UNDERSTANDING GEORGIA AUTOMOBILE ACCIDENT CLAIMS

A CLAIMANT'S GUIDE

Second Edition

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In addition to his law practice, Chris currently serves part time as the Chief Municipal Court Judge for the Cities of Bartow, Blythe, Waynesboro, Wrens, and Stapleton, Georgia.

Chris was born in Augusta, Georgia, in 1975, and has been a resident of Columbia County, Georgia, nearly all his life. Chris graduated high school from Lakeside-Evans High in 1994. Following high school, Chris attended Augusta State University for two years, and then finished his undergraduate studies at the University of Georgia, where he graduated in 2000 with honors and obtained B.A. in Political Science.

Following college, Chris attended the Mercer University, Walter F. George School of Law, in Macon, Georgia. During law school, Chris served as Managing Editor of the *Mercer Law Review*, and published a law review article entitled, "PGA Tour, Inc. v. Casey Martin, Reasonable Modifications under the ADA FORE the disabled." 53 Mercer L. Rev. 1717 (2002).

Chris graduated law school in 2003 and achieved the academic record of *cum laude*, finishing among the top 5% of his graduating class. Chris also has numerous professional achievements, including an AV Preeminent Rating by Martindale-Hubbell; recognition as one of the top 100 trial lawyers in Georgia by The National Trial Lawyers; Life member of the Multi-Million Dollar Advocates Forum; an Avvo Rating of 10.0; and is Lead Counsel Rated.

Chris is currently a Member of the State Bar of Georgia and South Carolina, the Augusta Bar Association, and the Council of Municipal Court Judges. In his spare time, Chris enjoys spending time with his family and is an avid outdoorsman.

Chapter 1: Ten Things to Do (*or Not Do*) Immediately After an Automobile Accident

People react differently in stressful situations. An automobile accident can certainly be a stressful, shocking event. If you do find yourself in a motor vehicle accident, please take the following measures:

1) First and foremost, **remain calm** following an automobile accident. Call 911 or your local emergency number and notify emergency personnel about the accident.
2) **Remove the vehicles off the road, if possible**, to a safe location to prevent another accident from occurring. Georgia law requires parties to move their vehicles out of the lane of travel when there is not an apparent serious injury, if it is possible to do so.[1]
3) **Document the Evidence.** Make sure you (or a family member, or the investigating officer) write down the names and contact information of any witnesses at the scene. If possible, take pictures of the automobiles and collision site. Make mental notes (or written, if possible) of any conversations you had or overheard at the scene.
4) **Do not admit fault and** do not speak with the other driver. Sometimes it takes an investigation of the physical evidence at the scene and witness statements to determine fault. If you are asked for a statement, be concise and stick to the facts. For example: "I was travelling westbound on Washington Road at the lawful rate of speed when the blue vehicle ran the red light and slammed into the front passenger side of my vehicle."
5) **Report your injuries, even if you think they are "minor."** If you feel *any* signs of injury, even if you believe the injury is slight,

[1] O.C.G.A. § 40-6-275 (2013).

make sure the investigating officer is aware and have your injuries documented by a medical provider, immediately. Oftentimes people shrug off slight stiffness or soreness at first, but after a few days realize it is a serious injury. The top portion of the Georgia Uniform Accident Report Form contains a section where the officer notes injuries. While it does not mean you do not have a claim for injuries if the officer fails to note your injury, an insurance adjuster's first go-to excuse to discount your claim will be to note that the accident report failed to mention any injuries.

6) **Seek Medical Attention.** If you feel pain, seek medical attention immediately. Use your discretion and the advice of the EMTs at the scene as to whether you should be transferred via EMS to the hospital; go to the hospital on your own with a family member; go to a "prompt care" facility; or report to your family doctor. In any event, **do not self-medicate your symptoms**. An insurance adjuster will certainly attempt to discount your claim later if there is either no treatment following the accident or a significant delay in seeking medical treatment.

7) **Notify Your Insurance Company.** You have a contractual obligation to notify your insurance company of any potential claims. However, only give a concise statement of the location of accident, the parties involved, and the basic facts of the accident.

8) **Do not give a recorded statement** until you have consulted with an attorney. The purpose of a recorded statement is so that a savvy insurance adjuster can use what you say against you to later discount your claim. For example: You are involved in an accident and agree to give a recorded statement to the insurance company that evening. You tell the adjuster, "Yes, I am injured. My neck hurts." However, the next day the symptoms move

further toward the mid-back. Months later, the insurance adjuster will likely try to use the statement to attempt to avoid paying for any treatment relating to your back.

9) **Do not sign anything!** Some insurance companies will come to you immediately after your automobile accident and attempt to settle with you, with promises such as "sign here and take this $1,000.00 for your pain and suffering, and we will pay your medical bills." You may be asked to sign a release to allow the insurance company unfettered access to your medical records. *I had a client who signed such a release only to find out the adjuster requested medical records from her OBGYN doctor. These records were completely irrelevant to the client's claim, and this is an example of why you should not sign such a release without the advice of an attorney.* **Bottom line: Do not sign anything unless you receive legal advice first.** Insurance companies are for-profit enterprises, and their goal is to pay you as little as possible.

10) **Seek the advice of an experienced motor vehicle injury attorney**, not a TV lawyer who refuses to go to court, not a lawyer that "finds you," not a lawyer's private investigator who "finds you," and not a lawyer who handles your real estate transactions, your wills, or your family court matters. Please see **Chapter 15**: **How to Choose a Personal Injury Attorney.**

Chapter 2: Insurance Coverage

Understanding insurance coverage and contractual obligations between the insurer and insured (or claimant) is a complex subject. However, it is important to understand the differences between the following coverages in Georgia: liability coverage; collision coverage; comprehensive coverage; medical payments coverage; and uninsured/underinsured motorist coverage.

Liability Coverage. Liability coverage pays damages to an injured party on behalf of the at fault party. This type of coverage is mandatory.[2] For example, Negligent Ned causes a wreck. You are injured due to Ned's mistake. You have a claim against Ned for damages. If Ned has liability coverage, then your damages will be paid by Ned's liability coverage. In Georgia, the state minimum coverage is $25,000.00 per person and $50,000.00 per occurrence.[3] This means that if you are injured and Ned carries the minimum coverage, then Ned's insurance company is only obligated to pay up to $25,000.00 to you. The "per occurrence" figure means that if you have passengers that are injured, then the passengers may make a claim for remaining $25,000.00 in coverage, but the total aggregate coverage the insurer must pay among all parties is $50,000.00

Again, understanding insurance coverage can be complex because there are many types of insurance coverages that a claimant maybe not be aware of. For example, if Negligent Ned is driving his friend's vehicle, and his friend has insurance coverage, then both Ned and his friend's liability coverage may be available to cover expenses of any injured individuals.

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[2] O.C.G.A. § 33-7-11 (2013).

[3] O.C.G.A. §§ 33-7-11 & 33-34-4 (2013).

Collision Coverage. Collision coverage covers an insured party's *own vehicle* if he or she was either at fault or if fault cannot be determined for some reason. For example, if Negligent Ned runs into your vehicle, Negligent Ned will need to use his collision coverage to have his vehicle repaired or replaced. Collision coverage is typically subject to a deductible, unlike liability coverage. Collision coverage is an *optional coverage.*

Comprehensive Coverage. Comprehensive coverage provides insurance for losses caused by occurrences such as theft, vandalism, fire, lightning, or other unpreventable events. Comprehensive coverage also typically covers property damage sustained as a result of colliding with an animal (bird, deer, etc.). Comprehensive coverage is also an *optional coverage*.

Medical Payments Coverage. Medical payments coverage is another *optional coverage* that covers medical bills that an *insured party* incurs due to an accident. Note that this coverage is not "third-party coverage," meaning it typically only applies to the holder of the policy or anyone the policy defines as "insured." For example, if Negligent Ned causes an accident with you, Negligent Ned may use his medical payments coverage to cover his personal medical expenses. You may also use medical payments coverage *from your own insurance company* to pay your medical bills while waiting to settle your injury claim against Ned and his insurance company. Medical payments coverage is highly recommended.

Uninsured (UM) or Underinsured (UIM) Motorist Coverage. Uninsured motorist coverage allows an injured party to use his or her own insurance coverage in case the at-fault party either has no insurance or does not have enough insurance to cover a claimant's damages (meaning

that the at fault driver is considered underinsured). Uninsured motorist coverage comes in two forms: "add-on" and "difference in limits" coverage. Here are some examples of how uninsured motorist coverage works.

Example 1: Negligent Ned causes an accident and injures you. It is later determined that Ned failed to pay his insurance premiums and his insurance was cancelled. Ned is an "uninsured driver" and therefore you may make a claim against your uninsured motorist policy for the damages.

Example 2: Ned causes an accident and injures you. Ned carries the minimum state coverage of $25,000.00 per person, $50,000.00 per occurrence. You, however, have $50,000.00 in damages. You carry $25,000.00 in "add-on" uninsured motorist coverage. Therefore, you may settle your claim against Ned on a "limited liability release," meaning that your insurance company may still go after Ned to repay them for the cost of your claim on your uninsured motorist coverage. Then, you make a claim against your uninsured motorist coverage for the remaining amount of the damages, $25,000.00. Your insurance company will pay you the $25,000.00 from your uninsured motorist coverage and will file an action against Ned for damages that was paid under your policy. Here, the insurance company would seek for Ned to pay $25,000.00.

However, if you carry "difference in limits" coverage, then you may only make a claim for uninsured motorist coverage *to the extent to which your coverage exceeds Ned's coverage.* Therefore, if you only carry $25,000.00 in difference in limits uninsured motorist coverage, then you cannot collect against your uninsured motorist policy.

Potential Pitfall: It is very important that you place your insurance company on notice of a potential uninsured or underinsured motorist claim. Many insurance policies contain provisions that require

prompt notice of the occurrence of an accident. If you do not comply with your policy provision, your claim may be denied.

Chapter 3: Determining Fault

As stated by Professor Charles R. Adams III of Mercer University, "Man's greatest contribution to civilization was to replace murder with litigation." Under our system of laws, we have criminal and civil wrongs. Civil wrongs are called "torts." Negligence is a tort. Negligence is defined as a breach of a duty to use the care that a reasonable person would use under similar circumstances. For example, if someone runs a red light and causes an automobile accident, he or she has breached his or her duty to exercise reasonable care. An injured party has a civil claim against the at-fault driver for his or her negligence. Usually, this claim will involve a claim for damages incurred as a result of the at-fault driver's negligence. Damages, usually in the form of money, are a way for a court to try to make the injured party "whole" by compensating them for their injuries and expenses. Damages will be discussed in detail in **Chapter 8**.

Sometimes accidents occur and it is not so easy to determine fault. For example, Ned jumps on his motorcycle with a passenger, cranks it up, takes off, and suddenly runs into a parked car, injuring Cathy, his passenger. It may appear that the accident is clearly Ned's fault. However, witnesses at the scene state they know Ned, he is a very experienced driver, and would never be so inattentive as to run his prized motorcycle into a parked car. As it turns out, Ned's motorcycle had a defect that prevented the clutch from engaging, which prevented Ned from slowing down. Cathy's claim for negligence in this instance may be a products liability claim against the manufacturer of the motorcycle, not Ned.

Often disputes occur between parties as to who is at fault in an accident. This is one reason to hire an experienced automobile accident lawyer who can properly investigate the accident, interview witnesses, preserve evidence (the vehicles), and hire an accident reconstruction expert if necessary.

Potential Pitfall: I know first-hand of horror stories involving insurance companies and their "expert witnesses" arriving at the scene of an accident and spoiling evidence to cover up their insured's mistake. Remember, insurance companies have teams of lawyers and expert witnesses ready to investigate and attempt to deny liability. You deserve to have a team behind you.

Comparative Negligence. Occasionally, multiple parties are at fault in an accident. For example, Negligent Ned is an ambulance driver who has been called to assist in a medical emergency. Ned activates his emergency lights and sirens and heads down Washington Road in Augusta, Georgia, toward the scene of the emergency. In the process, Ned slows (but not stops) at a red light and proceeds into the intersection. At the same time, Cathy has the green light, but because of her radio, she does not hear the ambulance. As she proceeds into the intersection, Ned and Cathy collide.

Georgia follows a "Modified Comparative Negligence Rule." This means that if the claimant's actions are found to be 50% or more responsible for his or her accident, then the claimant cannot recover damages in court. If the claimant is less than 50% at fault, then the amount of damages that the claimant may receive is reduced by the claimant's percentage of fault.[4] For example, in the case above, assume Cathy was injured and sues Ned. After all the evidence is heard, assume the jury finds that Cathy is 51% at fault because she had her radio too loud and should have been paying attention. Under this scenario, Cathy is not entitled to damages. On the other hand, assume that the jury found that the ambulance driver was 90% at fault because he should have made sure the intersection was clear before entering, and Cathy was found to be 10%

[4] O.C.G.A. § 51-11-7 (2013).

at fault because she was slightly distracted by her music. In this case, if a jury awarded Cathy $100,000.00 in damages, that award would be reduced by 10%−her percentage of fault.

Chapter 4: Trucking Accidents

Trucking accidents often result in serious, debilitating and permanent injuries for the obvious reason a tractor-trailer is much larger and heavier than passenger vehicles. In fact, a fully loaded tractor trailer may weigh up to 80,000 pounds (40 tons), absent special permits allowing higher weights. The average weight of a passenger vehicle is roughly 4,000 pounds. Therefore, in an accident involving a car and a semi-truck, serious or deadly results often occur. Such a serious accident requires the expertise of an attorney who has the knowledge, experience, and resources to properly handle a trucking accident claim.

Trucking litigation is a highly specialized field of practice for lawyers. Other than the complexities involved with dealing with serious injury or death, there exists numerous other complications involving trucking accidents, including: the involvement of federal regulations governing tractor trailers; the potential for multiple defendants in trucking cases; the extensive documents and records companies who operate tractor trailers are required to keep; the need to examine the vehicle's Electronic Control Module (the "ECM"), which electronically records data such as speed and brake system operation at the time of the accident; and the costs associated with properly making a claim arising from a trucking accident.

Potential Pitfall: If you are involved in a trucking accident, I recommend that you immediately seek the advice of a lawyer that is familiar with trucking accidents. An experienced attorney in this field of law will know the importance of hiring an accident reconstruction expert and immediately sending a "spoliation letter" to the trucking company and its insurance carrier requiring them preserve certain

evidence following an accident, including all documents related to the vehicle, the driver's log book of hours, and the ECM.

Chapter 5: Should I Use My Personal Health Insurance to Pay for My Medical Expenses?

When you are injured in an automobile accident, it is generally wise to give your medical providers your personal health insurance card and ask them to file your medical bills under your health insurance. While you should confirm with your attorney whether this is his or her advice, I generally advise my clients to file all their bills under health insurance for two reasons. First, you want to avoid having any medical bills sent to collections while you and your attorney are negotiating with the insurance company who insures the at-fault party. Many claimants are under the impression that the insurance company will pay their bills while they treat with their medical providers and then pay a lump sum settlement later. In my experience, this is rare. Most insurance companies will pay a one-time lump sum settlement after the client has finished treating or reaches maximum medical improvement. However, keep in mind that, as discussed in **Chapter 9**, you may have to repay your health insurer for what they paid upon settlement.

Second, using your health insurance to pay your medical bills will often work in your favor and increase your net settlement proceeds. This is because of the "collateral source rule." The collateral source rule under Georgia law states that it is not admissible in court whether your health insurance company paid a portion of your medical bill(s). This means that that the at-fault party and his or her insurer are required to pay you for the full value of your medical bill, not the amount that your health insurance company paid.[5] For example, assume you are in an automobile accident and your emergency room bill is $1,000.00. You then file this bill under your health insurance policy, Blue Cross Blue Shield. Because the

[5] O.C.G.A. § 46-7-12 (2013).

insurance company has a contract with the hospital, the bill is reduced to the contracted rate of $600.00. However, because of the collateral source rule, the at-fault party still owes you for the full value of the medical bill, which is $1000.00. Even if you are required to reimburse your health insurance company the $600.00, the collateral source rule works in your favor in this instance.

Potential Pitfall: The collateral source rule also works against a claimant in some instances, cause whether someone is "insured" is not admissible in court, a jury is not made aware of the presence of automobile insurance. This places you at a disadvantage, especially if you have filed a lawsuit against a sympathetic defendant (such as an elderly woman who does not appear to have assets).

Chapter 6: What if I Cannot Afford Medical Treatment?

Unfortunately, many people involved in motor vehicle accidents cannot afford the treatment necessary to recover from their injuries. Moreover, the at-fault insurance company typically will not pay medical bills along the way. Instead, you will be offered a settlement offer for a full and final settlement of your claim. In the meantime, if you cannot afford treatment, there are several ways to obtain treatment. First, the Federal Emergency Medical Treatment and Labor Act (EMTALA) requires emergency rooms to ensure that anyone coming into the emergency room be stabilized and treated, regardless of their insurance status or ability to pay.[6] Therefore, if you are injured in an automobile accident and transported to an emergency room, your treatment is governed by this law.

If you cannot afford medical treatment following the emergency room visit, there are several alternatives to access medical care following an automobile accident. If you carry medical payments coverage, as discussed in **Chapter 2**, this coverage may be used to pay for medical treatment. Next, some companies will finance medical treatment for injured accident victims and charge an interest rate on the amount paid. Finally, there are numerous medical providers that will agree to treat an accident victim in exchange for a lien or assurance that their bill will be satisfied once you have finished treating and received either a settlement or judgment. Please refer to **Chapter 9** for a more detailed discussion of this topic.

Potential Pitfall: Many attorneys will simply send clients to "their chiropractor." This is not always the best option when you are injured in an automobile accident. It is important to have an attorney

[6] 42 U.S.C. § 1395dd (2013).

who has knowledge of a variety of medical providers, including orthopedic physicians, pain management physicians, physical therapists, and chiropractors so you can get the right care from the right provider.

Chapter 7: What Can I Expect to Happen When Making an Injury Claim?

Making an injury claim is a serious and complicated task. An experienced attorney understands the nuances and the importance of collecting the appropriate information, knows how to communicate with the insurance company, and understands the present and future implications of any settlement discussions. If you do end up making a personal injury claim, the following should shed some light on the process and what you can do to be proactive.

Gather Necessary Documentation. It is very important to have all your evidence ready before you attempt to settle an automobile accident claim. Make sure you have all photographs or documents that you think may be relevant to your case. Save all medical bills related to your case, including prescriptions. Once you have either finished treatment or have reached maximum medical improvement (meaning, from a medical standpoint, your condition has improved as much as it will likely improve), your attorney will gather all of your evidence, medical records, and medical bills and forward a "settlement demand" to the insurer or at fault party. *The settlement demand speaks volumes about a client or attorney's abilities to pursue the claim* should the case require a lawsuit. A poorly drafted demand with little documentation tells the claims adjuster that the attorney (or client) is not serious about the claim and/or is either not prepared or not a real "trial lawyer." A well-drafted, well-worded settlement demand, with organized documentation lets the adjuster know, "If we don't pay what this claim is worth, this attorney is going to file a lawsuit. We might as well go ahead and pay up now."

The following is a checklist of examples of documentation that should be gathered on behalf of the client prior to engaging in settlement discussions with an insurance company:

- The Accident Report
- The EMS Report (if applicable)
- Photographs of the vehicles
- Photographs of any injuries and/or scarring
- Medical/Pharmacy bills
- Medical records
- Evidence of lost wages (examples include tax returns, W-2's, or letters from employer)
- Disability Statement from the client's Physician
- Statement from the client's Physician as to "Permanent Impairment" (if applicable)
- Estimate of future medical expenses
- Notes or Journal from client on how the accident has limited his/her activities
- Jury Verdict Research on similar cases and injuries

By collecting all this information, the attorney will be able to discuss his client's case confidently with the insurance company and will know what is going to be a fair amount to accept for his client's case.

Settlement Discussions. After the insurer reviews the settlement demand and supporting documentation, the insurer will make an offer of settlement. Typically, it takes some negotiating back and forth with the insurer to get their "best offer." After receiving the insurer's best offer, you will need to decide (in consultation with your attorney) whether the offer completely compensates you for your injuries or whether you need to pursue a lawsuit.

Potential Pitfall: It is often said that the best way to maximize your settlement is to be ready for trial! If you have an attorney who follows this theory, like me, your case will likely settle without ever having to go to court. Make sure that your attorney has the experience

and all available information to help you make an informed decision whether to accept or reject a settlement offer. A well-prepared attorney will be able to go to trial if the insurance company will not provide a reasonable settlement offer.

Filing of a Lawsuit. In some cases, for some reason or another, the adjuster and/or insurance company and a claimant simply cannot agree on a reasonable settlement amount. In this event, the claimant will need to file a lawsuit. In Georgia, lawsuits may be initiated in four different courts: magistrate court, civil court, state court, or superior court. Generally, the lawsuit will be filed in the county in which the **at-fault party (defendant)** resides at the time that the lawsuit is filed.[7] This rule has some exceptions but having the best possible "venue" is very important. Some jurisdictions are much more conservative than others. For example, historically, Columbia County, Georgia, is more conservative and the typical jury will award less than a more liberal jurisdiction, such as Fulton County, Georgia. It is very important to have an attorney who can identify all possible jurisdiction and venues and choose the best venue for your claim. The following paragraphs describe the different trial courts in Georgia.

Magistrate Court. Magistrate courts are often referred to as "small claims courts" because the judge only has the authority to award up to $15,000.00 in damages.[8] Once a suit in magistrate court is initiated by filing a "notice of claim", the defendant will have thirty days to respond to the lawsuit by filing an "answer." After an answer is filed, the court will schedule the case for trial, typically within 30-60 days after the filing of an answer. At trial, the parties will have the opportunity to present their

[7] O.C.G.A. § 9-10-30 (2013).
[8] O.C.G.A. § 15-10-2 (2013).

documents and testimony, and a magistrate judge will decide how much to award to the plaintiff. Magistrate courts do not allow "jury trials," which is where a party may request a jury to determine who wins. Either party may appeal a magistrate court judgment to a superior court. After appeal, the case essentially starts all over again with a new trial.[9]

State and Superior Courts. There are some differences between state and superior courts, but for most automobile accident claims, these courts operate similarly. First, there is *no jurisdictional limit* to the amount the court can award, meaning that the court may award as much in damages as it sees fit. Second, either party may demand a trial by jury of 12 persons to decide the case. (However, in state court a jury of 6 decides the case unless a party demands a jury of 12).[10] Finally, these courts are much more formal in procedure than magistrate or civil court. Once a lawsuit is initiated in state or superior court, the defendant has thirty days to answer the lawsuit.[11] After the answer is filed, the court typically requires a six-month period of "discovery." The discovery period is where the parties can exchange documents, take depositions, attend mediation and file pre-trial motions.[12] Once the six-month discovery period has expired, the parties may request the case to be scheduled for trial.

A plaintiff's attorney who has prepared his client's case as if he were ready to take the claim to trial before a jury is much more likely to obtain a favorable outcome once the case goes to Court. It is very important that all documentation and evidence listed above is in proper order and ready for trial—well before the actual trial takes place.

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[9] O.C.G.A. § 15-10-41 (2013).
[10] Trial Handbook for Ga. Lawyers § 6:1 (3d ed.).
[11] O.C.G.A. § 9-11-12 (2013).
[12] Ga. Unif. Super. Ct. R. 5.1.

Chapter 8: What Damages am I Entitled to Following an Accident?

Personal Injury Damages: Special and General Damages. Personal injury claims generally have two components: special damages and general damages. Special damages are specific economic expenses while general damages are non-economic costs and may vary considerably from situation to situation.

Special Damages. Special damages are out of pocket economic damages resulting from the accident. Special damages are usually relatively easy to calculate and may include the following:

- Property Damages
- Medical Bills (both past and future)
- Pharmacy Bills (both past and future)
- Lost Wages
- Lost Earning Capacity

When a claimant seeks to recover damages to his or her vehicle, Georgia law requires the at-fault party (or their insurer) to pay the reasonable value of the repairs caused by the accident and the loss of use of the vehicle while it is incapable of use. In addition, the law entitles a claimant to damages for diminished value, which means the difference between the value of the vehicle before the accident, and the value of the vehicle after the accident.[13] In addition, under Georgia law, the insurance company may **NOT** require you to use a specific repair facility.[14]

In some instances, the repair value, diminished value, and damages for the loss of use may exceed the fair market value of the vehicle before the accident. In this case, your car will be considered a total loss and the insurer must pay you the difference between the fair market value

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[13] Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741 (1957).
[14] O.C.G.A. § 33-34-6 (2013).

of the vehicle before the accident, and the fair market vehicle after the accident.

General Damages (including "Pain and Suffering"). Unlike special damages, general damages are not as easy to quantify. General damages include the non-economic damages resulting from the accident. This includes "pain and suffering," which is a legal item of damages. The measure of these damages is the "enlightened conscious of a fair and impartial jury," which is a legal way of saying that your pain and suffering is worth what a jury of your peers believes it is worth. Examples of general damages that one may receive as a victim of another's negligence include:

- Physical Pain and Suffering
- Physical Disfigurement
- Physical Impairment
- Lowered Quality of Life
- Mental Anguish
- Anxiety, Shock, and Worry

Punitive Damages. In some auto accident cases, there may be aggravating circumstances that would warrant punitive damages. This type of damage is awarded to a plaintiff to deter the defendant from engaging in certain conduct. These damages are usually awarded if the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or a conscious indifference to the consequences of his or her actions. If any of these things can be shown, then the plaintiff may be entitled to punitive damages. A classic example of an award of punitive damages in a motor vehicle accident is where the defendant causes injury while driving under the influence of alcohol or drugs. In these circumstances, punitive damages are warranted to deter the defendant from driving under the influence of alcohol or drugs in the future.

Chapter 9: Medical Liens and Subrogation Interests

Once a claim is settled (or a judgment has been obtained), often you must also satisfy certain liens. A lien in a personal injury claim means that some entity has an interest in a portion of your settlement proceeds. Common types of liens include hospital liens, healthcare subrogation liens, and Medicare or Medicaid liens.

Hospital Liens. If you are involved in a motor vehicle accident and seek treatment from a hospital, a physician practice, or a burn unit, the treatment provider may have a "lien" on your claim against the at-fault party. Consequentially, before you settle your claim (or get the proceeds from a judgment), a medical provider who holds a lien must be paid. For example, Negligent Ned causes an accident, which sends Cautious Cathy to the hospital. The hospital treats Cathy and incurs a $1,500.00 bill. If the hospital follows the lien statute and takes certain measures to file the lien with the County Clerk and notifies the parties, the hospital is must be reimbursed for its $1,500.00 bill once Cathy settles with Ned's insurance company.

In some cases, the amount of the lien exceeds the available insurance proceeds. For example, assume Cathy's hospital lien was $30,000.00, but Ned only carried $25,000.00 in insurance proceeds. In this case, the hospital's bill will need to be negotiated down prior to settlement. A good plaintiff's attorney will work with the hospital's lawyer in such an instance to resolve the bill in a manner that suits all parties. Also, a good plaintiff's attorney will also advise you on whether to insist that the hospital file their bill on the claimant's health insurance, if applicable.

Healthcare Subrogation Liens. Many health insurance policies place a contractual duty upon the insured to repay the insurance company if they recover damages from a third party. For example, assume you are

injured in a car accident and your health insurance carrier pays $10,000.00 in medical expenses, if there is a contractual provision in the health insurance policy requiring reimbursement, then your health insurance carrier's subrogation interest must be satisfied at the time of the settlement. This means that you must repay your health insurance carrier the amount provided in the contract. However, the extent of a healthcare insurance company's right to receive reimbursement may be limited. This depends on whether the health care policy is governed by state or federal law. In general, if the policy is governed by Georgia law, then the insurer is subject to the "made whole doctrine", which means that an insurer will not receive any of the proceeds from the settlement of a claim, except to the extent that the settlement funds exceed the amount necessary to fully compensate you for your losses.[15] If the policy is governed by federal law, then the insurer has greater rights to reimbursement and may not be subject to the made whole doctrine.[16]

Medicaid, Medicare or Tricare Liens. Medicare, Medicaid and Tricare also assert liens over personal injury settlements. Generally, Medicare, Medicaid and Tricare require claimants to reimburse what they pay in medical expenses upon settlement. Typically, once a claimant has finished treating for his or her injuries, Medicare, Medicaid or Tricare will provide the claimant a list of all bills that have been identified as associated with the automobile accident. Upon settlement, the claimant must repay Medicare, Medicaid or Tricare any bills that were paid on the claimant's behalf. However, these amounts are usually negotiable.

Workers' Compensation Subrogation. If you are injured by a third party while on the job, you may have both a claim against a third

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[15] O.C.G.A. § 33-24-56.1 (2013).
[16] *See Cagle v. Bruner,* 112 F.3d 1510 (11th Cir. 1997).

party and a workers' compensation claim. In this situation, if you receive workers' compensation benefits, the employer and/or insurance company paying your benefits may be entitled to seek reimbursement from your third-party claim. A common example of this is where you are injured in a motor vehicle accident while on company time. If you receive workers' compensation benefits, the employer and/or the employer's insurance company may have a "subrogation claim" entitling it to reimbursement of these benefits out of your third-party settlement or judgment. However, generally workers' compensation subrogation is limited by the "made whole doctrine" discussed earlier in this chapter. If you want to learn more about workers' compensation claims, please refer to my other book, ***A Claimant's Guide to Understanding Georgia Workers' Compensation Claims.***

Chapter 10: Insurance Bad Faith

A person purchases insurance to protect himself or herself from financial risks and unexpected events. Automobile insurance companies have a duty to help protect their insured from claims and lawsuits from others and to pay damages a claimant may suffer as a result of an automobile accident.

When an insurance company receives a claim, the insurance company has a duty to investigate the claim fairly and promptly. If a lawsuit is filed, the insurance company has a duty to protect the insured individual's interests by defending the suit, and to attempt to settle the case in *good faith*.[17] Once you have filed a claim, the insurance company will request access to medical information describing any injuries, medical treatments, and other documents as described in **Chapter 7**. Once you have completed your medical treatment or once you achieve Maximum Medical Improvement (MMI), your attorney should send the insurance company a settlement demand letter. An insurance company should consider this offer and decide in good faith whether to accept the demand, make a different offer, or to deny the demand completely.

To determine whether an insurance company has acted in good faith, each case must be examined individually. Usually, a court will consider whether proposed settlements were rejected after deliberate evaluation and whether there were other reasons for rejecting settlement offers.[18] An insurance company will be considered to have acted in bad faith if it delays or takes an unreasonable amount of time to respond to a

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[17] *Gingold v. Government Emp. Ins. Co.*, 283 S.E.2d 614 (1981), judgment rev'd on other grounds, 288 S.E.2d 557 (1982).
[18] *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F.2d 525 (5th Cir. 1962).

claim, or if it does not provide a reason for the denial.[19] Further, if you file an action against someone and the insurance company does not make a faithful attempt to settle the claim, they will be acting in bad faith and could be liable.[20]

Therefore, if you file suit against another person for injuries you sustained in an automobile accident and his or her insurance company delays the payment, will not cover your expenses, or denies that they can pay, then you may have an action against the insurance company for its bad faith actions.

Potential Pitfall: If an insurance company has refused to satisfy your claim or negotiate a settlement on your behalf, then you should speak to an attorney whether the company may have acted in bad faith. To file an action for bad faith, you must meet every technical requirement under the law. Your attorney needs to be experienced with this kind of suit and the high standards that must be proven in order to succeed with this kind of action.

[19] *Cotton States Mut. Ins. Co. v. Brightman*, 580 S.E.2d 519 (2003); *S. Gen. Ins. Co. v. Holt*, 416 S.E.2d 274 (1992).
[20] *Great American Ins. Co. v. Exum*, 181 S.E.2d 704 (1971).

Chapter 11: Do I Need a Lawyer?

Many people after an accident believe that an insurance company, in a benevolent fashion, will pay all damages in a fair and prompt manner. In my opinion, this is far from the truth! Insurance companies are for-profit enterprises whose goal is to make as much profit for their shareholders as possible. The motto of many insurance companies is to:

1) **Deny** the claim altogether; but when that tactic no longer works;
2) **Delay** the claim if possible; and then,
3) **Defend** the claim by trying to discredit the claimant and pay as little in damages as possible.

Here is a typical scenario: You are involved in an accident caused by Negligent Ned. You contact Ned's insurance company and explain that the accident report clearly placed Negligent Ned at fault. However, the insurance company **denies** the claim and refuses accept responsibility until they can "get a statement from their insured." Once the insurance company does reach their insured and realizes there is no way around the fact that their insured is responsible for the accident, the insurance company will then go into **delay** mode. During this time, the insurance company may ask you to fill out irrelevant documents and request medical records for unrelated conditions. They then undergo a "review process" of the medical records and documents requested. Once the insurance company has completed its review of your claim, then they move into **defend** mode. Their goal is to use whatever documentation they have gathered to discredit your claim for medical expenses and pain and suffering and offer you the least amount possible. For example, the insurance company will use an authorization to request medical records against you by looking through voluminous amounts of prior records in

hopes they will find some reference to a condition that they can say is contributing to the problem you are complaining of. The most common claim by the insurance company is that "you had a pre-existing condition, so we are only going to pay you 50% of your damages."

The bottom line is this: **If you do not have an attorney, many insurance companies will take advantage of you.** Insurance Adjusters know that you do not have the training in the rules of civil procedure and evidence, and it is simply not easy for you to run down to the courthouse and file a lawsuit to protect your rights. Having a lawyer on your side early places the insurance company on notice that if it does not pay your damages, you can enforce your rights in Court. In my experience, having an experienced personal injury lawyer levels the playing field and is likely to add significant value to your claim.

Chapter 12: How Much is My Case Worth?

If you ever walk into a lawyer's office after an automobile accident and he or she tells you that your case is worth X amount, **my advice is to get up, thank them for their time, and walk (or run) out of their office.** In my opinion, that attorney is not competent (or honest enough) to handle your personal injury claim. Lawyers do not have crystal balls. The value of a personal injury claim is dependent on numerous elements, some of which are easy to place a value on, some of which are more difficult to place a dollar figure on. Nobody knows what your case is worth until you have finished treatment and all elements of the damages described in **Chapter 8** have been identified and a reasonable value has been assigned to each element.

Once you finish treatment, the medical bills, lost wages, estimates on future medical bills, and tangible damages expenses represent your claim for "special damages." Your claim also has an element of "general damages," which are intangible, such as the mental pain stemming from the shock and horror of being involved in a motor vehicle accident, the mental pain associated with being injured, the physical pain and suffering associated with the injuries, both past and future, and any permanent disability a claimant may have sustained. While lawyers can certainly provide you with experience on how much they have been able to obtain in other cases, it is impossible to calculate these damages early on in a personal injury claim. Typically, these damages can only be calculated once you achieve Maximum Medical Improvement (MMI). MMI occurs when you reach a point where your condition cannot be improved any further or when a treatment plateau in the healing process has been reached.

What is most important is for you or your lawyer to be able to articulate what your general damages are worth, both to you, the insurance

adjuster, and potentially to a jury of your peers once you reach maximum medical improvement. A good lawyer will gather the documentation identified in **Chapter 7** and thoroughly evaluate your claim and possibly do jury verdict research prior to attempting to articulate the value.

Chapter 13: What Will it Cost for Me to Hire an Attorney?

Many people believe that hiring an attorney will be an expensive venture that will not provide any real benefits. However, nothing could be further from the truth. This is usually because most individuals do not understand how attorneys charge their clients.

Usually, attorneys charge different fees depending on the type of case. An attorney will usually charge a flat fee, a one-time payment, for projects like a real estate closing. Flat fees are best for projects that are straightforward, have relatively few changes or exceptions, and will take a standard amount of time. When an attorney is hired to defend a civil lawsuit, like a personal injury suit, an attorney will charge an hourly rate calculated in six-minute intervals. By charging an hourly rate, an attorney is only charging his or her client what is necessary to provide the best defense possible. Hourly rates are used for these types of cases because each case is incredibly different. While one client's case may only need several hours of work to reach an outcome that the client is happy with, another case may take several weeks to reach an acceptable settlement.

Generally, personal injury attorneys offer a free initial consultation and then charge a "contingency fee." Usually, the attorney will conduct a preliminary review of your case, provide his or her opinion, and will describe what he or she thinks the best course of action will be. A contingency fee is only charged to the client for an attorney's services only when there is a successful verdict in a lawsuit, or the case is settled favorably outside of court. This means that the lawyer upon conclusion of the case will receive a percentage of the recovery. An attorney will not charge a contingency fee unless he or she is able to obtain a verdict or settlement in favor of his or her client. Contingency fees can vary from attorney to attorney, so it is important to ask an attorney about his or her fees before you hire him or her.

Additionally, clients are also ultimately responsible for "costs" that are initially advanced by the attorney. These types of costs include requests for the medical records, copy and postage charges, court filing fees, and other litigation expenses related to their cases. While an attorney will usually advance payment for these expenses initially, the clients are expected to repay the attorney these costs upon conclusion of the case.

For any personal injury action, I recommend hiring an experienced attorney. The costs are clearly outweighed by the benefits. Not only will an attorney provide the knowledge and background to successfully pursue your claim, but **settlements for injury victims are 40% higher when victims are represented by an attorney**.[21] Further, **insurance payouts are, on average, 3.5 times higher to clients who have hired an attorney than for those without one**.[22]

Please note that Chris Hudson and Associates offers a free initial consultation and evaluation of a potential client's cases. If a client chooses to hire our firm, the contingency fee will vary between 30-40% percent of the outcome. We want to make sure that each potential client is aware of what will happen and what each person is agreeing to before the client officially hires him. We believe that being straightforward and honest with clients helps create a relationship that will increase the odds of success for each client.

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[21] Insurance Research Council, "Paying for Auto Injuries," *Consumer Panel Survey of Auto Accident Victims* (1999).
[22] Insurance Research Council, "Auto Injuries: Claiming Behavior and Its Impact on Insurance Costs" (1994).

Chapter 14: Beware of TV Lawyers!

Not all TV lawyers fit this description but BEWARE of anyone on TV waving around checks and using gimmicky slogans. When I began to practice law, I worked approximately one year on the insurance defense side. After making the decision to represent the injured, I opened my own practice. However, most of the cases were going to the TV lawyers, and I spent several months early in my practice watching my phone and praying for it to ring. One day, my phone did ring, and it was one of the famous TV lawyers, who asked me to go to lunch with him. I readily agreed, hoping he would impart just a sliver of advice to help my struggling law practice. This turned out to be the best lunch I had. After this lunch I learned a lot about the real practice of law and how to ***not handle cases***.

After finishing lunch, the TV lawyer looked at me with a long face and stated, "Chris, I have too many cases right now, and I am either going to have to fire some clients or refer some cases out to another lawyer." I readily agreed to take some of these cases and share the fees. At that time, I walked to his vehicle and he opened his trunk, and STACKS of files began falling into my arms! At that moment I went from having no cases to many, many cases to work on. I settled most of these cases by notifying the insurance company of my involvement and forwarding them a copy of a lawsuit filed on the clients' behalf. All I had to do on many of these cases is simply take the time (and money) to file a lawsuit and miraculously I would receive a call from an adjuster who increased their settlement offer to something reasonable and the case settled. Believe me, the insurance companies know which lawyers are willing to fight for your rights in court, and which lawyers do not either have the knowledge, skill, or time to go to court on your behalf.

What I learned from this experience, and what you should know, is that **the TV Lawyer was not willing to go the extra distance for his**

clients and file a lawsuit if the insurance company was being unreasonable. He simply did not have the time to go the extra distance for his clients. He was not a trial lawyer; he was a settlement lawyer.

TV lawyers often get numerous calls about wrecks. Instead of meeting with potential clients, many TV lawyers send "runners" or "investigators" (non-lawyer employees) out to the injured parties' home or the hospital to sign them up. The TV lawyer then requests the medical records and files a claim with the at-fault party's insurance company. However, if the insurance adjuster does not offer the client enough to settle, some TV lawyers fire the client or refer the client to another attorney.

Potential Pitfall: I know of several attorneys who do heavy advertising, including billboards, phone book, TV, who are not from this area, do not regularly maintain a physical presence in the area, and do not personally meet with their "clients." They simply have an office and have a staff member meet with their "clients." Meeting and discussing your case with a legal assistant, investigator, or "runner" is no substitute for sitting down with an experienced personal injury attorney who is easily accessible and willing meet with you personally to discuss your case.

Chapter 15: How to Choose A Personal Injury Attorney

When you contact a lawyer, remember, you are the customer and that you are entitled to quality service. When you meet with the lawyer, ask the following questions and do not settle for someone who cannot answer them to your satisfaction:

- Is this a free consultation?
- Will you be the actual attorney responsible for my case?
- What is your strategy for my claim?
- Do you return your calls promptly?
- What is the average time I should expect to get an answer for my questions?
- Do you have time to start work on my case now?
- Are you willing to take my case to trial if the insurance company does not settle?
- How many cases have you taken to trial?
- What type of success have you had on cases?
- What is your contingency fee?
- Will you front any costs associated with pursuing the claim, or do I need to come out of pocket for my medical bills and other fees?
- Have you spoken in any seminars or published any books, journals, or articles on personal injury claims?

Many insurance companies set “reserves” on claims soon after automobile accidents. This means that the company allocates a certain amount of dollars towards the claim, and once the reserve is set, the insurance company fights hard to settle the claim within the reserve amount. The reserve is based on numerous different factors. An insurance company that is placed on notice early on that you have a competent personal injury attorney who is willing to take your case to trial is most

certainly a factor in an insurance company's evaluation of the value of the claim. Therefore, **it is imperative that you choose your attorney wisely.**

Chapter 16: I am Unhappy with My Attorney. Can I get a Second Opinion?

Some people make the mistake of hiring the lawyer they see on TV, sign up with the TV lawyer's "investigator," never get to speak with a lawyer, and find out the firm does not actually go to court. Some people hire an attorney who will not return their calls promptly or keep them updated of what is going on with their case. Sometimes, it may feel that your case simply is not going anywhere. In these situations, keep in mind that **you can fire your attorney at any time. You do not have to accept and keep a sorry lawyer.** Within reason, you should expect to receive a return call from your lawyer within 24 hours. You should also expect to be able to meet with him or her, personally, to discuss your case. Prior to firing your lawyer, however, you may want to seek a second opinion with another lawyer. Under the Georgia Professional Rules of Ethics, lawyers can meet with prospective clients and give you a confidential second opinion.

Remember, your current attorney may be entitled to reasonable attorney fees for the efforts he or she has placed in your case if you decide to hire a different attorney. It all depends on the contract you signed with your former attorney. As discussed in **Chapter 13**, most personal injury attorneys work on a contingency basis, which means that the attorney gets a percentage of the personal injury settlement or judgment. Some contingency fee contracts include a provision where if you fire your attorney and retain another attorney, your former attorney has a right to charge for his or her services. Some agreements also state that your former attorney may be entitled to his or her percentage of the amount of the last offer of settlement in the case. In any event, these issues can usually be resolved between your new attorney and the former attorney. **Regardless, if your attorney is sorry, get a second opinion and upgrade.**

PLEASE NOTE:

The content provided in this book is not case specific and should not be considered legal advice. This book was written to help illustrate the process and the events that surround a personal injury claim. If you are injured in an automobile accident, you should consult with an attorney about your case and not rely on the information provided in this book as a substitute for legal advice.

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