going through with the appeal.

Recently, Mike Barasch had extensive shoulder surgery. His surgeon recommended a healing device, but Oxford Insurance deemed it "medically unnecessary" and refused to reimburse him for the cost of the device. Mike asked his surgeon to write a letter indicating why the device was medically necessary. He used the letter in support of his appeal to the insurance company. The surgeon had a lot more credibility than the insurance company's in-house doctor. It is not uncommon for an insurance company's in-house doctor, who reviews hundreds of claims, to be nothing more than a general practitioner. Understandably, his motivation is to keep his job, and sometimes he's more concerned with saving his company money than doing the right thing.

In Mike's case, he demanded that Oxford bring the case to an outside doctor for review. The outside doctor was an orthopedic surgeon and he readily agreed with Mike's surgeon. Oxford was forced to pay for the medical device.

The lesson here is: Don't take "no" for an answer. You have appeal options and rights. We highly recommend taking a look at: **patientadvocate.org**. There are examples of appeal letters which you can use. You don't have to hire an attorney or be an attorney to fight the insurance company denials. Naturally, if you ever have any questions feel free to contact us.

Mike Barasch and colleague Noah Kushlefsky were honored by John Feal of the Feal Good Foundation for their legal work on behalf of the 9/11 community. Mike and Noah were asked to read the names of the 162 responders who have died from WTC-related illnesses.