

NEW JERSEY INJURY AND MALPRACTICE LAW

**A Reference for
Accident and
Malpractice Victims**



Kenneth G. Andres, Jr. and Michael S. Berger

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and
Michael S. Berger**

**ANDRES & BERGER, P.C.
HADDONFIELD, N.J.**

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*New Jersey Injury and Malpractice Law: A Reference for
Accident and Malpractice Victims*

By: Kenneth G. Andres, Jr. and Michael S. Berger

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Contributing Authors

This book is a collective effort compiled for you by twenty leading members of the plaintiff's bar in the states of New Jersey, New York, North Carolina, South Carolina, Texas, Pennsylvania, Arkansas, Florida, Georgia, Indiana, Kentucky, and Tennessee. Each attorney involved has contributed his or her expertise to this project to assure the reader that they are being provided with basic sound information when they find themselves the victim of an accident or medical malpractice. This is not a law book, but rather an overview of personal injury and medical malpractice law.

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About the Authors

Kenneth G. Andres, Jr. is a partner at Andres & Berger, P.C., in Haddonfield, N.J. Andres is a graduate of Swarthmore College in Pennsylvania and the Capital University Law School in Ohio. He is Certified by the Supreme Court of New Jersey as a Civil Trial Attorney, and Certified by the American Board of Trial Advocates as an Advocate, and is a Fellow of the American College of Trial Lawyers. He limits his practice to significant personal injury and medical malpractice claims on behalf of the plaintiff. Andres served as the President of the Association of Trial Lawyers of America—New Jersey in 1998-1999 and is a National Governor with the American Association for Justice. He has an “AV” rating by Martindale Hubbell and has been identified by the New Jersey Commission on Professionalism in the Law as a “Professional Lawyer of the Year.” Andres has been listed by numerous publications as a Top 100 New Jersey SuperLawyer, The Best Lawyers in America, by *South Jersey Magazine* as a Top Civil Trial Attorney of South Jersey and an “Awesome Attorney” by *SJ Magazine*. He has received the Association of Trial Lawyers of America—New Jersey Gold Medal for “Outstanding Service to the Legal Profession” and the Trial Attorneys of New Jersey Civil Trial Award “For Distinguished Service in the Cause of Justice.” He served on the New Jersey Supreme Court Committee on Model Civil Jury Charges for over 10 years, the Supreme Court Ethics Committee and is currently a member of the New Jersey State Bar Association Civil Practice Committee. An Adjunct Professor of Law at Rutgers University—Camden School of Law, Andres is a frequent speaker and lecturer for State and National Legal Organizations.

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Foreword

If you are reading this, you or someone you care about has probably been involved in a serious accident or has been injured as the result of medical malpractice. The accident or medical malpractice has probably caused serious injuries, along with severe pain and emotional trauma. Maybe you expect to deal with those injuries for the rest of your life — or maybe you are not sure what the impact of your injuries will be and are anxious about your future and your family's future.

To make matters worse, chances are good that the injuries kept you from working for quite a while, which took a toll on your income. You are uncertain about whether you will ever do the same job again. Maybe you are struggling to make ends meet without that income, and that's without worrying about the medical bills you may have from the injuries. Or even worse, maybe a loved one died as a result of an accident or malpractice and you or your family is grieving. Maybe the insurance company isn't helping or you suspect it isn't telling you everything. It's all overwhelming, and you know you need help, but you have no idea what to do next.

If this sounds familiar, we wrote this book for you. This is a guidebook for people who have been involved in serious accidents or who have been injured by medical errors or who have family members who were injured or even died, and have no idea what to do next.

After the initial emergency room trip, hospital stay or doctor's visit, most people have no idea what to do after a serious injury. And why should they? Fortunately, most people do not have a lot of experience with catastrophic injuries, and nobody teaches us how to deal with these issues in school. After an injury from an accident or medical negligence, you might need to learn a lot of new things about insurance claims, financial obligations, liens, medical conditions and injury law. Even for uninjured people, that's a lot to learn all at once. For people who are already struggling with

injuries, pain, financial strain and insurance company red tape, it can be overwhelming.

That is why we wrote this book. We want this book to be a simple, accessible guidebook for people written without too much “legal-ese.” After reading this, we hope you come away with a better idea of what to expect throughout the aftermath of an accident or injury, from follow-up examinations by your doctors to the day you receive a settlement check — if you do. We also want to leave you with more information about whether a lawsuit is right for you, because we know it’s not right for every situation.

Another important reason we wrote this book is because we want to help protect injured victims from the financial threat posed by insurance companies. You may be thinking, “Threat?” But haven’t I paid my insurance company to take care of me after an accident? Shouldn’t doctors be concerned with my best interest? While we agree that an insurance company *should*, that doesn’t necessarily mean it *will*. While doctors and other health care professionals are supposed to exhibit a certain level of care, that doesn’t mean they always do. You may have had a positive experience with your insurance company before; in fact, we hope you did. But as you will read several times in this book, insurance companies are frequently not on your side — especially when you have to make a claim for medical benefits or compensation for injuries or wrongful death.

Like all businesses, insurance companies are in business to make money. They make money when premiums are paid, but when an insurance claim is made, they lose money. That’s especially true with significant claims, which is why the most seriously injured people or surviving family members are at the greatest risk. That means insurance companies do not want to pay you any more money than they have to. When the chips are down, insurance companies are on their own side.

We can fight insurance companies’ practices and tactics — but only if you speak to us *before* you sign any permanent settlement or waiver of liability. We have had to turn away more than one client who learned this lesson too late, and we don’t want that to happen to you. If you take nothing else away from this book, we

hope you take away the lesson that insurance companies are your adversaries whenever you make a claim for medical treatment or compensation for your injuries. When your health and future welfare are at stake, please consider taking advantage of the free consultations offered by Andres & Berger, to discuss your situation before giving a statement or signing anything.

Finally, we wrote this book to help answer your questions. With more than 70 years combined experience as personal injury and medical malpractice attorneys, we have come to realize that clients keep coming to us with the same questions — questions about fault, their insurance claims, medical negligence and the risks and benefits of filing a lawsuit. This book is an attempt to answer some of the most common questions we get from clients and potential clients.

However, we know no book can answer every question. Every case is different, and it's only after we hear about your case that we can give you the answers that fit your personal situation. And no book can build the same relationship that can be created by a face-to-face meeting. That is why we encourage you to contact us for more information or if you have questions or concerns. Meeting with potential clients to learn more about their cases is never an inconvenience — it's an important part of our job.

You can come to our offices at Andres & Berger, P.C., 264 Kings Highway East, Haddonfield, New Jersey 08033, call us at (856) 795-1444, or find us online at www.AndresBerger.com. If you are unable to travel we will come to you in the hospital or at home. All initial consultations are free and without obligation. Remember to contact us as soon as possible after an incident causing serious injury or a wrongful death so we can begin working for you by gathering the necessary evidence to support your case, filing the required forms and notices, and avoiding any potential problems caused by legal technicalities.

Introduction

At Andres & Berger, we are dedicated to helping injured people and families who have lost a loved one. That's not an empty statement — it's our reason for existing. Kenneth G. Andres, Jr. and Michael S. Berger only handle cases on behalf of seriously injured people and wrongful death claims for family members seeking compensation from the individuals and institutions responsible for accidents or medical malpractice. We are highly selective and limit the number of cases we accept so that we are able to provide a high level of service to our clients. All cases are carefully screened by our firm and evaluated by independent, qualified experts to make certain that our cases have merit. We are proud to say that we have helped thousands of clients recover the money they need to pay their medical bills, support their families and be compensated for their injuries.

About Our Firm: Andres & Berger, P.C., Haddonfield, N.J.

After any serious accident or injury, New Jersey citizens are urged to contact a qualified personal injury or medical malpractice lawyer as soon as possible. At Andres & Berger, we will strive to help you pursue the compensation you need to put the accident behind you and move forward. We offer compassionate care and top-notch representation, with uncommon sensitivity, in order to help our clients cope with the emotional, physical and financial harm they have suffered. In order to better serve our clients with our expertise and experience, we limit our practice to only the most serious injury and malpractice cases.

Award-winning personal injury and medical malpractice attorneys, Kenneth G. Andres, Jr. and Michael S. Berger, are Certified by the Supreme Court of New Jersey as Civil Trial Attorneys and by the National Board of Trial Advocates. Andres and Berger have a combined total of more than 70 years of trial experience and a

proven record of success in obtaining multi-million dollar settlements and verdicts. That is why lawyers throughout the state refer their major cases, as well as their family and friends, to Andres & Berger.

Credentials matter and the attorneys of Andres & Berger, have been recognized by the courts, major legal bar associations and their fellow lawyers for their expertise in representing personal injury and medical malpractice victims.

Kenneth G. Andres, Jr. and Michael S. Berger ***Distinguished Credentials***

- Certified by the Supreme Court of New Jersey as Civil Trial Attorneys (only 2% of New Jersey lawyers awarded this distinction)
- Certified by the National Board of Trial Advocates
- Each elected and served as President of the Association of Trial Lawyers of America-New Jersey (now known as the New Jersey Association for Justice-NJAJ)
- Both are Fellows of the American College of Trial Lawyers
- Andres represents New Jersey as a National Governor of the American Association for Justice
- Adjunct Professors of Law at Rutgers University—Camden School of Law—teach in the trial advocacy program
- Selected to serve on New Jersey Supreme Court Committees for Ethics, Civil Practice, and Model Civil Jury Charges

Top Honors and Awards

- Listed as Top 100 New Jersey *Super Lawyers*™ by Key Professional Media Inc., and Law & Politics as published in *New Jersey Monthly*
- Named to The Best Lawyers In America® by White & Woodward, Inc.

- Listed as the Top Medical Malpractice and Civil Trial Lawyers by *SJ Magazine*
- Listed In The Bar Register of Preeminent Lawyers for “High Professional Standards and Ethics”
- Awarded an “AV” Peer Rating By Martindale-Hubbell – The Highest Possible Rating
- Named Awesome Personal Injury Attorneys by *South Jersey Magazine*
- Berger named as one of the Top Medical Malpractice Attorneys of South Jersey by *SJ Magazine*
- Andres named as one of South Jersey’s Top Automobile Accident Attorneys by *SJ Magazine*
- Gold Medal Winners awarded to Andres and Berger for Outstanding Service to the Legal Profession by Association of Trial Lawyers of America-New Jersey
- Andres recognized by the New Jersey Commission on Professionalism in the Law as “Professional Lawyer of the Year”

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Our firm also includes high quality lawyers and experienced paralegals, nurses and support staff who provide valuable assistance in case preparation. Tommie Ann Gibney, Esquire, who leads our team of lawyers, is an integral member of Andres & Berger. Ms. Gibney is a graduate of Seton Hall University and Seton Hall Law School and has over 20 years of legal experience representing victims of personal injury and nursing home neglect. Certified by the Supreme Court of New Jersey as a Civil Trial Attorney, Ms. Gibney was elected and served as the President of the New Jersey Association for Justice in 2008-2009. She is listed in “Best Lawyers in America,” *Personal Injury Litigation* by White & Woodward, Inc., has been listed by *New Jersey Monthly* as one of

the “SuperLawyers™” and was named to the Top Attorney List for Nursing Home Abuse Attorneys by *SJ Magazine*. Ms. Gibney is a regular speaker and lecturer at legal seminars throughout the state.

The attorneys of Andres & Berger also consult with independent medical, scientific, economic and vocational experts to understand and prove the merits of a case. We believe it is important to retain the most highly qualified experts available and present them to the court and jury so no one can legitimately question the facts of a case. We are accustomed to doing the hard work necessary to achieve the optimal result for our injured clients — in and out of court.

Our award-winning personal injury and medical malpractice law firm will immediately begin a detailed investigation of your case; guide you through all interactions with law enforcement, health care professionals, and insurance adjusters; negotiate from a position of strength with liable parties and insurance companies; and present an honest, persuasive argument to make sure our clients are fairly compensated in settlements or at trial.

At Andres & Berger, we have the resources and work ethic to do what is necessary to present understandable and compelling arguments. The firm fights for clients to obtain full compensation for injuries and losses arising out of an accident or malpractice. With a reputation for hard work and genuine concern for our clients’ well-being, we seek to accommodate our clients’ needs in any way possible — by offering free consultations, working on a contingency basis, and meeting with you at home and/or in the hospital.

In every case, Andres & Berger prepare diligently for trial, even if we hope to settle the case. Kenneth G. Andres, Jr. and Michael S. Berger are experienced trial lawyers who have received favorable results in the following types of cases:

Personal Injury	Medical and Nursing Home Malpractice
Wrongful Death	Wrongful Death
Catastrophic Injuries	Catastrophic Injuries
Automobile Accidents	Hospital Malpractice
Truck and Tractor-Trailer Accidents	Nursing Home Negligence and Abuse
Slip and Fall	Birth Injuries and Cerebral Palsy
Construction Accidents	Obstetrical Malpractice and Fetal Monitoring
Defective or Dangerous Products	Shoulder Dystocia and Erb's Palsy
Claims Against the Government and Public Entities	Surgical Errors
Dog Bites	Misdiagnosis of Cancer and Diseases
Class Action Lawsuits	Anesthesia Injuries and Brain Damage
	Heart Attack and Stroke
	Prescription and Drug Errors
	Brain Injury

Preparation for your case includes bringing in credible, respected expert witnesses in order to build fact-based, persuasive arguments. The goal is to obtain fair compensation for pain and suffering, disability and impairment, and loss of enjoyment of life, and to put our clients back in the same financial position they would have been in had the accident not occurred. When many people have been affected by similar circumstances, we also handle class action lawsuits.

When cases do go to trial, Kenneth G. Andres, Jr. and Michael S. Berger fight hard on behalf of their injured clients and surviving family members of people who tragically lost their lives as a result of the negligence of others. The firm of Andres & Berger is a vital presence in the legal community throughout New Jersey. We teach other lawyers how to try cases and lecture extensively on trial law, medical malpractice, automobile and truck accidents, and nursing home negligence. We are among the fewer than 2 percent of New Jersey attorneys Certified by the Supreme Court of New Jersey as Civil Trial Attorneys.

How We Can Help

Because we work with injured people and their families every day, we fully understand how devastating an accident or medical negligence can be. Our clients come to us with all types of serious injuries, from broken bones and herniated discs to chronic pain, paralysis or brain damage, as well as the wrongful deaths of loved ones, which in every case are the result of someone else's carelessness. Some of our clients will have to live with these injuries for the rest of their lives. In addition to physical pain, the emotional trauma, shock and just plain unfairness of this situation are emotionally very difficult to handle.

On top of all this, our clients and their families typically begin to have significant financial problems as time goes on. In a serious injury, medical bills can easily add up to six figures, a sum that can bankrupt most Americans. In fact, one recent study found that medical bills are the most frequently cited cause of individual bankruptcy in the United States. Hospitals will frequently hold the

injured person responsible for paying those bills, which means victims and their families can be financially crushed if an insurance company refuses to do its job. Injured victims can't work to earn that money, and their loved ones are likely to lose income taking care of them. That's not even counting other costs, such as a wrecked car in the case of an auto accident.

As injury and malpractice lawyers, our goal and our job is to help solve this problem for injured people. While a lawsuit cannot undo an accident, although we wish it could, it can help victims pay the astronomical financial costs of accidents or medical malpractice. It can also compensate them for their injuries, disabilities, physical pain and emotional suffering. In the best cases, it can even prevent the same accidents or mistakes from happening to others by penalizing wrongdoers and by raising community awareness of the dangers.

Some people are uncomfortable with the thought of asking for money to compensate them for their injuries and losses. They believe — correctly — that no amount of money will reverse an injury or bring back a loved one. That's true; unfortunately, science hasn't found a way to undo past wrongs. Instead, our civil justice system compensates people for injuries and losses with money as a way to penalize wrongdoers and to try to make the innocent victims whole, as much as possible. It may be a flawed system, but we do not believe anyone should be ashamed of using our court system for its intended purpose, especially if he or she is suffering financially due to the accident or malpractice. We have yet to meet a single client or family member who wouldn't give back all the money, in a heartbeat, if it could erase their injuries or losses.

The civil justice system throughout the United States allocates monetary compensation to accident and malpractice victims based on their damages — that is, the bodily injuries and losses they have suffered as a result of the other person's wrongdoing. Damages can be divided into two categories: (1) Economic damages, for financial costs related to the accident or malpractice such as medical bills and lost wages; and (2) Non-economic damages, for intangible but very real losses caused by pain,

disability and impairment and the loss of enjoyment of life.

A person making a bodily injury or wrongful death claim as the result of an accident or malpractice must prove two things, liability and damages, by a preponderance — the greater weight — of the evidence.

Liability

Whenever a person, the plaintiff, makes a claim, the law requires that he or she prove the responsibility or fault of a defendant, which is the person or entity being sued. This is called legal liability. In most personal injury and malpractice cases, it is necessary to prove that someone else was negligent and that the negligent conduct caused the accident and injuries or death. Negligence is the failure to use reasonable care. That is, failing to do something that a reasonable person, guided by ordinary considerations, would do; or conversely, doing something that a reasonable and prudent person would not do. Once you prove that a defendant was negligent, it is also necessary to show that the person making the claim was not comparatively negligent and more at fault for causing the accident than the defendant. Obviously, if the defendant did nothing wrong, you are not entitled to damages from that defendant.

Damages

The injured person must also prove what injuries and losses he or she suffered, and that those damages were caused by the negligent conduct of the defendant. To do so, it is necessary to produce evidence from a physician stating to a “reasonable degree of medical probability” the injury, diagnosis, and the medical treatment which was required, as well as the medical prognosis detailing the effect the injuries have and will in the future have on the life of the patient. The injured person must also prove how the injuries impacted him or her and caused pain and suffering, disability and impairment, loss of enjoyment of life and any economic damages for unpaid medical bills or wage loss due to

the inability to work. In death cases, you must prove the financial losses which have resulted from the death of a family member.

As you can see, proving and presenting a personal injury or malpractice claim is complicated and requires the skill and assistance of an experienced, competent attorney. To be fairly compensated for damages, you will have to prove to a jury what the injuries and losses are and that you suffered them as the result of the fault of someone else – the defendant(s). If the jury decides you have suffered damages as a result of the carelessness and negligence of the defendant, the jury then decides how much money is appropriate for each claim you make. It is squarely the function of the jury to determine the fault of the parties and what amount of money is appropriate to fully and fairly compensate a person for an injury or malpractice claim.

This brings us to an important point: bringing a lawsuit does not guarantee a recovery. If we take your case, it means we think you have a strong claim; however, no reputable lawyer will guarantee specific results. And even if you do recover damages for your loss, resolution of the claim will take time. It often takes years to investigate and prosecute a lawsuit to completion. But we can promise that we will work our very hardest to get you the best possible financial settlement or verdict — and we have a strong record of past successes that we are proud to show you.

All of this is possible because of the type of fee we charge — a contingency fee — which is determined by the New Jersey Supreme Court and set forth in New Jersey Court Rule 1:21-7. Like many reputable personal injury and malpractice firms, we usually do not charge a fee at the beginning of the case. Instead, we are paid with a percentage of the money we recover for you —if you win the case through a successful verdict or settlement. The percentage will always be explained to you *before* you agree to hire us and will be confirmed in a signed, written Agreement to Provide Legal Services. We will also discuss with you how the expenses incurred in preparing and prosecuting your case are paid and reimbursed. Preparing and prosecuting personal injury and medical malpractice cases is very expensive. The costs we have to pay for investigation, court and deposition fees, obtaining

medical and other necessary records, and expert witness fees regularly run into the tens of thousands of dollars. We understand that our clients are not usually in a position to pay these costs in advance. In most cases, we agree to pay these litigation costs to prepare the case on behalf of our clients in advance and seek reimbursement of those expenses only after a settlement or successful verdict. If you lose, we will not ask for any legal fees at all. It's that simple. This allows us to represent everyone who comes to us with a strong case, regardless of their income or background. In New Jersey you also have the option of paying your attorney an hourly fee, if agreed to by you and your lawyer. Under this option of paying an hourly fee, you will probably be required to pay a retainer and your lawyer will charge you for his or her time and expenses regardless of whether you win or lose your case.

This book is dedicated to the most common cases we handle. We handle a wide variety of cases arising from all types of serious accidents, including:

- Personal Injury
- Medical Malpractice
- Wrongful Death
- Catastrophic Injuries
- Automobile Accidents
- Truck and Tractor-Trailer Accidents
- Slip and Fall
- Construction Accidents
- Defective or Dangerous Products
- Hospital Malpractice
- Nursing Home Negligence and Abuse
- Birth Injuries and Cerebral Palsy
- Obstetrical Malpractice and Fetal Monitoring
- Shoulder Dystocia and Erb's Palsy
- Surgical Errors
- Misdiagnosis of Cancer and Diseases
- Anesthesia Injuries and Brain Damage
- Heart Attack and Stroke
- Prescription and Drug Errors

Brain Injury

Claims Against the Government and Public Entities

Dog Bites

Class Action Lawsuits

If you consult us about a case which Andres & Berger do not feel qualified to handle, we will refer you to an attorney who is knowledgeable about the type of case and particular subject matter, and we will not charge you any fee.

Personal Injury: Beware of Insurance Companies

As we said before, insurance companies are not on your side when you make a claim. Your insurance company may try to deny paying for the medical treatment you need, or for the lost wages, disability payments or other benefits to which you are entitled. The insurance company for the individuals or businesses who injured you may also try to deny your claims for unreimbursed financial losses for medical bills and for lost wages, as well as for the pain, disability and loss of enjoyment caused by your injuries. The insurance companies may not actively wish anyone harm, but make no mistake: their primary goal in the claims process is to save money by avoiding paying you any more than necessary. Within the insurance industry, the tactic is cynically referred to as “Delay, Deny, and Defend.”

When insurance claims adjusters begin working on your claim, they will crunch the numbers and come up with a range of values that they believe could adequately financially compensate you. Typically, they will then make you an offer from the low end of that range. You do not have to take it. Most people do not realize that they have every right to negotiate if they believe the offer is too low. Insurance companies rely on their customers’ trust, fear of bargaining, or ignorance of their rights to keep from paying the full amount to which injured people are entitled. In the best case scenario, you can reach an acceptable agreement with the insurance company without getting a lawyer involved.

However, because serious injuries tend to be very expensive,

victims of serious injuries are unlikely to be in the best-case scenario. That means victims of serious injuries especially need to be on the lookout for the insurance company's shrewd practices and pressure tactics. After a serious accident or medical malpractice error, representatives from insurance companies have been known to contact victims within days or weeks to discuss a settlement. They might offer victims a small amount of money, ask them to sign or record a statement, or pressure them to settle right away, before the victims have time to learn the full extent of their injuries.

Signing any agreements or statements can have serious consequences down the road. If you take a financial settlement from an insurance company, your claim will likely be considered closed forever. If a doctor later tells you that you need more medical care than you thought, you cannot go back to the insurance company and get more money. That's why we strongly recommend that our clients wait a substantial length of time before signing anything or settling the case. If you feel at all pressured or suspicious, it's best to politely decline the insurance company's calls until you can speak to us about your rights.

In the worst cases, insurers have been known simply to deny expensive claims that should be covered under the victim's or the wrongdoer's insurance policy. They may use technicalities or half-truths, give confusing explanations or simply accuse you of lying about how the accident happened or the extent of your injuries. If you believe you are a victim of any of these types of insurance company behavior, please contact us right away for a free consultation so that we can review the facts of your case and the insurance coverage issues to learn what you are entitled to under the law.

Next Steps

We wrote this book hoping it would be a resource for people who suddenly find that they are dealing with the difficult physical, emotional and financial fallout from a serious accident or medical malpractice. We hope it gives you a good grounding in

personal injury and malpractice law, even if you don't end up filing a lawsuit.

But we know that no book can answer everyone's questions. Each case is different and every client will have questions that can only be answered after we learn more about his or her unique situation. That's why we'd like to invite you to call or come in and talk to us in detail about your case. We offer free, confidential initial consultations — meetings at which we discuss your case and its prospects. If you are not able to travel, we can bring this meeting to you, whether that means your home or a hospital bedside if necessary.

At a consultation, you can tell us exactly what happened and show us any documentation you may have saved. Then, we can give you our professional legal opinion about your case and its prospects if you decide to pursue a legal claim. However, this consultation is also a job interview of sorts — your chance to interview us. Please don't be afraid to ask us, or any other law firm, questions about past results or other things that might be important to you. We know hiring a lawyer is an important decision and we want to be chosen for our merits.

If you want to set up a consultation — or just have questions, comments or concerns — we encourage you to contact us at (856) 795-1444 to schedule an appointment to come in to our office at 264 King Highway East, Haddonfield, New Jersey 08033. You can also find us online at www.AndresBerger.com.

CHAPTER ONE

Automobile Accident Law in New Jersey

New Jersey has a comprehensive set of laws which are supposed to ensure that people injured in motor vehicle accidents are compensated promptly for their injuries and financial losses by immediate recourse to insurance or public funds. Unfortunately, that is not the case. The automobile insurance system has become very confusing and burdensome for injured people trying to receive the benefits for which they paid.

The New Jersey Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1 *et seq.*, became the law in 1998 and sets forth the statutory compensation system. It includes a limited package of “no-fault” personal injury protection (PIP) benefits intended to pay medical expenses and partial wage replacement benefits without regard to fault. It also sets the legal standards for presenting a bodily injury claim for pain and suffering, disability and impairment and the loss of enjoyment of life, as well as claims for uncompensated economic losses.

A New Jersey automobile insurance policy provides several different types of coverages depending on the type of claim made by or against the insured individual. Examples of the different types of automobile insurance coverage are:

Liability: Liability coverage pays for damages from an automobile accident caused by the insured individual. Bodily injury liability coverage pays for claims for pain and suffering, disability and impairment and the loss of enjoyment of life, as well as uncompensated financial losses such as medical bills and lost wages which were not otherwise paid. Property damage coverage pays for claims for damage to cars and certain other kinds of property.

Personal Injury Protection: Commonly known as “PIP” coverage, this is the medical insurance coverage to pay for medical treatment for injuries you (and others covered by your policy) suffer in an automobile accident. It is sometimes referred to as “no-fault” coverage because your automobile insurance company pays your own medical bills no matter who causes the accident. There are two parts to PIP coverage: (1) medical benefits coverage to pay for the cost of treatment you receive from hospitals, doctors and other medical providers and medical equipment you need; and (2) partial reimbursement for certain other expenses you incur because you were injured, such as income continuation benefits for lost wages and essential service benefits if you have to hire someone to help care for your family or home.

Uninsured Motorist (UM) Coverage: Uninsured motorist coverage is a type of insurance you purchase from your own insurance company to pay you (and others covered by your policy) if you suffer bodily injury in an automobile accident caused by an uninsured or “hit and run” driver.

Underinsured Motorist (UIM) Coverage: Underinsured motorist coverage is another type of insurance you purchase from your own insurance company to pay you (and others covered by your policy) if you suffer bodily injury in an automobile accident caused by another driver who is insured, but who does not have enough insurance to adequately compensate you. However, this coverage only applies if you have more UIM coverage than the coverage of the at-fault driver who injured you. When your bodily injury damages are greater than the limits of the at-fault driver’s liability policy, the difference is covered by your UIM coverage.

Automobile insurance in New Jersey is mandatory, and the penalties for not having insurance can be severe. You must purchase automobile insurance or you will be subject to civil and criminal penalties. Owners of motor vehicles registered or principally garaged in the state must maintain liability insurance for certain mandatory minimum amounts. Currently, the minimum

mandatory liability insurance coverage for a standard automobile policy is only \$15,000, which is rarely enough to compensate someone who is seriously injured. All automobile insurance policies must also include certain types of “no-fault” PIP coverage providing first-party compensation for medical bills without regard to fault.

Lastly, if you are uninsured, you will not be able to make a claim or file a lawsuit against a careless driver who hits your automobile and causes injury. Later on in this chapter, we give you our recommendations for the types and amounts of automobile insurance coverage you should carry.

Are You Covered and Can You Make a Bodily Injury Claim?

After an accident, one of your first concerns will probably be whether your injuries and property damage are covered by auto insurance. You probably have at least some insurance coverage because 48 states, including New Jersey, make auto insurance mandatory. Unfortunately, having *some* auto insurance is not the same as having *enough* auto insurance. Many drivers carry the minimum amount required by law — only \$15,000 — or break the law by carrying none at all. This is bad news if you rely on the other driver’s insurance policy to cover your injuries.

Before continuing, you should understand how automobile insurance works in New Jersey. There are two types of auto insurance systems in the United States, and which one you use usually depends on where you live. Most states are “at-fault” or “tort” states, which mean the other driver is legally responsible for any medical bills, bodily injuries and the financial costs caused by the accident. The other driver’s insurance policy is supposed to pay those costs, but you may have to sue to get payment if the facts are in dispute. A few states are “no-fault” states where all claims are adjusted without regard to fault.

New Jersey has an automobile insurance system which is a hybrid: a combination of “at-fault” and “no-fault” principles. As explained in the previous section, some of the benefits are part of the no-fault program which requires that you obtain first party

personal injury protection benefits (PIP) for medical bills, income continuation and essential services benefits from your own insurance company, regardless of how the accident happened or who is at fault. Under New Jersey law, your medical bills and a portion of your lost wages are paid by your automobile insurance company up to the stated policy limit amount.

However, a bodily injury claim for pain and suffering, disability and impairment and loss of enjoyment of life and uncompensated financial losses is very different. To collect bodily injury damages and make the claim against the negligent driver, you must prove another driver is at fault and caused your injuries.

Your Coverage Choices Can Limit Your Bodily Injury Claim Even When the Other Driver is at Fault

A “tort” claim is a bodily injury claim for money damages for injuries, including pain and suffering, disability and impairment and the loss of enjoyment of life, and uncompensated medical bills or lost wages. New Jersey law requires that a “tort” claim must be made against the at-fault driver. Assuming the other driver has automobile liability insurance, his or her insurance company will provide a defense and may be required to pay money damages up to the amount of the policy limit purchased by the negligent driver. In this instance, you must prove that: (1) The other driver is at fault for causing the accident; and (2) You suffered injuries and losses which were caused by the accident.

However, the choices you make when you purchase your automobile insurance policy can also limit the rights of you and your family members when injured by a negligent driver. You have an important decision to make when you purchase automobile insurance regarding the “Tort Threshold,” which is your right to sue an at-fault driver even when you are innocent of fault. There are two choices when you complete your insurance “Coverage Selection Form” regarding the tort threshold. This choice determines whether or not you may be able to successfully make a claim when suffering a bodily injury.

The Tort Threshold choices are:

Unlimited Rights: Under the “No Limitation on Lawsuit Option,” you retain the right to make a claim for compensation against the person who caused the accident for bodily injury damages, for pain and suffering, disability and impairment and loss of enjoyment of life for *any injury* caused by the at-fault driver.

Limited Rights: If you choose the “Limitation on Lawsuit” option, you forfeit the right to make a claim against the negligent driver who injured you unless you suffer one of the injuries listed below:

- Death
- Dismemberment
- Significant disfigurement or significant scarring
- Displaced fracture(s)
- Loss of a fetus
- A permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement. An injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment.

As you can see, an innocent person injured in an automobile collision who has the restricted rights of the “Limitation on Lawsuit” option may be denied compensation for legitimate injuries because the injuries do not fit one of the limited categories listed above. We encounter this situation all too frequently, and unfortunately, have to advise good people that we sometimes cannot help them because of the limited rights coverage they purchased. However, we recommend that you consult a qualified attorney even if you do have the “Limitation on Lawsuit Option” so that your case and injuries can be thoroughly reviewed. Often injuries do not heal and people are left with permanent injuries.

Even people who have never been in a serious accident often dislike dealing with insurance companies. If you have been in an accident and have a large or complicated claim to make, you may

soon find out why. Unfortunately, talking to insurance companies, yours as well as the insurance company for the at-fault driver, is an essential part of recovering from your accident, and how you handle these interactions can make or break your case.

Contacting Your Insurance Company

After you receive medical care and recover from the immediate effects of your accident, one of the first things you should do is call your automobile insurance company. You will probably also have to call the other driver's insurance company, but we suggest you have a qualified attorney do that for you. You should make the call to your insurance company as soon as you reasonably can, so that your insurance company can set up a "no-fault" PIP claim to pay for your medical treatment. If you wait too long, it might appear to the insurance company that you are exaggerating your injuries. Calling promptly is also part of your obligations under the contract you signed with your insurer.

This first call should be fairly short. Its purpose is only to give the insurance adjuster for your company the basic facts about your accident and your injuries and treatment, and the information for the other driver's insurance company, if there is one. During the call, the insurance adjuster should never ask to record you or ask you to sign anything, especially in exchange for money. If you get this kind of request, you should politely decline and call a lawyer as soon as possible.

During your initial call, the insurance adjuster will probably ask you who was at fault for the accident or who was to blame. If this is disputed or you are unsure, just stick with the facts. During this or any other conversation with an insurer, it is important to avoid apologizing or accepting blame just to be polite because that could be taken as an admission of guilt. Additionally, if you were seriously injured, knocked unconscious or taken to the hospital, you may not know the full story. One way to be informed is to request a copy of the police accident report, if there is one. In New Jersey, you are entitled to obtain a copy of the police report for a modest fee. If they will not release it, your attorney or the

insurance adjuster can get it for you and use it to start your claim.

How Do You Get Your Medical Bills Paid?

If you received any sort of medical treatment after an accident, you will have to worry about medical bills and health insurance claims as well as auto insurance claims. In New Jersey, your auto insurance should cover your medical treatment which is required for the injuries suffered as a result of the accident under the “no-fault” PIP provision of the policy, unless you selected your health insurance company as the primary payor. If you are injured while working, Workers’ Compensation should pay your medical bills. In other kinds of accidents, your own medical-health insurance should pay the bills, assuming you have health insurance coverage. Keep in mind that hospitals and doctors often prefer not to wait to work out who is responsible to pay; therefore, if you were not able to give them your automobile or health insurance information (if any) when you arrived, they will probably try to bill you personally. In this case, you or your lawyer should be able to get the bill sent to the appropriate party to pay later.

If you have both medical and auto insurance, you may be wondering which will pay for your medical costs. Under at-fault insurance plans, the hospital will start by billing you personally or billing the automobile or medical health insurance company whose information you provide. If you make an auto insurance PIP claim, your automobile insurer should pay the bill directly.

You will still have a deductible under your PIP policy and will incur some co-payments. If your bills are higher than the total amount of your PIP medical coverage, your medical health insurance should take over after your auto insurance coverage is used up. If there are problems, keep in mind that most states ultimately hold you responsible for your own medical bills, regardless of whether insurance should cover it. That means you should take action quickly if the insurance company refuses to meet its obligations.

Auto Repairs and Other Property Damage

Damage to your car, truck or other vehicle is the most common type of property damage, but any other property you lost or had to repair because of the accident should also qualify. The same auto insurance policy that covers your injuries should also cover your property damage.

If you purchased collision coverage on your vehicle, you can make a claim with your own insurance company to get your vehicle repaired. If you do not have collision coverage, you will have to try to get the insurance company for the other driver to pay for the repair or compensate you for the loss of your vehicle and other expenses such as towing and storage fees. If this is the case, the other insurance company is only going to compensate you if its insured driver was at fault for causing the collision.

Generally, claims of damage to your vehicle fall into two categories. If the insurance company says your car or truck is “totaled,” it means the repair costs are more than the actual fair market value of the vehicle. That makes it not worth repairing, at least to the insurance company. The fair market value of the vehicle is determined by its age, condition, mileage, appearance, depreciation and other factors. Each insurer does this differently, and some take into account incidental costs like storage. You can always check on-line with a reputable service to determine the “book value” of your vehicle if it is a total loss.

Because car loans and other financial obligations related to the vehicle are not considered in determining fair market value, your car or truck might be considered worth less than what you owe for it. This is especially likely with newer vehicles, which depreciate (lose value) quickly within their first few years of use. The insurance company is obligated to pay only the actual cash value of the vehicle immediately prior to the accident, not the cost of repairs you made or your original purchase price. A special type of insurance called gap insurance is designed for this situation; it pays the difference between actual cash value and any loans you still owe. Gap insurance is optional, but insurers often try to sell it to owners of new or leased vehicles.

If the insurance company considers the vehicle repairable, it should pay for repairs by a certified body shop or a mechanic. Your insurance coverage may pay for use of a rental car during repairs or compensate you for the temporary loss of your car or truck. Some states allow you to choose your own repair shop; others allow the insurance company to choose. If you disagree with the insurance company's estimation of the damage, you should get a second opinion from another repair shop.

Dealing With Uninsured and Underinsured Drivers

If you were hit by an uninsured or underinsured driver, you will have a different set of challenges ahead. An uninsured driver is a driver with no insurance coverage at all. An underinsured driver is one with some coverage, but not enough to cover the damage he or she caused. (A hit-and-run driver is considered an uninsured motorist, at least until he or she can be identified.) In New Jersey, your own PIP coverage should cover at least some of your medical bills and lost wages. However, being hit by an uninsured or underinsured driver may mean there is no money available to compensate you for your bodily injuries and unreimbursed financial losses. You are free to sue the at-fault driver, of course, but most individuals are not wealthy enough to fully pay for a serious injury if they are not insured or do not have enough insurance.

The only way to protect you and your family from this risk is by purchasing uninsured/underinsured motorist insurance (UM/UIM) from your own automobile insurance company, which supplements your own policy. You have to buy this additional coverage from your own automobile insurance company to protect yourself and your family. In the event of an accident, you will have to file a formal claim with your insurance company to get the uninsured or underinsured motorist benefits you purchased, which will almost certainly be denied and litigated by your insurance company, even though you paid for these benefits.

When a Disability Takes You Out of Work

If your injuries take you out of work for more than a few days, you stand to lose a lot of wages. If you have short-term or long-term disability coverage, you should be able to collect payments that help you make ends meet while you are out of work. If you are eligible for this coverage and decide to use it, you may hear from your insurance company about “subrogation,” which is a legal term for transferring the obligation to pay from one party to another. In an at-fault state, subrogation gives your disability insurer the right to be reimbursed if you win any money for lost wages from a third party, such as the insurance company for the other driver. Because this can be complex, your lawyer should handle it for you.

You may be entitled to payment of income continuation benefits which will reimburse you for a portion of your lost wages from your own automobile PIP insurer if you purchased this protection. You may also be entitled to temporary disability benefits from the State of New Jersey. In cases of long term disability, you may be entitled to Social Security Disability benefits. Your lawyer should assist you with filing the necessary PIP and State Temporary Disability forms and with obtaining the supporting medical documentation from your doctor.

Settling Your Claim with the Insurance Adjuster

Sometimes, it is possible to settle an accident claim just by working with the insurance adjuster for the defendant. This is most likely when you have few injuries that require little medical treatment. In this situation, you may not even need help from a lawyer. But before you close your claim, you should make sure you have identified all of your injuries and property damage and feel that you will be truly and fully compensated by the payments you will receive.

Many people do not realize that they are not required to take the first settlement the insurance company offers. In fact, you are allowed to negotiate for the fullest compensation you are

entitled to, using documentation from police, from repair shops and from other independent parties to support your claim. But if the insurer refuses to change its offer, a lawyer can drastically change your situation. Hiring a lawyer to handle the negotiations lets the insurer know that you know your rights and are prepared to enforce them.

Because we refer to “our” insurance companies, it can be easy to believe that insurance adjusters are there to help us. Unfortunately, this is usually not true in the real world. In many cases, your own insurance company may try to limit the medical care you receive by denying or refusing to pre-certify needed medical treatment and tests. Of course, the insurance company for the other driver will also try to limit the compensation you receive for your injuries and damages. Insurance companies are in business to make money, and premiums — the monthly or yearly payments we make to have insurance — are just part of their profit. Like any other business, insurers make more money if they keep costs low. In an insurance company’s case, that means paying less to people with expensive claims. The job of an insurance adjuster is to save the company money by settling your claim for as little money as possible.

If you were seriously injured in your accident, you may not be in the best state of mind or condition to fight with an insurance company. Insurance companies are very sophisticated and practiced in the tactics of limiting payment for legitimate claims. Hiring a reputable lawyer may be the best decision you can make to protect yourself, your family and your future.

Your Automobile Insurance Policy— Our Recommendations

Since first passed in 1972, the New Jersey No Fault Act has increasingly restricted the ability of persons injured in automobile accidents to sue those responsible for their injuries. These options are often not explained by insurance agents when selling you coverage.

In 1998, the New Jersey Legislature created a new class of

automobile coverage called “basic” coverage. The basic policy does not include any mandatory personal injury liability insurance coverage or legal defense of personal injury claims, although it does offer optional coverage of \$10,000 for bodily injury liability claims. The “basic” policy includes \$5,000 property damage coverage, mandatory limitation on lawsuit threshold and no underinsured motorist coverage. It also does not provide PIP medical coverage. This basic policy is often called the “no-insurance insurance coverage” and is usually chosen by someone who would not otherwise buy insurance. The result is less coverage to pay for medical treatment and less rights to recover monetary damages from careless drivers who cause accidents. At Andres & Berger, we recommend that you **never** buy a basic policy.

The “standard” policy provides liability coverage if someone makes a claim against you with minimum limits for bodily injury of \$15,000 per person/\$30,000 per accident and property damage of \$5,000. You are also provided with uninsured motorist (UM) and underinsured motorist (UIM) coverage with minimum limits of \$15,000 per person/ \$30,000 per accident, if you or a resident member of your family is injured by a person who is uninsured or has no bodily injury liability coverage. Of course, you should purchase higher limits than the minimum to protect you and your family. We **recommend** you purchase a standard policy with the highest coverage limits you can afford, so that you have the coverage to protect your assets if you are sued and to provide compensation to you and your family if you are injured.

We **recommend** that you purchase \$250,000 of PIP medical expense coverage as part of the standard policy. You may elect to purchase less coverage, but then you may not have enough insurance to obtain all of the medical treatment you need or to pay for all of your medical bills. You should also select an insurance company that does not require pre-certification. Insurance policies which require your doctor to request pre-certification authorization from the insurance company before rendering any medical treatment or administering any diagnostic tests do not permit the doctor to make decisions regarding your treatment. We believe your medical treatment should remain in your

doctor's hands. You should also select income continuation benefits in an amount equal to what you earn to cover lost wages if you are injured and cannot work.

Another choice you have is to select a "tort option" which governs your rights to make a claim for injury when the accident is caused by someone else. You must select either the "no limitation on lawsuit option" or the "limitation on lawsuit option." It is important to understand that if you select the limitation on lawsuit option (also known as the verbal threshold), it limits the legal rights of you and your family to make a claim for monetary damages or to file a lawsuit against a careless driver who causes an accident and injuries. You can be seriously injured in a car accident and will be denied compensation unless you sustain one of the following defined types of injury:

- Type 1 – Death
- Type 2 – Dismemberment
- Type 3 – Significant disfigurement or scarring
- Type 4 – Displaced fracture(s)
- Type 5 – Loss of a fetus
- Type 6 – Permanent injury (which occurs when a body part has not and will not heal to function normally with further treatment.)

An additional requirement of the "limitation on lawsuit option" requires the injured person to provide the defendant with a Certification of Physician from a licensed treating physician or from a board certified specialist to whom the patient was referred by the treating physician. The Certification of Physician shall state, under penalty of perjury, that the injured person has suffered one or more of the 6 types of qualifying injuries listed above as a result of the accident. Failure to provide a Certification of Physician in timely fashion will result in dismissal of the lawsuit. The burden of proof rests with you, the injured party, to prove that your injury is such that it meets the "verbal threshold" set forth in the "limitation on lawsuit option."

The better coverage for you and your family is the "no

limitation on lawsuit option,” which permits you to make a claim or to file a lawsuit against a careless driver for any and all personal injuries. We **recommend** that you choose the “no limitation on lawsuit option.”

Remember if you purchase a Basic Policy or a Standard Policy with the “limitation on lawsuit option,” the careless drivers who cause accidents will benefit because they may have no legal responsibility for your pain and suffering. The insurance companies who provide coverage for careless drivers will benefit also because they may not have to pay any monetary damages for your injuries. That is why we **recommend** that you choose the “no limitation on lawsuit option.”

You can also purchase a personal catastrophe or excess liability umbrella policy that will provide you with additional coverage of \$1 million if a claim is made against you (or any resident family member) for injuries sustained by another person. In addition, some companies offer personal catastrophe or excess liability umbrella policies which include uninsured and underinsured motorist coverage of \$1 million to protect you and your family members who are seriously injured. We **recommend** this additional excess coverage.

To summarize, Andres & Berger strongly recommend that you make the following selections when purchasing your automobile insurance coverage:

1. **Choose the Standard Policy.** A Standard Policy provides the best insurance coverage to protect your assets if you are sued and to provide compensation to you and your family if you are injured. Never buy the Basic Policy.
2. **Choose Enough PIP Coverage.** Select \$250,000 of PIP medical expense coverage. Medical care for serious injuries is very expensive, and you want to make sure that you and your family can pay for the treatment you need.

Select income continuation benefits in an amount which is enough to cover your wage loss if you are injured and cannot work.

3. **Liability Insurance Limits.** Select a minimum of \$100,000 of liability insurance (or the highest limits you can afford) to protect your assets if you cause an accident which results in injuries to someone else, including family members and friends who are passengers in your car.
4. **Uninsured and Underinsured Motorist Coverage.** Select \$100,000 of uninsured and underinsured motorist coverage (or the highest limit you can afford). This is the only way to protect you and your family if you are injured by an at-fault driver who has no insurance or not enough insurance to compensate you. Always select UM and UIM coverage in the same amount of your liability coverage to protect you and your family from careless drivers.
5. **No Limitation on Lawsuit Option.** The no limitation option permits you to make a claim or file a lawsuit against a careless driver for any and all injuries.

Never buy the limitation on lawsuit coverage, which limits your rights to make a bodily injury claim when you are innocent and hurt by a negligent driver.

AUTOMOBILE INSURANCE CHECKLIST		
YES	NO	
	✓	Basic Policy
✓		Standard Policy
✓		Liability Coverage (A minimum of \$100,000 or the highest limits that you can afford)
✓		Uninsured Motorist Coverage (A minimum of \$100,000 or the highest limits that you can afford)
✓		Underinsured Motorist Coverage (A minimum of \$100,000 or the highest limits that you can afford)
✓		PIP Medical Expense Benefits (\$250,000)
	✓	PIP Medical Expense Benefits (less than \$250,000)
	✓	Pre-certification of Medical Treatment
✓		No Limitation on Lawsuit Option
	✓	Limitation on Lawsuit Option

What if you are reading this section after your accident? Perhaps you didn't understand what kind of automobile insurance you were buying and now you have been involved in an accident. Unfortunately, the coverage in effect on the date of the accident determines the coverage you have. However, if you have been injured because of the carelessness of another driver, see a Certified Civil Trial Attorney experienced in automobile personal injury law to make sure you obtain the insurance benefits you paid for, and find out what alternatives you have to recover compensation for your injuries and losses. At Andres & Berger, we have a proven record of getting our automobile accident clients the compensation they deserve.

CHAPTER TWO

Truck and Tractor-Trailer Accidents

Truck and tractor-trailer accidents can result in devastating injuries. One reason is that trucks are enormous; they can weigh in excess of 40 tons, while a car or SUV might weigh two or three tons. The United States trucking industry is growing every year with more and more trucks on the road.

Legally, truck accidents are more complex than an average car accident. There are more sources of potential causes of the collision and liability. The driver, the owner of the tractor, the owner of the trailer, the warehouse that loaded the truck and the shop that maintained it may all share responsibility for the accident.

If you were injured in a commercial trucking accident or if a loved one died in a truck wreck, your attorney must pursue all possible sources of potential liability to maximize the recovery of damages. Tractor-trailer accidents are more complex to litigate than standard car-on-car crashes due to the large number of parties involved. Every entity, from the driver, the trucking carrier, the manufacturer of the truck, to the mechanics involved in the maintenance of the vehicle can be involved, causing a complex web of legal issues. For this reason, it is suggested that victims of tractor-trailer accidents retain legal representation from a qualified attorney with experience in litigating claims involving tractor-trailer accidents. The good news in the face of this misfortune is that there is a law firm well prepared to handle tough cases like these. The award-winning trucking accident lawyers of Andres & Berger have handled and resolved many cases involving semi-trucks, tractor-trailers, 18-wheelers and other commercial trucks. We represent clients who were injured in truck accidents, including those caused by:

- Fatigued or poorly trained drivers
- Driver error which can include speeding, improper lane changes and even alcohol or drug use
- Inadequate maintenance or truck defects
- Improper loading
- Negligent operation of a truck in poor weather conditions

Truckers are under such pressure to deliver goods on time that they frequently violate federal regulations regarding how much time a driver can stay behind the wheel. At Andres & Berger, as soon as we accept a truck accident case, we move quickly to obtain the driver's log books — both the ones documenting his or her actual driving time and the one many drivers keep for authorities. We will request data from the truck's black box record or satellite tracking system, if the truck is so equipped. The investigation may include hiring an expert in accident reconstruction, truck maintenance and mechanics or trucking industry standards to prove fault of the trucker or the owner.

We will begin an in-depth investigation into the cause of your truck wreck to determine if the truck driver was meeting all the regulatory requirements to maintain a commercial driver's license or whether the driver was careless or inattentive, sleep-deprived or under the influence of alcohol, prescription drugs, over the counter medications, or other illegal substances.

We will investigate the condition of the tractor trailer, including the maintenance record to determine whether the trucking company was in full compliance with all safety regulations, whether the tires were properly inflated and the brakes were in optimal working order, whether proper pre-trip safety inspections were performed and logged; and how frequently the engine was checked and the parts serviced.

Finding the answers to such questions can be a challenge, but at Andres & Berger we are experienced and familiar with the many variables, regulations, and potentially liable parties that create such a maze after a truck wreck. Our goal is to recover the full amount of compensation you deserve, whether a delivery

truck rear-ended you in a parking lot or a tanker truck slammed into you on the New Jersey Turnpike, Garden State Parkway or any other roadway. We will cut through the red tape, identify all responsible parties, and fight to maximize your compensation.

CHAPTER THREE

Medical Malpractice

“We have an epidemic of medical malpractice, not of malpractice lawsuits.”—Tom Baker, Professor of Law, University of Pennsylvania

Preventable medical errors kill and seriously injure hundreds of thousands of Americans every year. Medical malpractice is the sixth leading cause of death in America.

In 1999, The Institute of Medicine, the world renowned U.S. Government agency, issued the results of two startling studies which concluded:

- Between 44,000 and 98,000 Americans die each year from preventable medical errors in hospitals alone.
- These 44,000 to 98,000 deaths do not account for those who die from medical errors outside the hospital.
- It is equivalent to the number of people who would die if a jumbo jet crashed every day for a whole year, and all its passengers died.
- Medical errors cause more deaths than motor vehicle accidents, breast cancer or AIDS.
- These figures do not include the number of patients who are seriously injured as the result of medical malpractice which is never reported.

Can you imagine how many people are seriously injured as the result of medical malpractice when the medical and malpractice insurance industries admit that 50,000 to 100,000 people die every year because of preventable medical errors?

Medical malpractice is defined as negligence by act or omission by a health care provider in which the care deviates from accepted standards of practice in the medical community and causes injury or death to the patient. A physician has a duty to exercise the

degree of skill and care expected of a reasonably prudent physician acting in the same or similar circumstances at the time of the care or treatment in question. The failure to do so is negligence. Medical practitioners are interacting with the most valuable thing an individual has – his or her body and health. Significant damage to the one body a human being will ever have can be assessed at a very high dollar amount in terms of the compensation.

The medical practitioner also has a duty to discuss all relevant information and disclose to the patient all courses of treatment that are medically reasonable. The ultimate decision as to which treatment to pursue among reasonable alternatives belongs to the patient. A physician is negligent if he or she does not provide all the information necessary for a patient to knowingly evaluate the options available and the associated risks. Informed consent is not just limited to invasive procedures such as surgery. The health-care provider must inform the patient not only of alternatives that the physician recommends but also of medically reasonable alternatives that the particular practitioner does not recommend. This standard focuses on the patient's needs to understand all potential risks.

The practice of medicine has become increasingly more complex and specialized. It is not surprising though that the medical profession and insurance industry have sought to blame the rising cost of health care and medical malpractice insurance premiums on lawyers and the cases being filed. Politicians, often receiving support from the insurance industry, have enacted regressive and unwarranted legislation in nearly every state, making it harder for victims of medical negligence to be compensated for their injuries. Such legislation usually ignores the enormous lost wages and expenses for future care malpractice victims may be burdened with. There has been much focus on restricting patients' rights to hold negligent health care providers accountable, but precious little focus on reducing and eliminating preventable medical errors. A massive publicity campaign by the insurance industry and the medical profession designed to influence politicians, potential jurors and the judiciary has met with some success.

Handling a medical negligence case remains one of the most challenging tasks of a trial lawyer. Medical malpractice cases are also very expensive to investigate and prosecute because your lawyer will have to retain and pay for highly qualified, independent medical experts to analyze and provide testimony in the case, specifically stating what the doctor or other health care professional did or did not do which deviated from the standard of care (the malpractice) and how the malpractice caused injury or death. It is not uncommon for our office to incur expenses of tens of thousands of dollars in the preparation of a medical malpractice case, and witness fees for trial are often more. You will need a skilled and experienced medical malpractice lawyer in this subspecialty of litigation to handle your case. Medical malpractice attorneys work long and hard hours in trial preparation and in trial, offering the last, best hope for a better life to victims of medical malpractice who would not otherwise be compensated. The dedicated work of these lawyers has also had the beneficial effect of monitoring the medical profession at a time when it is not being adequately policed by its own membership or by regulatory and disciplinary authorities. The victories of these dedicated attorneys have the effect of weeding out bad doctors and encouraging higher medical standards.

There are certain myths and falsehoods about medical malpractice which need to be dispelled for victims of malpractice and for potential jurors.

MYTH 1: Medical malpractice lawsuits raise the cost of healthcare.

TRUTH: Preventing medical errors will dramatically lower health care costs, reduce doctors' insurance premiums, and protect the health and well-being of patients. A patient's access to the legal system to recover financially for injuries attributed to medical negligence hold the medical community accountable for malpractice. Insurance companies are raising rates because of poor returns on their investments, not because of increased litigation or jury awards, according to J. Robert Hunter, Director of

Insurance for the Consumer Federation of America. Malpractice insurance costs amount to only 3.2 percent of the average physician's revenues. Few medical errors ever result in legal claims. Only one malpractice claim is made for every 7.6 hospital injuries, according to a Harvard University study.

MYTH 2: There are too many frivolous negligence lawsuits filed.

TRUTH: Despite the shocking number of medical errors, few injured patients ever file a medical negligence lawsuit, and fewer still file frivolous claims. Research shows most malpractice claims are legitimate and meritorious. The best way to prevent medical negligence claims is to put systems in place in hospitals and medical offices to prevent harm. Legal claims are filed on behalf of a small fraction of patients who sustain injury through medical negligence, and even fewer are prosecuted because of the enormous time and expense involved. Most malpractice cases cannot be accepted for litigation because the expenses required to prove a case are simply too much to justify unless the patient has suffered a very serious injury or wrongful death.

MYTH 3: Patients who file lawsuits are seeking a financial "jackpot."

TRUTH: Research shows that patients file claims because they are seeking accountability. Seventy percent of patients who experience medical errors are not even told by their doctors that an error occurred. Nearly one half of the nation's doctors admit to not reporting incompetence or medical errors. On the other hand, hospitals and health systems that have embraced full disclosure of medical errors to patients have found that the number of medical negligence claims and their related costs actually decline. There is no "jackpot" for people who are severely injured due to malpractice. These victims would give anything to just have their lives back.

MYTH 4: Restricting patients' ability to file lawsuits will save everyone money.

TRUTH: The savings from preventing medical errors run into billions of dollars. Medical negligence costs amount to less than two percent of health care spending, and government economists estimate restricting all patients' restitution would only lower health care cost by 0.5 percent or less. Preventative reforms that focus more on the medical industry rather than the legal system are a key part of any effort to making health care more affordable and accessible. Limiting patients' rights does nothing but increase the profits of malpractice insurance companies and place burdens on taxpayers to care for malpractice victims. The wrongdoer who commits malpractice should pay for all of the damage caused.

MYTH 5: Doctors have to pay increasingly expensive insurance premiums because of all the lawsuits filed.

TRUTH: Medical malpractice claims have remained stable for decades. The Administrative Office of the Courts confirms that fewer malpractice claims than ever are being filed every year in New Jersey. Despite these facts, insurance companies have drastically raised physician premiums to build huge surpluses of cash. States which have enacted caps on damages have seen hospitals and malpractice insurance companies make tens of millions of dollars, but have not seen lower prices charged to patients and health insurers. Meanwhile, the cost of health care continues to rise at near record levels.

MYTH 6: Doctors leave states and retire early in areas where there are no medical malpractice caps or other regulations.

TRUTH: Data from the American Medical Association (AMA) show that physician numbers have been increasing across the

board for many years. Not only are there record numbers of physicians in the U.S., the increase has also significantly outpaced population growth. There are now twice as many physicians per 100,000 people as there was when the AMA began tracing figures in the 1960s. The number of physicians per 100,000 people is significantly higher in states without caps on damages. This fact is supported by a large body of research that has found physician supply is not connected to insurance premiums.

MYTH 7: The medical profession has standards in place to police its own members.

TRUTH: Just 6 percent of doctors are responsible for nearly 60 percent of all medical negligence, and the civil justice system is the only effective means for holding them accountable. State medical boards are supposed to discipline doctors who consistently violate standards of care. Yet two thirds of doctors who make 10 or more medical negligence payments are never disciplined at all. Nearly half of all U.S. hospitals have never reported a disciplinary action against one of their doctors since the National Practitioner Data-bank was created in 1990.

FACT: The civil justice system holds doctors, hospitals, and insurance companies accountable. It is this accountability that drives the development of patient safety systems that help prevent negligence before it occurs. Hospitals, health systems and even entire medical fields have reformed dangerous practices because of the civil justice system. Without the accountability enforced by the civil justice system, patient safety will suffer and health care costs will go up for everyone.

What if you or a family member or friend has been injured or someone died because of the negligence of a physician, nurse or other hospital or medical staff? First, you will need to locate an experienced medical malpractice attorney. Unfortunately, some attorneys advertise and say that they are experienced in handling medical malpractice claims when it is really not true. You need to

investigate before retaining an attorney and ask specific questions of an attorney about his or her experience and the number of medical malpractice cases he or she has handled. Medical malpractice insurance companies employ teams of dedicated medical malpractice defense attorneys who will fight to ensure the insurance company pays out as little as possible. For injured patients, it's not enough to hire a general practice attorney, these cases are much too complicated and there is too much at stake. If you or a loved one has suffered an injury due to medical negligence, it's important to talk to a medical malpractice lawyer. Andres & Berger have prosecuted hundreds of favorable settlements and jury verdicts in medical malpractice cases and recovered, in some cases, millions of dollars for our clients. We are qualified to handle complex cases. We will consult with well-credentialed, independent medical doctors and nurses in order to assess a client's case and determine if, in fact, medical malpractice and negligence did occur, and exactly how it caused an unnecessary injury or wrongful death of a patient.

The fundamental difference between a medical negligence case and a more routine negligence case is that the jury or judge needs to know the standard for ordinary medical care so a determination can be made as to negligence. New Jersey passed a law in 1994 called the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 *et seq.*, which requires that a person making a malpractice claim obtain and serve an "Affidavit of Merit" signed under oath by a qualified medical expert attesting to the fact that there was malpractice and the case has merit. You need an Affidavit of Merit from a similarly qualified expert for every doctor, nurse, technician or other medical provider involved in the malpractice. If you do not timely serve an Affidavit of Merit signed by a qualified health care expert trained in the same area of medicine against a defendant, the court is obligated to dismiss the case. That is one more reason why there is no such thing as a "frivolous" medical malpractice lawsuit. A case will be dismissed by the judge and never even presented to a jury in New Jersey without the Affidavit of Merit signed by a qualified medical professional certifying that malpractice occurred and that the patient's case is meritorious.

Judges and jurors will require assistance from experts in order to determine what the reasonable standards of care are in a medical treatment setting. A practical reality that the courts have recognized is that the practice of medicine is not an exact science. Medical practitioners are not guarantors of the health of their patients. However, medical practitioners will be held responsible for the results of their negligent acts and malpractice.

The period of time within which an injured patient can bring a medical malpractice lawsuit is called the Statute of Limitations. N.J.S.A. 2A:14-2 requires that a personal injury or malpractice case “be commenced within two years next after the cause of any such action shall have accrued.” In New Jersey, an injured adult patient has two years from the date of the injury caused by malpractice to file a lawsuit or, in the event that the patient does not learn of the possible malpractice until after the injury has occurred, two years from the date on which the patient reasonably should have known that malpractice occurred. This opportunity for a limited extension of the statute of limitations is called the “discovery rule.”

In a case of malpractice involving a minor (a person under the age of 18), N.J.S.A. 2A:14-21 “tolls” the statute of limitations until the child reaches the age of majority. This means that the statute of limitations for most injuries to infants or children is the date of their twentieth (20th) birthday and any claim must be filed before that date. However, for cases involving injury to a baby “sustained at birth,” there is a special time limitation set forth in the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:14-21, which states that any action shall be commenced prior to the minor’s thirteenth (13th) birthday.

Pursuant to N.J.S.A. 2A:31-13, a claim for wrongful death must be filed within two years after the date of death, regardless of the age of the patient.

Yet another deadline requires that after a medical malpractice lawsuit is filed in New Jersey, the plaintiff must serve within 60 days of the filing of the answer to the complaint by the defendant, the sworn Affidavit of Merit signed by an appropriately licensed person which states there exists a reasonable probability that the care, skill or knowledge exercised in the treatment or

work fell outside the standards of that profession. As you can see, the procedural aspects of a medical malpractice case alone make it necessary for you to consult an experienced medical malpractice attorney to avoid missing critical deadlines before you even address the merits of the case.

In situations where the health care was provided by a public facility or employee, The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., applies and there are additional very specific notice and procedural requirements which must be complied with or the claim will be barred as a matter of law. N.J.S.A. 59:8-8 requires that a specific form called a Tort Claim Notice must be served by certified mail, return receipt requested, upon the public entity and the individual health care providers within ninety (90) days of the malpractice or the claim may be barred, despite the fact that the statute of limitations has not expired. Failure to serve a Tort Claims Notice in timely fashion will serve as a complete bar to a valid claim.

Because of these specialized statutes of limitation and tort claim notice requirements, you should bring any potential medical malpractice claims to the attention of an experienced malpractice attorney as soon as it is discovered in order to protect your rights.

The types of errors that frequently result in medical malpractice claims include:

Diagnostic

- Error or delay in diagnosis of cancer or other diseases or conditions
- Failure to obtain indicated tests
- Use of outmoded tests or therapy
- Failure to act on results of monitoring or testing

Treatment

- Error in the performance of an operation, procedure, or test
- Faulty treatment administration or monitoring

- Medication errors
- Avoidable delay in treatment or in responding to an abnormal test
- Inappropriate (not indicated) care

Preventative

- Failure to provide prophylactic treatment
- Inadequate monitoring or follow-up of treatment

Other

- Failure of communication
- Failure to properly inform the patient of risks and options
- Equipment failure
- Other system failure

Your attorney will need to obtain the records, test results and the actual radiographic films and studies and consult different medical specialists prior to accepting your case. The information and the medical experts will also be used during the case preparation process for advice and to provide testimony at trial. You may be asked to be examined by a specific doctor. After consulting with qualified medical experts, the attorney will also decide who should be named as a defendant in your case. Sometimes your injury may have been caused by more than one person or circumstance. Hospitals, doctors, nurses, pharmacists and other staff personnel and pharmaceutical companies may all hold some responsibility for your injury. Your attorney will evaluate your case to determine how to proceed with a lawsuit. Medical malpractice claims are very complicated and require an experienced attorney to prepare and prosecute the case.

Birth Injuries & Cerebral Palsy

Birth injuries and cerebral palsy result from errors in both prenatal medical care and during labor and delivery. Women undergo many routine tests and procedures as they progress through pregnancy in order to assure delivery of a healthy baby. Tests include pelvic exams, tracking weight gain and blood pressure, urine tests to check for bacteria, protein and sugar, measurement of the top of the uterus (height of the fundus), calculation of gestational age, size and position of the baby, in addition to blood tests to check for anemia, diabetes, RH antibodies, blood type, syphilis and hepatitis. Standard tests further include a clinical examination of the ankles and lower legs for swelling, an alpha-fetoprotein blood test to screen for certain birth defects, ultrasound scans to look at the baby and the uterus, and a nonstress test to check the health of the baby by the heart rate. There are additional tests available to women with high risk factors.

If prenatal care and delivery of the baby are not handled properly, a number of lifelong injuries, disabilities and even death can occur to the mother and child. Cerebral palsy is usually caused by a lack of sufficient oxygen to the baby's brain during the pregnancy, while hypoxic ischemic encephalopathy is usually caused by the lack of sufficient oxygen to the baby's brain during labor and delivery. Monitoring of the baby's heart rate in response to contractions during labor can indicate "fetal distress" and should trigger an appropriate emergent response by the medical team.

Prenatal testing can identify a number of birth defects and abnormalities of the fetus. This information may be important to parents who may not want to carry an abnormal pregnancy to term or if identified, treatment to the fetus may lessen the risk of injury to the child. If you feel or suspect that your physician was negligent during your pregnancy or delivery and that you or your baby was injured, contact a medical malpractice attorney immediately.

Shoulder Dystocia

When the baby's anterior shoulder becomes trapped behind the mother's pubic bone, the baby cannot come out of the birth canal. This diagnosis occurs when the baby's head delivers, but the shoulders and body fail to follow and the baby is stuck in the pelvic canal. If the obstetrician does not recognize the risk factors prior to the commencement of labor or improperly manages the delivery, the baby's arm can suffer nerve injury called Erb's Palsy, which can vary in severity from slight stretching of the nerves causing weakness, to rupture of the nerves causing complete arm paralysis.

The risk factors for shoulder dystocia include: previously delivering a baby weighing over 8.8 lbs; a history of a previous child who had shoulder dystocia; maternal and/or gestational diabetes; estimated fetal growth over 41 weeks; and a second stage of labor that lasts for more than two hours. Your obstetrician can identify those patients at risk by taking a careful history from the mother, ultrasound evaluations and testing for gestational diabetes.

Prevention of injury to mothers or infants at risk is a prophylactic cesarean section or to employ certain delivery techniques if shoulder dystocia occurs unexpectedly during delivery. The most important step is for the physician to remove his or her hands from the fetal head as soon as the diagnosis is made. There are several obstetrical maneuvers that can free the anterior shoulder so the baby can be safely delivered. Proper use of these maneuvers can prevent the traction of the fetal head that injures the brachial plexus and causes the Erb's Palsy. It is the excessive traction to the baby's head and neck by the obstetrician that causes the injury to the brachial plexus (bundle of nerves that controls the arm). If your baby is diagnosed with shoulder dystocia, contact an experienced medical malpractice attorney so your case can be evaluated and damages can be recovered. Your child may require medical treatment and therapy perhaps for the rest of his or her life. It is important to get the financial assistance you need and deserve to deal with this situation.

Cancer

The word “cancer” strikes fear in the mind of a patient, but when diagnosed early many cancers can be treated with success. Treatment options and survival chances are directly related to and limited by the size and spread of the cancer at the time of the diagnosis. While not all cancers can be detected early, many of the more common cancers can be detected through screening tests and recognition of early warning signs.

Unfortunately, delayed diagnoses of breast cancer can result when physicians fail to order baseline and periodic screening mammograms, radiologists misinterpret a mammogram as “normal” or treating physicians fail to perform necessary follow up testing after abnormal mammograms. The same is true with cervical cancer and the use of PAP smears and biopsies. Follow up treatment can change the outcome of the cancer. Delays in diagnosing colon cancer can result when doctors fail to perform occult fecal blood testing and/or order diagnostic screening tests. Lung cancer deaths can result when physicians fail to order chest x-rays for screening purposes, and/or after pneumonias clear up or when x-rays are misinterpreted by radiologists. A treatable prostate tumor can become untreatable when not caught in time by manual digital rectal prostate examinations during routine physicals or ordering blood tests for PSA levels.

Contact an experienced medical malpractice attorney if your physician failed to order and/or inform you of the routine tests necessary to detect cancer early and you now have been diagnosed with the disease. At Andres & Berger, we have had far too many cases where a physician’s negligence resulted in a patient dying from a curable form of cancer if it had only been caught in time. We have recovered damages which have helped families cope with the economic loss from the death of a loved one due to undiagnosed cancer. Although financial settlements do not alleviate a family’s grief, we are often able to achieve results which help pay the medical bills and compensate for the lost income, as well as suffering.

Heart Attacks & Strokes

Cardiovascular disease is the nation's leading killer for both men and women and among all racial and ethnic groups. More than 6 million hospitalizations each year of men and women in the United States are due to cardiovascular disease. More than 80 million Americans have some form of cardiovascular disease, with a person dying every 33 seconds as a result of the disease. Diagnosis and treatment of risk factors for cardiovascular disease help prevent heart attacks and strokes. Immediate treatment within hours of a heart attack or stroke is necessary to minimize damage. If a doctor is found to have misread test results, failed to order tests or misinterpreted symptoms of coronary heart disease, then there may be potential for medical negligence. Additionally, an untimely or delayed diagnosis of coronary heart disease may also be grounds for medical negligence. In the worst cases of undiagnosed coronary heart disease, or coronary artery disease, the untreated patient may suffer a massive heart attack and die. In these types of cases, family members can bring a suit on behalf of the lost loved one for medical malpractice as well as for wrongful death.

Surgical Errors

Multiple surgical errors occur in operating rooms nationwide every day. These errors result in injuries caused by surgical instruments injuring surrounding areas that should not have been in the operative field or when a patient is not positioned properly on the operating room table. Sometimes patients are not monitored during the procedure or anesthesia is improperly administered. There are even cases where items are left inside the patient or the doctor operates on the wrong surgical sites. Often the error is apparent, but the surgeon never describes what really happened and the mistake is never mentioned in the hospital records.

For every surgery performed, there are certain inherent risks involved which must be explained to the patient so he or she can make an informed decision as to whether to consent to the

surgery. This is your right as a patient. If you were not informed as to the risks and/or you suffered injury as a result of surgical error, you may have the right to be compensated. Signing a consent form does not waive a patient's right to bring a medical malpractice claim if the doctor fails to provide medical care in accordance with accepted medical practice.

As experienced medical malpractice attorneys, Andres & Berger are qualified to handle highly specialized areas of medicine. We regularly work with medical experts of the highest quality from the most reputable hospitals, practices and medical schools in all areas of medicine. As a result, we understand, organize and present complex medical facts to a judge and jury. We have contacts with the most respected expert witnesses in the country and are able to bring vast resources together for the benefit of our clients.

Meeting with a Medical Malpractice Attorney

When you meet with an attorney, you should ask very specific, detailed questions about his or her experience prosecuting medical malpractice cases and insist upon seeing a complete resume. Make sure your attorney has the credentials, reputation and experience to handle a complex medical malpractice case.

You should bring your medical records as well as a list of all physicians and hospitals that you have visited over the course of the last ten years. You should also bring any x-rays or other imaging films in your possession, as well as any photographs which would be evidence of your injuries.

Your attorney will decide what needs to be done to investigate whether or not you have a case and what type of expert medical witnesses must be consulted. His or her decision will be partially based on how your injuries occurred, which medical and health care providers were involved in your care, and the severity of the outcome. Case screening, evaluation, expert selection and pre-trial discovery are the most important aspects of any medical negligence case, and it takes years of experience to be able to understand and effectively prosecute medical malpractice cases.

It is your case, and you have the right to be represented by qualified and experienced legal counsel. You should accept nothing less when so much is at stake.

CHAPTER FOUR

Nursing Home Negligence and Abuse

Vulnerable, elderly nursing home residents deserve to be treated with dignity and respect. Sadly, nursing homes too often put greed and profit before the care of their patients, resulting in devastating injuries and wrongful death.

The “New Jersey Nursing Home Responsibilities and Rights of Residents Act” N.J.S.A. 30:13-1 et seq., states that a nursing home patient shall “have the right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident.” This declaration of state law continues by stating this includes “the right to expect and receive appropriate assessment, management and treatment of pain as an integral component of that person’s care consistent with sound nursing and medical practices.”

In response to widespread neglect and abuse in nursing homes, the United States Congress enacted legislation that requires nursing homes participating in Medicare and Medicaid programs to comply with requirements for the standard of care. This Federal law is part of the Omnibus Budget Reconciliation Act of 1987 (OBRA) and is also known as the Nursing Home Reform Act. To participate in the Medicare and Medicaid programs, nursing homes must be in compliance with the federal requirements and “provide services and activities to attain or maintain the highest practicable physical, mental and psychosocial well being of each resident with a written plan of care...” United States Code of Federal Regulations, 42 C.F.R. 483 et seq.

New Jersey state law and Federal OBRA regulations require that nursing homes maintain and improve the health of their residents. We trust our loved ones to the care of nursing homes and assisted living facilities, only later to find out that the facilities do

not always provide our loved ones with the care they need. The nursing home staff, or absence of enough well trained and supervised staff often fail to monitor the residents and fail to provide appropriate care which can result in:

- Bed Sores and Ulcers
- Falls and Fractures
- Sepsis and Other Infections
- Malnutrition and Dehydration
- Medication and Prescription Errors
- Physical Abuse and Even Sexual Abuse
- Emotional and Mental Abuse
- Employee Neglect
- Hazardous and Unsanitary Conditions
- Abuse of Patients suffering from Alzheimer's and other Dementia
- Wandering and Elopement
- Medical Neglect which includes not informing the family of any health changes or concerns

In some instances our family members and loved ones die due to inadequate and poor treatment.

Pursuing nursing home litigation often means that other people won't have to suffer the same dangers and indignities that your loved one endured. By standing up for the rights of individual victims of nursing home abuse and neglect, we are sending a message to nursing homes to treat their residents well. Nursing home negligence resulting in neglect or abuse of vulnerable adults can generally be traced to corporate greed where administrators chase profits at the expense of patients. Most abuse and neglect incidents can be traced to negligence in staffing. Aides and nurses may be poorly paid and overworked; administrators may not have performed adequate criminal and employment background checks on staff; or training and supervision may be inadequate or non-existent.

Most nursing home residents are in a nursing home or assisted living facility specifically because they are unable to care for

themselves. Nursing home staff members are required to make regular observations about a resident's health, and the administration must inform the family or physician if there is any decline in health, including weight loss, apathy, mobility, and incontinence. The expectation should not be that patients will suffer accidents and declining health. Nursing home staff and administrators are required to evaluate each patient on a regular basis, identify risks, and take special measures to avoid incontinence incidents, bed falls, wandering, bedsores, dehydration, malnutrition, and other common nursing home illnesses and injuries. If there is any appreciable decline in the health of the resident, the facility must notify the family and obtain medical care as needed.

Pharmaceutical errors are common despite in-place safety measures which are supposed to prevent mistakes. Nurses are expected to check and double-check medications before giving them to patients and record prescriptions in a medical administration record (MAR). Nurses should be diligent in administering patient medications. They should not be so overworked that they must rush, resulting in making a patient more sickly, even fatally ill, as safety standards are ignored. Prescription errors can result from:

- Physicians hastily and illegibly writing prescriptions or signing them without checking for accuracy
- Nurses failing to accurately log medications in the MAR so patients receive multiple doses or none at all
- Nurses failing to verify prescriptions before giving them to patients, resulting in mix-ups of drugs
- Pharmacists failing to review medical records to catch drug interactions

The most inexcusable mistakes result from nurses and health-care staff ignoring the nursing home residents. Nurses and aides may not be checking to make sure patients eat their meals. Some seniors have medical problems that do not allow them to retain nutrition, and others cannot eat on their own. When seniors suffer from malnutrition or dehydration, it often creates a ripple effect

of problems throughout their bodies. Malnutrition can increase the sensitivity in their skin, making their bodies more susceptible to pressure sores, bedsores and pressure ulcers.

Yelling at, threatening or neglecting a patient is emotional abuse and is unacceptable from a supposed caregiver. If a senior is unable to swallow solid foods but is not given appropriate food, that is abuse. If someone needs to go to the bathroom, but is unable to go without assistance, waiting can be painful. Worse, if residents must wait so long that they soil themselves, sitting in their own mess for hours or days is a horrific punishment and can lead to life-threatening infections. Our loved ones have been self-sufficient most of their lives. Now, when they are placed in the care of another person, they must fully rely on nurses and aides for help with even the simplest tasks. If they cannot communicate their needs, or if their needs are being ignored, they might be suffering from emotional abuse.

When a nursing home or assisted living facility accepts a person who has a tendency to wander, its staff are responsible for keeping that person safe. Wandering patients who are neglected can injure themselves or other patients. Patients who have a tendency to wander off should be placed in units where all doors to the outside are locked, and the windows in their room should not have the ability to open far enough for a person to fall out. Without proper staffing, a patient who wanders out of safety may go unnoticed.

If you have spent most of your life with a person, you have likely noticed all of their unusual physical characteristics. Moles, scars, birthmarks — you are probably familiar with all of them. So what happens when you notice new bruises or if you see scratches that were not previously on your loved one's body? When your loved one is in a nursing home or assisted living facility, you are his or her advocate. If you notice suspicious injuries or bruises that do not have a good explanation, it is important to ask questions. If your loved one starts spending all his or her time under the covers of the bed, ask him or her why.

If your parent or spouse is in a nursing home, you may feel as though it is your responsibility to make sure things operate as

they should at the nursing home. Unfortunately, despite your best efforts to understand what is happening with your loved one's health care, you may still feel as though there is something you don't know. We help clients investigate suspicious injuries and behaviors, including:

- A sudden decline in health without medical explanation
- A change in demeanor or mood
- Unexplained bruises, cuts or injuries
- Weight loss
- Failure of nursing home staff to adequately explain your loved one's injuries

A nursing home has an obligation to each resident to take care of that person and address his or her needs—physical and psychological. Family members who keep lines of communication open with caregivers, nurses and aides will often identify risk, preventing injuries and catching situations early enough to turn them around. As the responsible party, you have a right to access caretakers and reports. If you have any suspicions that a vulnerable adult is subject to abuse or neglect in a nursing home, assisted living facility or at the hands of a home health care aide, demand a meeting with the director of nursing and insist on immediate changes in patient care. Begin keeping a record of your suspicions. You may even set up a recorder in the patient's room. One of the most important steps you can take is contacting an attorney who has experience with nursing home care and the many issues that can arise. At Andres & Berger, we regularly handle nursing home cases and will be able to answer your questions including filing appropriate legal action, if necessary.

CHAPTER FIVE

Construction Accidents

Safety First is Safety Always!

Construction sites are some of the most dangerous workplaces in the United States. The construction industry employs about 8 percent of U.S. workers but has 22 percent of the fatalities—the largest number for any of the industry sectors. Each year thousands of American men and women are seriously injured in construction accidents. The injuries suffered by these hard-working people, such as paralysis or loss of limbs, cause workers to incur numerous hospital bills, doctors' visits, surgeries and bills for medication. Many accidents are life-altering, leaving a victim unable to work or provide for loved ones. In a worst-case scenario there may also be a wrongful death. While almost any type of workplace can offer an unexpected accident risk, it is the responsibility of everyone on the jobsite to take action to keep that risk as low as possible. Construction sites may seem to be more inherently hazardous than office buildings or stores, but even at the construction site, accidents and dangers can be prevented by implementing rigid and enforceable safety practices. Workers should be properly trained in the operation of machinery, and the site should be properly managed according to legal standards.

The Occupational Safety and Health Administration (OSHA) is an agency of the United States Department of Labor which was created by Congress in 1970. The mission of OSHA is to prevent work-place injuries, illnesses and fatalities by issuing and enforcing rules called Standards for Workplace Safety and Health. Specific federal rules have been enacted governing construction workplace safety, which is very complex due to the many dangerous situations encountered by workers on job sites. Another

federal agency is the National Institute for Occupational Safety and Health (NIOSH) which is part of the United States Department of Health and Human Services. NIOSH is responsible for conducting research and making recommendations for the prevention of work-related injuries and illnesses. A construction accident lawyer must be familiar with the federal OSHA regulations, New Jersey state common law, workplace standards for all of the trades working on a construction project, as well as the research and recommendations made by NIOSH.

A construction site requires careful management and oversight in order to reduce the hazards to workers and passersby. When an accident occurs on a construction site, the effects can be devastating. Unfortunately, mistakes and oversights can create potentially dangerous situations. There are numerous innate hazards on a construction site which can be exacerbated when the machinery or tools are defective or unsafe because they were inadequately maintained or fail to comply with OSHA regulations.

Causes of Construction Accidents

- Defective equipment and machinery
- Defective or unsafe tools
- Exposed power or electrical lines resulting in electrocution
- Faulty scaffolding or other supports
- Communication errors
- Unsafe practices
- Unsafe sites that are inadequately supervised or poorly coordinated
- Violations of OSHA regulations and other safety standards
- Being hit with falling debris
- Crane accidents
- Getting caught between machinery
- Falls off of ladders, scaffolds, roofs, rafters
- Vehicular accidents—forklifts, faulty machinery, being hit by cars or trucks, etc.

- Explosions, fires and floods
- Tunneling procedures
- Open stairways
- Improperly handled gases or chemicals
- Access areas not maintained
- Insufficient bracing or support of concrete structures
- Individual worker negligence
- Improper worker training procedures

The family members of construction accident victims are not spared the costs of severe on-the-job injuries. As the hospital bills and rehabilitation costs mount, the family finances slip closer and closer to the brink, yet medical expenses are only a fraction of the real costs of a construction accident. Loss of companionship and emotional hardship are very real components of a severe injury or death of a loved one which deserve compensation.

Damages that a construction accident victim and the victim's family are entitled to recover may include: hospital and medical expenses; past and future lost earnings; past and future permanent physical disability, such as a limp, scars, loss of a limb; physical pain and suffering; emotional distress, such as depression and anxiety; loss of enjoyment of life; grief and emotional suffering, loss of love and companionship caused by the death of a loved one; and damage or destruction of property.

Many times a construction accident may be reported as only a Workers' Compensation injury (see Chapter 6), which limits your recovery to wage loss and medical expenses. There is no recovery of pain and suffering and other damages under Workers' Compensation. Although you may be able to recover Workers' Compensation benefits against your employer, there may also be a claim for negligence against other persons or companies working at the jobsite under several different insurance policies involved, including a commercial or general liability policy of the owner of the property or another person or entity that may have been negligent in causing your accident and injury. Often there are multiple defendants (the property owner, the general contractor, various sub-contractors, the developer, investors, lessors/lessees of the

property, and the designers, including the engineers, architects and manufacturers), multiple insurance companies and multiple defense attorneys involved. Sometimes the owner, developer and general contractor are large and wealthy companies with sophisticated legal teams and insurance companies dedicated to avoiding liability.

That is why it's important to have an experienced construction accident lawyer on your side who can act quickly to make sure that your accident claim is reported correctly and that important evidence is preserved. If the accident is not reported appropriately, the accident site or equipment involved may not be properly preserved for investigation. If the important evidence is not preserved, you may be prevented from proving your construction accident claim.

It is also important to identify and locate all the parties that may be liable either through Workers' Compensation or other insurance. Whether you have been hurt on the job by defective equipment or suffered a severe construction accident injury caused by negligence, you need to seek the assistance of a Certified Civil Trial Attorney who has experience with personal injury or wrongful death resulting from construction accidents.

Proper and thorough investigation can make the difference in a successful claim. Timely investigation of the accident is the key to identifying and prosecuting construction site accidents. The investigation may include interviewing witnesses, obtaining photographs of the accident location before there are any changes, obtaining copies of the work site plans and of the contracts between the general contractor and the subcontractors, obtaining copies of any safety manuals used by the general contractor and the subcontractors and working with construction site experts to establish who was at fault for the accident. Since early investigation and legal intervention are important, you should obtain legal assistance immediately. At Andres & Berger, we will provide you with the timely and expert advice necessary to determine the feasibility of a construction accident claim.

CHAPTER SIX

Work Related Injuries and Workers' Compensation Insurance

If you were injured in an accident while working, you are probably entitled to Workers' Compensation insurance benefits. There is no need for an employee to prove that anyone committed negligence in order to collect benefits. As long as the injury occurred during the course of employment, Workers' Compensation pays the cost of any injuries you sustain at work and a limited replacement wage while you are unable to work, regardless of who was at fault for the injury. Your employer carries Workers' Compensation insurance to cover those payments. In fact, you have also paid for Workers' Compensation insurance benefits coverage through regular deductions from your paycheck. In exchange for collecting Workers' Compensation benefits, you agree not to sue your employer, even if you believe your employer or co-worker caused the accident. However, if a third party (an individual or entity other than your employer) was responsible for the injury, you may still be able to sue that third party while collecting Workers' Compensation benefits. Subrogation, the transfer of the right to receive payment, may also come into play with a Workers' Compensation case because multiple insurance companies are often involved in a claim. If you receive Workers' Compensation payments, the insurer may have the right to be reimbursed if you are awarded money for lost wages from a third party.

When you are injured while working, the Workers' Compensation insurance carrier must pay 100 percent of all related medical treatment, and 70 percent of your average weekly wages up to a maximum amount (established every year) while you are unable to work. If an injury is determined to be permanent, you may

be entitled to an award of permanent disability benefits after being discharged from medical treatment. There is a schedule of disabilities set forth in the Workers' Compensation Act stating specific amounts of compensation depending upon the injury. In the case of a work injury leading to death, the employee's dependents are entitled to receive benefits based upon the employee's average weekly wage. If a minor is employed in violation of the Child Labor Law and suffers a disability because of a job-related injury or illness, benefits will be double the amount ordinarily awarded.

Medical treatment must be pre-authorized by the employer's Workers' Compensation carrier. The employer chooses the doctor and has the right to "control" the treatment. Fortunately, Workers' Compensation judges are authorized to order the insurance carrier to pay for any treatment recommended by the authorized treating physicians.

Benefits are usually terminated when the worker is released to return to work in some capacity and/or if he or she has reached maximum medical improvement (MMI). MMI means that additional treatment will no longer improve the medical condition of the injured worker.

Workers' Compensation law is a complicated area and some lawyers focus their entire practice on it. Many workers have trouble collecting Workers' Compensation because replacement wages can be expensive — and insurance companies prefer not to pay expensive claims, even when they are legally obligated to do so. Andres & Berger are knowledgeable of the ins and outs of Workers' Compensation law and involve other attorneys in this area of law when necessary to prosecute your claim.

CHAPTER SEVEN

Wrongful Death

Wrongful death actions are brought in connection with accident and medical malpractice claims when a person dies as a result of someone else's negligence. Close family members who are financially dependent on the deceased may be able to recover economic losses. The law also permits recovery for the conscious pain and suffering of the deceased from the time of the initial injury until death.

When the death of a person is caused by a negligent or other wrongful act, there are three ways that surviving family members may recover damages:

1. If there is a period of survival of the decedent after the negligent act causing suffering and pain which was experienced from the time of the injury until the actual time of death, the law provides a remedy for damages.
2. If the deceased was married, the surviving spouse is entitled to claim loss of services, society and consortium for that period of time from when the injury occurred until the actual time of death. The spouse's claim may be very substantial if he or she was needed to provide extraordinary services for the decedent's needs during the time of suffering through a lingering death.
3. If the surviving close family members were financially dependent on the deceased, they may recover the actual financial losses as a result of the death of their loved one. Claims after the death are limited to actual monetary losses or losses pertaining to money. All associated medical, funeral and burial expenses are also covered. Furthermore, the economic value of lost services,

guidance, counsel and advice may be compensated based upon the replacement value of those services which could be purchased in the marketplace. Your attorney will probably need to retain the services of a qualified economist to assist in calculating the economic losses to the survivors based upon government studies, and the unique character of the relationship between the decedent and the survivors.

We understand losing a loved one is very difficult, and we will work to help you get the compensation you deserve. Although nothing can bring back the person you lost, you can at least minimize your financial losses and concerns.

CHAPTER EIGHT

Property Owner Liability

Each year in the United States, one person in twenty receives Emergency room treatment because of a fall. Accidents and falls (tripping or slipping) that are caused by defective or dangerous property, either inside or outside a building, are called “premises liability” accidents. These accidents can take place at commercial buildings (stores or offices), residences (private homes or rentals), or on public property (parks, streets, or public transportation). Premises can be dangerous for many reasons — faulty design, shoddy construction or building materials, poor maintenance, dangerous clutter, sidewalks in ill repair, inadequate lighting, slippery wet floors, uncleared ice and snow on walkways and parking lots, debris-strewn pathways, lack of a hand-rail on stairs, second stories or platforms, inadequate warning of a hazard and unsafe playground equipment. Dangerous premises can lead to slipping, falling, tripping, or having something hit you or fall on you.

All property owners are obligated by law to maintain their property according to acceptable standards of safety. If you were hurt because a property owner or operator failed to fulfill these duties, you have the right to hold them responsible for any serious injuries that result by pursuing a lawsuit. If you have suffered a serious injury after a fall in a grocery store, parking lot, condominium hallway or on an elevator, escalator or hotel balcony, you have the right to seek compensation for your injury. A lawsuit can help compensate you for these injuries and the pain and suffering they cause as well as for your medical bills and other costs caused by the accident.

When we visit stores, restaurants and other places open to the public, we expect areas where we are invited to walk to be free from slippery surfaces and other potential hazards. Unfortunately, some property owners, managers and tenants neglect to

ensure that the customers and public are protected from these hazards. New Jersey law states that businesses and others have the legal duty to make sure that the property they open to the public is reasonably safe. When they fail in that duty, and it results in injury, you have the right to hold them responsible by bringing a premises liability claim.

Any business or individual whose property is open to the public can be liable for a slip or trip and fall, including private homeowners and many government agencies. If the property's owner knew or should have known there was a danger and failed to remedy the hazard within a reasonable amount of time, they are legally responsible for any injury resulting from that hazard.

"Slips" or "trips" may sound like minor accidents, but they can actually be quite serious and can cause broken bones, head injuries or spinal damage. In addition to causing serious physical injuries, these incidents can also be very expensive. Medical bills can quickly mount, and an injury that takes you out of work for months can result in significant lost wages. A slip, trip and fall accident lawsuit can help you recover those costs, as well as compensate you for your injuries and other losses.

Often, the owner of a property is different from the occupier. It is not always easy to determine who the responsible party is when someone is injured on the property. Your attorney will file a notice of claim against both the owner and the occupier. It is the responsibility of their insurance companies to decide if one or both are responsible for your accident. If your accident occurred on commercial property, whether the owner or occupier is legally responsible for your accident is usually determined by where the accident occurred and what the lease or other business contracts say about such liability. You should notify the business about your accident and injuries.

If your accident occurred at a residence, assigning responsibility may depend on whether it occurred at a rented apartment or a private home. If you are a guest or tenant who is injured on rental property, the party responsible for maintenance in the area or condition that caused your accident is accountable. Usually, the landlord is responsible for everything outside the apartment

(hallways, stairs, entrances) and for the immovable things inside (floors, walls, fixtures, appliances that came with the apartment), while the tenant is responsible for the movable things inside an apartment. An exception to this rule is when the tenant has knowledge of a dangerous condition to something immovable but does nothing about it. In that case, the responsibility may be shared between the tenant and landlord.

If you are injured in a private home by a known dangerous or defective condition, the owner of the home may be responsible, but there may be other issues which must be sorted out. For example, if you have an accident on adjoining properties (e.g., fence or a cracked sidewalk), your lawyer will file an initial claim against the owners of both properties.

Another rule of premises liability applies to the conduct of the injured person. If a person gets injured while acting in an unexpected, unauthorized, or dangerously careless way, the property owner or occupier is not responsible. Injured employees who are injured on their employer's property must file a Workers' Compensation claim rather than a private injury claim.

Wherever these accidents happen and whatever injuries result (fractures, head injuries, back injuries, for example), victims are wise to contact an experienced Certified Civil Trial Attorney as soon as possible so he or she can evaluate the situation and take appropriate action. Andres & Berger have successfully handled hundreds of trip, slip and fall cases.

CHAPTER NINE

Product Liability

When manufacturers, vendors, installers, sellers, or additional responsible parties put other people in danger through the use of harmful defective products, and you suffer injuries, you should contact a Certified Civil Trial attorney with experience in product liability cases in order to obtain compensation for your injuries and losses. A manufacturer or seller of a product has a duty to make and sell a product that is reasonably safe. The product must also be reasonably fit, suitable and safe for its intended or reasonably foreseeable uses. The manufacturer/seller owes this duty to direct users of the product, to reasonably foreseeable users of the product and to those who may reasonably be expected to come into contact with it.

The manufacturer or seller is liable only if you can prove that the product causing harm was not reasonably safe for its intended purpose because of a design defect, a manufacturing defect or a failure to adequately warn or instruct. A product liability lawsuit is intended to protect consumers by forcing manufacturers, distributors and retailers who supply defective products to pay for the misery and financial losses they cause. Whether you are injured by a poorly designed machine at work or by a dangerous or defective automobile, a child's toy or faulty heart stent or defective drug, your attorney can assist you in obtaining compensation necessary to cope with your injuries and move forward in life. For example, if you were seriously injured in a car wreck or trucking accident because your vehicle's safety equipment did not deploy, an airbag failure lawsuit may be the only way to obtain coverage for your doctor and hospital bills, nursing care, rehabilitation, pain and suffering, property loss, and lost wages.

Your attorney will retain the services of qualified expert witnesses to prove a product liability case, which may include engineers, scientists, physicians, product designers or professors

who are familiar with the industry standards and the particular product that injured you. These specialized experts are needed to establish the standards and violations of the design or manufacturing process and explain why the product is legally defective.

Andres & Berger have helped many clients following serious accidents involving: defective industrial equipment; defective guards on factory and construction equipment or machines; defective automobiles and car parts, such as tires, seatbelts, or airbags; dangerous consumer products such as poorly designed children's toys; faulty medical products; and dangerous drugs; as well as failure to warn of known risks. We seek to right the wrong and get our clients a settlement or verdict that compensates them for what they have lost. We believe that holding manufacturers, sellers and retailers of dangerous and defective products accountable not only helps our clients but also keeps others from being harmed.

CHAPTER TEN

Dog Bite or Attack

If you or your child has been bitten by a dog, contact a Certified Civil Trial Attorney, such as Andres & Berger, who has experience in handling dog bite cases. Owners and handlers of dogs are responsible for protecting others from dog bites or attacks caused by their dogs, whether in a public place or permissibly in a private place, regardless of the viciousness of the dog or the owner's knowledge of any viciousness.

A person is lawfully upon the private property of a dog owner when he or she is on the property in the performance of any duty imposed upon him or her by the laws of the state or the laws or postal regulations of the United States, or when he or she is on such property upon the invitation, express or implied, of the owner of the property.

There is no such thing as “one free bite” for dogs in New Jersey. Even seemingly benign dogs can surprise their owners by suddenly deciding to snap—and dogs who have never bitten before could end up mauling a child. Thus, dog owners and others who handle dogs are responsible and strictly liable at all times for protecting others from being bitten by their animals. In some cases, a landowner or landlord may also be liable for a dog bite if the dog's propensity to bite was known or should have been known and protected against.

Many dog bites are not minor injuries. Dog bites can lead to serious, disfiguring injury and scarring, and emotional trauma. Certain dog breeds are known to be more likely to attack; pit bulls and Rottweilers, for example, are commonly named in dog bite cases. However, dog bites occur wherever dogs of any breed interact with people or occupy the same space. There is no reason a dog bite victim should have to endure the trauma and pay for the expensive medical treatment (such as rabies shots, reconstructive surgery for facial scarring or disfigurement or therapy for

post-traumatic stress disorder) after a dog bite injury. Under the law, the animal owner or handler is responsible for your injuries, and their homeowner's or business insurance coverage should compensate you for your damages.

After the initial emergency room treatment or family doctor's visit, it is usually necessary to be evaluated and treated by a reputable plastic surgeon. A prognosis of expected healing along with future treatment, including reconstructive surgery and the costs of treatment, must be determined. Depending upon the severity of the bite and tissue damage, many people need psychological counseling, both to help with the emotional recovery and to gain insight into any problems that are likely to persist into the future.

Homeowner and business liability insurance may compensate you for injuries caused by someone else's dog. The dog owner has paid for this protection and someone who has been bitten is entitled to make a claim for his or her injuries and expenses for medical care and lost wages.

CHAPTER ELEVEN

Claims Against the Government, Public Entities and Public Employees

The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, sets forth very specific requirements for claims against the government, public entities and public employees. The State of New Jersey, counties, municipalities, public agencies and authorities and their employees receive very substantial procedural and substantive protection from claims for personal injury and medical malpractice under this law. In some instances, these claims are prohibited or limited, while other claims remain viable. Examples of viable claims against public entities are: dangerous conditions of public roadways and property, including schools; improper provision of certain public services; and negligent conduct of public employees, including doctors and other health care providers employed by a public institution or hospital.

There are very specific notice, time and injury requirements for bringing any claims against public entities or employees. First, before you are permitted to file a lawsuit, N.J.S.A. 59:8-8 sets forth a limited time period of ninety (90) days from the date of the incident during which a written Notice of Tort Claim must be served on the public entity and public employee or the claim will be barred. This Notice of Tort Claim must contain the information required by N.J.S.A. 59:8-4, and it must be signed by the injured party or legal counsel. There are very limited circumstances where a party can obtain approval from a Judge of the Superior Court of New Jersey to extend the time to serve a Notice of Tort Claim up to one year, but such extensions are rarely permitted. The deadlines for serving a Notice of Tort Claim are strictly adhered to and are required before a lawsuit can be filed. If a Notice of Tort

Claim is not timely served, even a legitimate claim will be barred, regardless of whether or not the statute of limitations has expired. It is therefore critically important to consult with a knowledgeable attorney immediately after any accident or injury involving a public entity or public employee.

Second, the injury must be serious and the damages substantial enough in order to be compensated. Pursuant to N.J.S.A. 59:9-2(d), an injured person can only recover bodily injury damages for pain and suffering from a public entity or employee in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment and where the medical treatment expenses are in excess of \$3,600.

After the notice of claim is served, you must wait six months to file a lawsuit. The two year statute of limitations still applies. In the case of an infant, the Notice of Claim does not have to be served until the child's eighteenth birthday, at which time the 90 day period begins to run. There are some exceptions to the tort claim notice deadlines at the court's discretion under limited extraordinary circumstances, but they are very rarely permitted.

In terms of whether an injury is serious enough to bring a claim, the Supreme Court has emphasized that the injuries must be objectively demonstrated and significant, and that "each case is fact sensitive."

Consulting with an attorney who is knowledgeable and has experience in tort claims cases is critical. At Andres & Berger, we have successfully filed lawsuits against public entities and employees, and received favorable results for our clients. We will evaluate your injury in light of the restrictions of the Tort Claims Act so you will know whether it is possible to pursue your case.

CHAPTER TWELVE

Understanding Your Injuries and Damages

In personal injury and malpractice law, the wrongdoer-defendant (sometimes known as a tortfeasor) is responsible for all of the injuries caused by his or her negligence or by any other unlawful conduct. If you are injured as a direct result of that conduct, you are entitled to be fully compensated for all the injuries that you suffered. In the law, the goal is to make the injured party whole. In other words, the purpose of monetary compensation is to try to restore you and your family to the position in which you were before your accident or injury occurred. There is no viable injury case without damages. Many negligent acts occur which are not actionable because no injury was suffered as a result.

Once it is clear that the wrongdoer is at fault for the accident, Andres & Berger can help you fully identify your injuries and understand what happened. We will obtain and review your medical records and talk with you, your family, expert consultants and your treating physicians to fully understand your injuries and how they have affected your life. It will also be necessary to obtain a written narrative report from a treating doctor or examining physician stating that the injuries diagnosed were caused by the accident or malpractice, and a prognosis addressing the future impact the injuries will have on the life of the injured victim. Using our prior experience with similar cases, we will be able to estimate the range of dollar amounts for a fair settlement or what a jury could award if the case were to go to trial.

In recent years, insurance companies, their lobbyists and greedy corporations have put forth a great deal of propaganda that casts personal injury and malpractice victims and their lawyers in an unfavorable light. They do this purposely to bias potential jurors against personal injury and malpractice victims and in favor of

the wrongdoers and insurance companies. Often, the media exacerbate this problem by highlighting bizarre or rare multimillion dollar cases. This creates the mistaken perception that most people pursuing personal injury claims receive unjust windfalls or do not entirely deserve the compensation they receive. Nothing is further from the truth. In reality, most victims injured by careless people are hardworking individuals who just happened to be in the wrong place at the wrong time.

Follow Through With Your Doctors

The full extent of your injuries may not be obvious immediately after an accident or act of medical negligence. Some people may feel that they did not sustain a serious injury, only to discover weeks or months later that what they initially thought was a minor injury has worsened and may require significant medical treatment. Because of this possibility, one of the things you should do after an accident is see a qualified doctor or specialist for a full evaluation. If your injury is significant, you should consult with your attorney, as he or she may be able to recommend a well qualified doctor who specializes in your type of injury or problem. Be certain to tell your doctor about all of your symptoms, no matter how minor they may seem. You should see this doctor as soon as possible after your accident or injury so the doctor can properly document the full extent of your injuries. This documentation is important because it creates a clear record of your injuries and treatment.

Immediately after the accident, it may be difficult even for the most experienced doctor to tell you how long you will require medical treatment. Depending on your injuries, you may need follow-up care for the first few weeks or months after you are injured or leave the hospital. For serious injuries, you may need specialized diagnostic testing and long-term or even lifelong care. Because it is often difficult to predict your needs early in a case, it is important for you to be vigilant about your health. If you notice a change in your symptoms, you should be certain to tell your doctor about it. You should also actively participate in your own

recovery by following your doctor's orders, taking your medications and undergoing whatever rehabilitation or treatment your doctor recommends.

Your lawyer will also need to know about changes in your condition and how they affect your life, so he or she can explain the full extent of your injuries and damages to the insurance company and ask for the fairest settlement of your claim. To help your lawyer, you should keep a written record of your medical treatment and how your life has been affected by your injuries. This will also help you refresh your memory later, in case your claim goes to trial months or years after the accident.

When your treatment is completed or your doctor feels you have reached maximum medical improvement, your lawyer may request additional medical records and a written narrative report from your doctor detailing the nature and extent of your injuries and a prognosis to better understand how the injuries will affect you in the future.

Types of Injuries

Under the law, a personal injury is any harm an individual sustains, including physical injuries, financial costs, and emotional trauma. Injuries can also be personal losses, such as losing the care and companionship of a loved one.

As you work to resolve your injury claim, you may hear insurance adjusters, lawyers and doctors talk about different degrees of injuries. You may hear injuries described as minor, moderate, severe or catastrophic. Minor or moderate injuries can be injuries such as sprains, strains, bruising or superficial cuts. These may be painful, but they usually heal well and quickly, with minimal medical treatment.

You may hear insurance adjusters refer to "soft tissue injuries." Soft tissue injuries are injuries to the non-bony parts of the body, such as internal organs, nerves, muscles and connective tissues. Sprains, whiplash and pulled muscles are all types of soft tissue injuries. Even if you have a bruise over the affected area, you and your doctor may not realize you have a soft tissue injury under the

bruise because it can be hidden from sight and hard to detect. Soft tissue injuries may heal quickly or may take a long time to heal. Some injuries like herniated discs or nerve damage almost always result in chronic pain and disability, which can be permanent even if treated properly. Typically, it is harder to recover substantial compensation in these cases than in cases involving more graphic or catastrophic injuries.

A catastrophic injury is a serious injury that is expected to permanently change the victim's life. Examples of this type of injury include burns, amputations, spinal cord injuries, paralysis and head injuries (also called traumatic brain injuries). These types of injuries result in the most significant settlements and verdicts because the injuries are more obvious to the insurance company or the jurors.

Although catastrophic injuries are immediately obvious in most cases, sometimes the full extent of the injury is not immediately revealed. This is especially true when the victim suffered a traumatic brain injury, which may also be called a closed head injury. In some cases, the brain may be affected in ways so subtle that only people close to the victim notice changes in abilities, behavior or personality. A closed head injury can be caused by physical trauma (a hard blow or penetrating wound), a blast wave from an explosion or violent shaking of the head. It often results from actual jostling of the brain. Such trauma can damage the tissues of the brain, which in turn affects the abilities controlled by the damaged tissue.

A concussion is the mildest form of brain injury, but more serious brain injuries leave their victims permanently disabled. Naturally, brain injuries affect many aspects of the injured person's life, including physical movement, the senses, intellectual ability, creativity and even personality. Sometimes, what appears to be a minor concussion or brief loss of consciousness following a car accident or fall can result in a serious brain injury, with symptoms such as chronic headaches, memory loss, loss of concentration or changes in a person's personality or behavior.

Permanent Disability

Unfortunately, some people's injuries lead to permanent disabilities, either partial or total. A permanent disability is any loss of ability that will affect the rest of the victim's life and at least partially impair his or her ability to work or perform other day-to-day activities. A permanent disability is often a major, life-changing event for victims and their families. In addition to the disability itself, disabled accident victims also face a higher risk of medical complications than uninjured people and often suffer profound emotional injuries because of their disabilities. People with permanent disabilities may require significant medical help, such as home health care nurses, extensive inpatient medical care and rehabilitation or long-term accommodation in an assisted living facility.

Someone who has suffered a permanent disability is much more likely to recover a large judgment than someone who has fully recovered. You may also qualify for Social Security Disability benefits if your injuries meet the guidelines established by the federal government.

Medical Expenses

As everyone who lives in a modern society knows, health care can be very expensive. Even if you have good medical health insurance or PIP benefits coverage through an auto insurance policy, you may be charged thousands or tens of thousands of dollars for a lengthy hospital stay, a trip to a specialized care center or repeated doctor visits and physical therapy appointments. For someone who has suffered a catastrophic injury or a permanent disability, lifelong medical treatment can cost millions of dollars.

In a personal injury or malpractice action, these medical expenses are part of the damages (financial compensation) you are entitled to claim. This is not limited to direct health care costs, but may extend to any medical expense, including prescriptions, medical devices and the cost of transportation to and from your doctor's office. Recovering your medical expenses is an essential

element of your personal injury claim.

If your case involves a catastrophic injury, your lawyer will want to not only determine your existing medical costs but also hire medical experts to determine the likely cost of your future medical treatment. In some cases, your attorney may need to hire an expert to develop a “life care plan” that predicts all of your future medical needs. This expert will evaluate your injuries, review your medical records, and project the cost of future medical care.

Lost Income and Loss of Earning Capacity

If you are unable to work because of your injuries, you are entitled to claim the income you lose. In addition, if you have a disability that affects your future earning potential, you are also entitled to recover monetary damages for loss of the income you would otherwise have earned.

For example, assume that you can no longer do the specific job you had at the time of the injury, but you find a job within your physical limitations that pays less than your previous job. In this case, you would be entitled to recover not only the income you lost from the old job but also any future income you lose because you had to take the lower-paying job. If you are self-employed and your injury makes you unable to do your job, you may need to hire someone to replace you. You may be entitled to compensation for the extra money you pay to that person during your recovery.

In addition to your loss of income and loss of future earning capacity, you may be entitled to recover any loss of benefits, such as health insurance, pension plans, bonuses or other benefits directly associated with your employment. An experienced personal injury lawyer will help you determine all of your financial losses so that you can seek compensation for those losses. Your lawyer may need to hire experts to calculate and quantify your losses, such as a vocational expert (an expert in work) or an economist. These experts will review your financial and medical records, then calculate and predict the economic losses you have suffered from the accident. If you are self-employed, you

can prove your economic losses through tax returns and other business documents. At Andres & Berger, we consult skilled vocational and economic experts in order to accurately document the vocational and economic impact caused by the injuries or wrongful death.

Damages for Pain and Suffering, Disability and Impairment and Loss of Enjoyment of Life

Another part of your personal injury claim is the way your injuries affect your daily life — your pain and suffering, disability and impairment and loss of enjoyment of life. Personal injury victims are entitled to recover damages for past and present suffering as well as any suffering they may experience in the future. These personal damages are a different type of damages from those you would claim for your economic losses or physical injuries. For example, someone who suffers chronic pain after an injury is entitled to be compensated for that pain and suffering.

Pain and suffering are not the same. Physical pain is a sensation; suffering is a mood. Pain is the awareness, through a stimulus in the brain, of something that could damage your tissues and is followed by a feeling of discomfort or unpleasantness. By contrast, suffering is an emotion that could be considered the opposite of happiness or enjoyment and involves cognitive awareness of an unpleasant situation or a lack of the pleasure the victim could have expected had the accident not occurred. Suffering could involve many emotions, including depression, anxiety and humiliation. For example, suffering could be embarrassment and anxiety from a disfiguring facial injury, an amputation, incontinence, paralysis or another injury that severely limits the victim's life activities.

It is our job as experienced personal injury and medical malpractice lawyers to help you prove specifically how your injuries have affected your life and your family. The ultimate goal of a personal injury or malpractice claim is to obtain the maximum possible compensation under the law, so that you may return to the same quality of life you had before the accident or medical negligence. Although some injuries make that impossible, you

are entitled to seek compensation for every injury you suffer. It is our goal to help you obtain the fullest and fairest compensation permitted by the law.

Loss of Consortium

In New Jersey, the spouse of an injured person is entitled to recover damages even if the spouse was not injured. This is called a loss of consortium claim. Black's Law Dictionary defines "consortium" as the "conjugal fellowship of husband and wife, and the right of each to the company, society, cooperation, affection and aid of the other in every conjugal relation." Loss of consortium includes not only the loss of material services because of a spouse's injury but also the lost intangibles such as society, guidance, companionship and sexual relations. Usually, you may only make a loss of consortium claim when one spouse has been seriously injured and that injury has had a direct negative effect on the marital relationship. You cannot make a loss of consortium claim if you are merely living with the injured person. A legal marital relationship is essential to making a loss of consortium claim.

Often the non-injured spouse can present compelling testimony at trial. This helps a jury understand that an accident has affected not only the marital relationship but also the family. Juries can sometimes empathize with the spouse who was not injured and better appreciate how the injuries have affected the injured person, marriage and the family. We can help you determine whether a loss of consortium claim on behalf of a spouse is appropriate.

Common Defenses Used by Insurance Companies

As experienced personal injury and malpractice lawyers, we have years of experience with the misrepresentations, exaggerations and other tactics insurance companies commonly use after injury victims make a legal claim. One common defense is to suggest that the victim suffered from similar injuries before the

accident or negligent incident or that the victim was predisposed to the type of injury he or she suffered. Yet another defense is to try to prove that the victim's injuries were not caused by the accident or negligence but by other events in the victim's life. When insurance companies cannot dispute the fault of their insureds (wrongdoers), they might resort to the age-old tactic of attacking a plaintiff's character or preexisting medical history.

A good lawyer will successfully challenge these common defenses and help the victim present his or her injuries clearly, concisely and coherently. For example, even if you suffered from a similar medical problem (such as a back or neck condition) before the accident, your lawyer can help you prove that your previous injury was made worse as a result of your accident. Most state laws support the premise that a wrongdoer "takes his victim as he finds him." This means victims are entitled to recover full compensation even if they were particularly susceptible to an injury or predisposed to experience greater pain or suffering than could have been foreseen by the defendant. For example, if you have a back condition that never required surgery, but your involvement in a serious car accident or slip and fall aggravates the back condition enough to require surgery, you are entitled to recover compensation for the surgery and worsening of your back. After all, you would not have needed the surgery and experienced the worsening pain and disability if the accident had not happened.

Doctors and Other Medical Providers

If you have been seriously injured for the first time, you may be encountering types of doctors that you have never heard of before. The following are some of the medical specialists that personal injury victims are most likely to encounter.

An **anesthesiologist** administers drugs to provide pain relief during surgery. Some anesthesiologists also treat chronic pain. Anesthesiologists who treat pain are also called specialists in **pain management**.

A **burn specialist** is exactly what it sounds like — someone who cares for patients with severe burns.

A **dermatologist** handles diseases and injuries to the skin, including burns.

A **doctor of emergency medicine** usually works in an emergency room. This doctor may have been the first doctor to treat you after your accident.

The doctor you most likely see regularly is probably a **family practice** or **general practice doctor**. Depending on your injuries, he or she might take an active part in your care or refer you to a specialist.

A **neurologist** treats injuries and abnormalities of the nervous system, which includes the brain and spinal cord. This is the doctor you will see if you have a brain or spinal injury. If you need surgery, you might also see a **neurological surgeon** or **spinal surgeon**.

An **orthopedic doctor** treats injuries to the bones, spine and intervertebral discs, muscles and joints, sometimes including amputations as well as broken bones.

A doctor who treats problems with joints is a **rheumatologist**.

For accident victims, doctors of **plastic surgery**, **reconstructive surgery** or **cosmetic surgery** work to correct damage to the body or unsightly scars, and to restore functions or prevent loss of functions.

Physical therapists, **occupational therapists**, and doctors of **physical medicine** and **rehabilitation** work with injury victims to restore movement or function to areas affected by an injury. This sometimes includes functions that you might not think of as physical, like brushing your teeth or writing.

Psychiatrists and **psychologists** handle mental health issues, including emotional injuries caused by accidents.

Specialists in other specific parts of the body include **nephrologists** (kidneys), **hepatologists** (liver), **gastroenterologists** (the digestive system), **cardiologists** (heart), **pulmonologists** (lungs) and **podiatrists** (feet and ankles).

Common Medical Tests

If you sustained any sort of internal injury, including an injury

to the spine, brain or internal organs, your doctor may ask you to take one of these special tests. These tests are important because the more information you have about your injuries, the easier it will be to diagnose the actual injury and begin the healing process. This will also make it easier for your lawyer to prove your injuries. Tests you might take include:

X-rays are the radiation tests with which we are all familiar; you have probably taken one at the dentist. Because they show bony structures, x-rays are best for diagnosing bone fractures and injuries and cannot be used to diagnose soft tissue injuries.

A **CT scan**, sometimes known as a **CAT scan**, is short for “computerized tomography scan.” A CT scan uses multiple x-rays taken in a circle around the same point to build a better picture than one x-ray could provide alone, using a computer to combine them. A CT scan is likely to be ordered if the doctors believe you have an injury to the internal organs of your torso or abdomen or multiple fractures to a hand or foot.

MRI is short for magnetic resonance imaging. If you get an MRI, the doctors will ask you to lie down in a large tube that uses harmless magnetic radiation to look at soft tissues of the body. Sometimes they will also ask you to drink or have an injection of a substance that makes those tissues easier to see. If your doctor suspects an injury to your brain, spinal cord or a disc, you might be asked to take this test. Because this technology uses magnets, you cannot undergo an MRI if you have a pacemaker or other metal implanted in your body.

A **PET scan** is often used in tandem with a CT scan. In a PET scan, the patient is injected with a harmless substance that can be seen by the scanner using radioactivity. Unlike CT scans, PET scans can show your body’s metabolic activity rather than just structures of the body. The images they produce are also three-dimensional.

If you know anyone who has had a baby recently, you are probably familiar with an **ultrasound**. An ultrasound test uses high-frequency sound waves that bounce off internal structures of the body to build an image. The image it builds is not as detailed as images from other methods, but because it does not use radiation, it may be the best choice for people with certain conditions.

It is also less expensive than an MRI. Doctors use it to look at internal organs, connective tissue, bones, blood vessels and eyes.

If your doctors believe you have a nerve injury, you may take a **nerve conduction study**, an electrical test that can detect problems with your nerves. In this test, one electrode is placed over the nerve being tested, while another is placed in a “downstream” area of the nervous system. The speed it takes for the electricity to travel between them determines whether there is nerve damage.

An **electromyograph** (EMG) shows muscles’ activity by measuring the electrical current they produce when they are in motion. This might be used for people with nerve damage, muscle weakness or the conditions that might cause them. In an EMG, doctors insert a thin needle into the muscle being tested or place an electrode over the area, then measure the electrical impulses of the muscle.

An **endoscopy** uses a flexible tube with a light and a camera to look inside natural openings in your body, such as the throat. This is most commonly associated with tests on the stomach or colon but can be used in any area with a natural opening.

Health Care Facilities

If you are seriously injured, you may end up at a health care facility more specialized than the hospitals to which we are all accustomed. If you need this kind of care, you might even be transferred from your original hospital to one of these facilities:

A **trauma center** handles patients who have sustained a sudden and serious physical injury. They are ranked from Level I to Level IV, with the most serious cases at Level I facilities. Because they are expensive to run, they are not common; patients outside major cities may have to be airlifted to one.

A **rehabilitation center** is a facility where patients undergo therapy to reestablish or relearn abilities they lost because of a serious injury. **Physical therapy** helps with movement or prevents loss of movement, while **occupational therapy** might focus on relearning activities of daily life or finding ways to perform them despite a new disability.

Burn centers focus on patients with serious burns. They not only treat burn injuries, but work to help patients return to everyday life, often with therapists, social workers, psychiatrists and other professionals who are not conventional doctors.

Assisted living facilities may be appropriate for injury victims who need long-term physical or occupational therapy and help with everyday living. This might be true of someone with a severe brain injury or spinal damage. In addition to providing meals and housekeeping, as at a nursing home, the staff at an assisted living facility works with patients to help them regain independence and abilities. Some patients are able to return home eventually; others may need to remain in a facility throughout their lives.

Home care is an option for patients whose injuries do not require full-time hospitalization. A nurse or other health care professional might visit every day or a few times a week. Depending on the injuries, the professional might do anything from changing bandages to administering a treatment with an IV to helping with personal needs.

CHAPTER THIRTEEN

Choosing a Lawyer: Credentials and Experience Matter

The lawyer you choose is one of the most important factors in the success or failure of your case. It is a decision you should research with care. Unfortunately, choosing a lawyer can be intimidating for people who have never been through the process before. You may be justifiably concerned about ending up with a lawyer with bad ethics or poor skills. In this chapter, we hope to ease those fears and provide a basic guide to finding a high quality personal injury or medical malpractice lawyer whom you can trust and who will work in your best interest at all times.

The first thing to consider is that lawyers, much like doctors, often concentrate their practices in specific areas of the law. If you need hip replacement surgery, you would probably see an orthopedic surgeon, not a cardiologist. Similarly, if you are in an accident, you will not want to hire a lawyer who focuses on divorce. Another type of lawyer may be able to help you, but he or she will not have the same experience and skills that a personal injury or medical malpractice lawyer brings to a case. Personal injury and medical malpractice lawyers understand the legal, procedural and evidentiary strategies that can maximize the value of your specific type of injury claim because they work with these issues every day. Be wary of “national” law firms that advertise they will handle your case anywhere in the country. What they actually do is sign you up and then refer your case to a local attorney in order to collect a referral fee when your case is settled.

If you are not an attorney yourself, you may not be sure how to judge an attorney’s ability and effectiveness before choosing to hire someone to represent you. Credentials can help you.

Reputation can help you. Credentials and reputation often represent the opinion of judges and other attorneys who know how to value an attorney's skills and effectiveness.

Here are some of the credentials you should look for when selecting a personal injury or medical malpractice attorney:

1. **Certified Civil Trial Attorney:** A designation granted by the New Jersey Supreme Court to attorneys who are able to demonstrate sufficient levels of experience, education, knowledge, and skill in civil trial practice. Personal injury and medical malpractice cases are civil cases because they seek to recover money damages. The Certification program helps the public find attorneys who have demonstrated proficiency in specialized fields of law according to certain standards: (1) have been members in good standing of the New Jersey bar for over 5 years; (2) completed ongoing continuing legal education requirements; (3) demonstrated a substantial level of experience in civil trial law; (4) received favorable evaluations from other attorneys and judges familiar with his or her work; and (5) passed a written examination in civil trial law. Although many attorneys now advertise in various mediums, only attorneys certified by the New Jersey Supreme Court are entitled to use the designation "Certified by the Supreme Court of New Jersey as a Civil Trial Attorney" on their letterhead, business cards, Yellow Pages listings, or in their advertisements.
2. **The American Board of Trial Advocates (ABOTA)** is a national association dedicated to improvement in the ethical and technical standards of practice in the field of trial advocacy. Certification and membership in ABOTA is highly selective and limited to attorneys who display skill, civility and integrity. Membership is by invitation only to those individuals with demonstrated trial experience. There are approximately 150 lawyers in the State of New Jersey who have earned the designation of "Advocate" with the American Board of Trial Advocates.

3. **The American College of Trial Lawyers** is composed of some of the best of the trial bar from the United States and Canada and is considered by many to be a premier professional trial organization in America. Founded in 1950, the College is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession. Fellowship is extended only by invitation, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. There are currently only 5,700 fellows throughout the entire United States and Canada.
4. **Martindale-Hubbell AV Rating:** For more than a century, the firm of Martindale-Hubbell has conducted a peer review process that rates lawyers on both legal ability and general ethical standards. Ratings are based on the confidential opinions of the bar and the judiciary. There is only one rating for the ethical standard (V for very high standard) which an attorney must receive in order to be rated. The attorney's legal ability is then rated either: C (good to high), B (high to very high), or A (very high to pre-eminent). The Martindale-Hubbell AV rating, the highest possible, is awarded to less than 5 percent of attorneys throughout the country.
5. **Elected Positions in Legal Organizations:** Elected positions held in county, state and national legal organizations are indicative of the opinion of an attorney's peers as to the quality and ability of individual lawyers.
6. **The American Association for Justice—AAJ** (formerly the Association of Trial Lawyers of America [ATLA]) is the world's largest trial bar organization and is a broad-based, international coalition of attorneys and law professors. As the world's largest trial bar, AAJ promotes justice and fairness for injured persons, safeguards victims' rights — particularly the right to trial by jury — and strengthens

the civil justice system through education and disclosure of information critical to public health and safety. With numbers worldwide and a network of affiliates involved in diverse areas of trial advocacy, AAJ provides member lawyers with the information and professional assistance needed to serve clients successfully and protect the democratic values inherent in the civil justice system.

7. **The New Jersey Association for Justice**—NJAJ (formerly Association of Trial Lawyers of America-New Jersey): Founded in the late 1940's, the New Jersey Association for Justice (NJAJ), headquartered in Trenton, New Jersey, is a state-wide association of more than 2,000 attorney members in private practice. NJAJ is dedicated to protecting New Jersey's families by working to preserve and strengthen the laws for safer products and workplaces, a cleaner environment and quality health care.
8. **Awards and Recognition by Major Legal Bar Associations:** Most major legal bar associations recognize leaders in the profession who demonstrate superior ability, good character, contributions and dedication to the practice of law.
9. **Appointments by the New Jersey Supreme Court:** The New Jersey Supreme Court has many standing committees which are responsible for addressing a myriad of areas affecting the administration of justice, including the rules of civil practice and evidence as well as civil jury charges.
10. **Teaching Experience:** Some lawyers are known for their expertise in teaching at law schools or lecturing other lawyers through Continuing Legal Education programs sponsored by the state bar association and trial lawyer organizations.

You should always ask for a detailed, written resume from a lawyer.

At Andres & Berger, we find that most of our clients come to us after a recommendation from someone they know who has used

us in the past or from other attorneys who are aware of our expertise. For that reason, we recommend that you begin the search by talking to your family and friends. Ask if anyone can refer you to a personal injury or malpractice lawyer who helped them get good results or about whom they have heard good things.

If you are comfortable with computers, an internet search may point you in the right direction. However, choosing a lawyer is an important decision which requires further research into the claims made in advertising and on websites. Make sure all qualifications are documented. Using a search engine like Google, Yahoo! or bing, you can easily search by both your location and the legal specialty you need. There are many ways to search for this information. Here are a few tips that may be helpful:

1. Search for a phrase instead of a single word. The phrase “medical malpractice attorney” will probably turn up more useful results than just “attorney.”
2. Put the phrase you search for in quotes. This will tell the search engine to look for the entire phrase as you searched for it, not the individual words in the phrase. Without quotes, your results will be greater in number but not nearly as relevant to your search. Just make sure to spell everything correctly.
3. Narrow your search by including some geographical information. For example, if your injury happened in New Jersey, you might want to search for “New Jersey medical malpractice attorney.” You need a lawyer in the state where the injury happened, even if that is not the state where you live or have legal residency.

You can research us online at **www.AndresBerger.com**.

The Initial Consultation

When you first call a law firm, your call may be taken by a lawyer, a paralegal, a case manager, nurse or an intake specialist. This person will ask you for basic contact information as well as

for the details of your accident. Based on your answers, a lawyer will make an initial assessment of your case and may schedule a consultation. If you cannot travel to the law firm, many personal injury and malpractice lawyers are willing to have the consultation on the telephone, in your home or at the hospital. At Andres & Berger, we make every effort to accommodate clients and potential clients with this type of need.

During the initial consultation, you will be asked for details about your accident and your injuries. Because details can be hard to remember and because some clients feel intimidated or stressed by this meeting, we recommend that clients bring all the documents they have that are related to the accident or to medical negligence — things such as incident or police reports, pictures of the accident scene and the involved vehicles or products, hospital bills, your insurance policy, and more. We always do our best to put clients at ease and explain everything as thoroughly as possible, without “legalese.”

Questions the lawyer is likely to ask at your consultation include:

1. Was an incident or police report made? If so, do you have a copy?
2. Did you take photos of the accident location or vehicle (if applicable)?
3. What is your right to sue threshold in your automobile insurance policy, if you were involved in an auto accident?
4. Did you take photos of your injuries?
5. Did you give a statement to police, insurance adjusters or anyone else?
6. Did the defendants say anything to you or someone else?
7. Were there any witnesses, and if so, did anyone get their contact information?
8. How much damage was done to your vehicle if you were in an auto accident?
9. What medical treatment have you had thus far?
10. What medical treatment, tests or follow-up are currently recommended by your treating physician(s)?
11. How are you feeling?

12. How are your bills being paid?
13. What insurance companies are involved?
14. What insurance coverage do you have?

Once you have discussed all of this, the lawyer is required to explain his or her fees and policy for payment of expenses in preparing the case. All of the investigation and preparation for your case is possible because of the type of fee we charge — a contingency fee — which is established by the New Jersey Supreme Court. Like most reputable personal injury firms, we usually don't charge a fee at the beginning of the case. Instead, we are paid with a percentage of the money we recover for you if you win the case. In New Jersey, the amount of the contingency fee is set by the State Supreme Court in Rule 1:21-7. The percentage will always be explained to you *before* you agree to hire us, and a written agreement for legal services will be signed by the client and an attorney on behalf of the law firm. If you lose, we will not ask you for any legal fees at all. It's that simple. This allows us to represent everyone who comes to us with a strong case, regardless of their income or background. In contingent fee cases, we pay the costs and expenses involved in preparing the case. If we are able to obtain a recovery for you, we give you an itemization of the expenses paid on your behalf and reimburse the firm for those expenses at the conclusion of the case. In New Jersey, you also have the option of paying your attorney an hourly fee if agreed to by all. If you choose to pay based on hourly fees, your lawyer will likely require a retainer and will charge you for his or her time and expenses, regardless of whether you win or lose your case.

We believe the option of a contingency is an essential and valuable part of our legal system, providing access to justice for everyone, no matter what his or her income or background might be. It levels the "playing field" by allowing injured people and the families of loved ones to hire experienced, well-qualified attorneys to fight against the insurance companies and big business.

What Is the Next Step?

When you find the right lawyer who is qualified to handle your specific type of case, you will sign a contract to provide legal services formally retaining him or her as *your* lawyer, giving you all of the rights of a client. To get the case started, your lawyer may direct personnel within the law firm to obtain your medical records, doctors' notes and medical test results, along with a copy of any accident or incident report and any insurance information or statements the insurer might have recorded. If necessary, the lawyer might also retain a private investigator to find important but elusive information about your case. All of this case development takes time. At our firm, we have found that clients really appreciate being kept informed, whether or not we have anything significant to report. For that reason, we assign specific staffers to update clients regularly about the status of their cases. At your discretion, we will provide copies of all correspondence and documentation or provide you with those items which are of significance.

In this first stage, your lawyer is working to understand the facts and the strength of your case. After the case is documented and prepared, your lawyer can begin negotiating with the other side to get you the best possible compensation under the laws of your state and the facts of your individual case. You may end up settling the case outside of court or participating in mediation, arbitration or a full trial. You will learn more about this process, the stages of a lawsuit and your own responsibilities in subsequent chapters.

What if My Case Is Rejected?

Unfortunately, sometimes lawyers must turn down cases. In order for a lawyer to accept a case, he or she must consider many factors, including the severity of your injuries, which parties were at fault, conflicts of interests, legal limitations, time constraints and more. If the firm decides that it cannot handle this case for

you, that may not necessarily mean that you do not have a case — just that the firm is not in a position to accept your case.

At Andres & Berger, we don't like to turn down cases. When we have to tell clients that we cannot take their cases, we do our best to refer them to a local bar association or another lawyer who is better suited to help. We also try to provide them with educational materials, like this book, to help them better understand the system and how it may affect their cases.

CHAPTER FOURTEEN

You Have Become a Plaintiff— What Now?

You have been injured through someone else's actions, and you know you may be entitled to recover financial damages. You have decided to hire a lawyer to represent you and bring a legal claim for these damages. You are now a plaintiff. A plaintiff making a bodily injury claim as the result of an accident or malpractice must prove two things by a preponderance of the evidence:

Liability. Whenever you make a personal injury, wrongful death or malpractice claim, the law requires that you prove the responsibility or fault of the defendant, who is the person or entity being sued. This is called legal liability. In most personal injury and malpractice cases, it is necessary to prove that someone else was negligent and that the negligent conduct caused the accident and injuries. Negligence is the failure to use reasonable care; that is, failing to do something that a reasonable person, guided by ordinary considerations, would do; or conversely, doing something that a reasonable and prudent person would not do. Once you prove that a defendant was negligent, it is also necessary to show that the person making the claim was not comparatively negligent and more at fault for causing the accident than the defendant. Obviously, if the defendant did nothing wrong, you are not entitled to damages from the defendant.

Damages. The injured person must also prove what injuries and losses he or she suffered and that those damages were caused by the negligent conduct of the defendant. To prove damages, it is necessary to produce evidence from a physician stating to a "reasonable degree of medical probability" the diagnosis, the

medical treatment which was required, and the medical prognosis detailing the effect the injuries have and will in the future have on the life of the patient. The injured person must then prove how the injuries impacted him or her and caused the pain and suffering, disability and impairment, loss of enjoyment of life and any economic damages for unpaid medical bills and for wage loss due to the inability to work. In wrongful death cases, the family must prove the financial losses which have resulted from the death of a loved one.

As you can see, proving and presenting a personal injury or malpractice claim is complicated and requires the skill and assistance of a competent attorney. As you focus on getting better, your attorney will research and prepare your case. You need to follow your doctor's advice and keep all of your appointments. If your doctor prescribes physical therapy, tests or other medical procedures, you should follow through with his or her recommendation. If your doctor writes you a prescription for medication to help you heal or manage your pain, you should not delay having it filled at the pharmacy.

Not only will this help you heal, but it also documents the evidence and proof that will be important for proving your injuries and damages. Your doctor's records often act as the basis for medical testimony in your case and help the lawyer determine the value of your claim. It is vital to be careful about following through with your doctor's recommendations.

Keeping Diaries and Calendars

Your lawyer may ask you to keep a diary of your daily activities or calendar of medical appointments or both, which focus on your physical and psychological injuries. This may seem like a chore, but it can be important because it helps to prove your claims about your injuries, your pain and how they affect your life. If you sustained serious injuries in the accident or as the result of medical malpractice, your treatment may continue for months and your healing patterns may change over time. It is important

to keep a record of the changes you notice, both positive and negative, starting as soon as possible after the accident. In some cases, even your treating physician may benefit from your notes.

In your diary, you should focus on how you feel and how you are coping with your injuries. Make these entries as often as you feel a change; there is no need to make an entry every day. To begin, write down your name and a start date. On any day after the accident when you notice any changes in how you feel or experience anything unusual, write it down. Include the date and a brief description of what you are feeling and what you were doing when you felt it. Include any descriptions of things that seem important, such as events that seem to trigger pain.

It is important not to forget the diary as time goes on. At the beginning, you may make daily entries, but as you start to feel better, you may find yourself making entries that are further and further apart. It is absolutely fine to make fewer entries if you have less to say, but it is important not to forget your diary altogether. Unfortunately, some injuries continue to have occasional side effects, even after they seem to have healed. Try not to tuck your diary so far out of sight that you forget about it.

You should use the calendar to record each of your doctor's appointments or other medical care. When you record a diagnostic appointment, be sure to note the type of test, such as an MRI. It is better not to use this calendar to record social appointments or chores that are not relevant to your case. However, you should also record the dates and times of appointments with your lawyer and any deadlines or court dates he or she provides.

You should take your diary and calendar with you both to doctor's appointments and to meetings with your lawyer. The two items will help your doctor track your injury progress and keep your lawyer updated on your injuries, treatment and how your injuries are healing.

Pre-Litigation Settlement

Many of our clients are surprised to learn that they might be able to settle their cases before they even file their lawsuit. In fact,

a significant percentage of personal injury cases are settled during the beginning stages of the case.

This is possible because part of the job of a lawyer is to negotiate with insurance companies, both your own and the company or companies for the other parties involved. This type of early settlement is most likely when there is little or no question about the defendant's liability for your injuries, such as when a driver has admitted responsibility in a car accident or when evidence clearly shows negligence in a slip and fall case. It may also happen when liability is still in question, but your injuries are especially severe. Unfortunately, it is rare for a medical malpractice claim to settle without extensive litigation.

During the pre-litigation process, your lawyer verifies that the liable person or people have insurance coverage and determines whether your own insurance policy provides some type of coverage for the injuries, such as uninsured or underinsured motorist coverage in the case of a motor vehicle accident. Your lawyer will also investigate the facts surrounding the accident or the medical procedures performed in the case of medical negligence. The investigation will include reviewing the incident or police report, interviewing the witnesses and inspecting the scene of the accident in order to get the best possible information on how the accident occurred and who is at fault. Your lawyer will also review your current and prior medical records in order to prove that your injuries stem from the accident or from healthcare providers' negligence and determine how they might relate to any preexisting medical condition.

Once your lawyer has done all of this, he or she can begin to determine the monetary value of your claim. This is generally expressed as a range of values (such as \$200,000 to \$500,000) because of the uncertainty of settlement negotiations and trials. Your lawyer should never settle your claim for less than it is truly worth, but unfortunately, some lawyers are not willing to go to court. You must investigate and ask questions to be sure that your lawyer is a Certified Civil Trial Attorney with a proven track record of trying cases when insurance companies do not make a fair settlement offer. The insurance companies know whether or not

your lawyer is willing to go to court and fight for you. You need to know this too when you select a lawyer.

At some point during the course of your medical treatment, your lawyer will demand a settlement from the insurance company in an effort to get the compensation to which you are entitled without a formal lawsuit. Usually, the insurance company will respond with either an offer to settle or a request for additional information. That additional information may include copies of MRI films, tax returns, records of a physical examination of you by a doctor retained by the insurance company or other information the insurance company feels is important in understanding your case. Once it has all of the necessary information, the insurance company will be in a position to make a settlement offer. Your lawyer will notify you of any settlement offer so that you can discuss it and determine whether you find the offer acceptable.

Pre-Litigation Mediation

Sometimes, but not often, the parties will agree to mediation before continuing to litigate. The mediation may come at the suggestion of either the insurance adjuster or your own lawyer. Mediation allows both sides to present the relevant facts of the case and the extent of the costs and damages to an independent third party, a mediator, who will work to help them agree on a settlement. These independent mediators are often retired judges or lawyers with special court certification as mediators and will therefore have experience with the laws and issues that are important in your case. If no settlement is reached at mediation, the case is free to proceed to litigation. Any failure to settle at mediation will have no effect on your right to continue your case.

The Case Settles

If a settlement is reached, either through negotiation or pre-litigation mediation, the insurance company will provide a settlement draft for you. It will also send a legal document called a release for you (and if necessary, your spouse) to sign. By signing

the release, you relieve the insurance company and the party who is liable for your injuries of any further obligations or payments related to the injuries and damages from the accident. You must sign this release in order to collect the settlement.

A New Jersey lawyer must have an attorney trust account, which holds money that has been entrusted to him or her but belongs to clients. Once the settlement funds clear through this trust account, your lawyer will prepare a settlement statement or closing statement for your signature. This is another legal document, which sets forth the total amount of the settlement and any deductions for lawyers' fees and costs or any medical bills or liens that should be paid from the settlement. You will have the opportunity to review this statement, and your signature will authorize the law firm to send you your settlement funds. Once you receive the proceeds from the settlement, your case is successfully concluded.

CHAPTER FIFTEEN

Litigation

Even though some claims are resolved before a lawsuit is formally filed, there are some insurers that simply refuse to settle a claim for a fair amount. Unfortunately, more insurance companies are adopting the tactic of “Delay, Deny and Defend,” making it more difficult to obtain fair compensation for injured people.

The extent of your injuries, the type of accident you had, the medical error that occurred, the amount of insurance coverage available, who was at fault and the difficulty of proving fault are all factors that could prevent you from reaching a prompt and fair settlement with the insurance company. If you are unable to reach a fair settlement, your lawyer will probably recommend filing a lawsuit. However, even if a lawsuit is filed, your lawyer will almost certainly continue trying to settle your case before the trial.

Time Constraints: Statutes of Limitation and Special Notice Requirements

New Jersey state law sets specific time deadlines called “statutes of limitations,” which place a time limit on filing a lawsuit. If a person or his or her representative fails to file a lawsuit within the prescribed time period, the right to make a claim is forfeited as a matter of law. These deadlines vary depending on the type of claim and the status of the individual making the claim. The time period usually starts to run and is calculated from the date of the accident or incident causing injury or death. In some limited circumstances, the statute of limitations is “tolled,” which means the time period has temporarily stopped running and may be extended.

Personal Injury and Malpractice: The statute of limitations for personal injury and medical malpractice lawsuits for adults in New Jersey is two (2) years from the date of the accident or incident causing injury. For injuries occurring to minors (a person under the age of 18), the statute of limitations is “tolled” until the child reaches the age of majority. This means that the two year statute of limitations for most injuries to infants or children starts to run on their eighteenth (18th) birthday and any lawsuit must be filed before their twentieth (20th) birthday.

Birth Injuries: For cases involving a baby with an injury “sustained at birth,” there is a special time limit which requires that any legal action shall be commenced prior to the minor’s thirteenth (13th) birthday.

Wrongful Death: A claim for wrongful death must be filed within two (2) years after the date of death.

Tort Claim Notices: Claims for injury or death against local, county or state governmental and public entities, agencies and their employees require that special written notices be served within 90 days of the incident. These special written notice requirements are a condition precedent to filing a lawsuit. If you do not serve tort claim notices in the proper time and manner, the claim will be barred even if you comply with the statute of limitations. Under limited circumstances, the time limit to serve tort claim notices can be extended up to a period of one year by a Judge of the Superior Court. (See Chapter 11 for a detailed discussion of claims against governmental entities and their employees.)

Sometimes it is not reasonably feasible for a person to discover the cause of an injury or even know that an injury has occurred until sometime after the act which caused the injury. In these limited circumstances, the “discovery rule” permits a suit to be filed within a reasonable period of time after the injury was or should have been discovered. The practical advice is simple: Consult a knowledgeable lawyer as soon as possible to learn your rights and make sure

that you do not lose the right to make a claim on a technicality.

Filing a Lawsuit

Your lawyer's office will take care of the drafting and formal filing of the lawsuit with the court. In general, you will file your case in the Superior Court of New Jersey, Law Division, in the county where one or both of the parties involved lives or where the incident occurred, depending on the circumstances. The county where the case is filed is sometimes called the "venue." Some cases may be filed in Federal Court which is officially the United States District Court for the District of New Jersey. Your lawyer can explain how these rules affect your case.

A lawsuit formally starts when you file a civil case information statement and written complaint or petition with the court. This complaint first describes the facts of the case, your injuries and why the person you are suing is responsible for your injuries. It then separately lists each "cause of action," which is a reason for suing, and finishes with a demand for damages for the injuries you have suffered. This can be general or quite detailed depending on the facts of the case, but it always contains enough information to tell the defendants why they are being sued.

Along with filing the complaint, your lawyer will also prepare a summons, which is a document that will be served upon (that is, formally given to) the defendants. The summons explains how the defendants should respond to the complaint and gives the deadline to do so. As a courtesy, your lawyer may send a copy of the complaint to the defendants' insurance company or companies.

When this complaint is filed, your lawyer will also specify whether you prefer a trial by jury or a "bench trial" in which a judge will decide your case. You and your lawyer will have agreed on this ahead of time. In a jury trial, a group of randomly selected citizens from the area decides all of the questions of fact while the judge acts as a referee and resolves legal questions. By contrast, in a bench trial, a judge decides questions of fact as well as questions about the law. Bench trials are less common than jury trials. If your lawyer recommends one, he or she should be able to explain why.

Who Answers the Complaint?

After the complaint is filed and served, the defendant's insurance company will usually assign the matter internally to an employee called a litigation claims adjuster, who will oversee the claim. This person's job is to try to resolve your claim before trial or handle the claim in a way that helps the insurer or its customer at trial. Insurance companies may take extra steps to resolve your claim after the lawsuit is filed, increasing your chance of settling at this stage. However, for this chapter, we will assume that you will not settle right away.

The insurance company will also assign one of its own lawyers or hire an outside lawyer to represent the defendant in court. The first task for the insurance company lawyer is to prepare a document called an answer to file with the court. This answer will either admit or deny the allegations of your complaint; it may even say that other parties are at fault for your injuries and should be added to the lawsuit. The answer may also set forth any defenses the defendant is planning to use in the case that explain why he or she is not responsible for your injuries.

After the answer is filed by the defendant, the court will schedule the discovery deadlines. If the defendant fails to file an answer or breaks a rule when filing it, you can request that the court declare you the winner by asking for a "default judgment." This is not common; it is similar to a sports team forfeiting a game because it never showed up to the playing field.

Discovery

Discovery is the formal pretrial exchange of information between the parties when the attorneys gather information during the process of the lawsuit. The methods of discovery are governed by the New Jersey Rules of Court pursuant to R. 4:10-1 and include (1) written interrogatories, (2) oral depositions, (3) requests for production of records and devices, (4) requests for inspections, (5) requests for admissions, and (6) medical examinations.

The law requires that both sides of a lawsuit share information

about the case with each other upon request. (Certain things, such as privileged communications between you and your lawyer, are exempt from discovery even if they are specifically requested.) In most cases, the information exchanged includes information about your accident, the injuries you sustained, the nature and cost of your health care, the effect of your injuries on your life and your family, your employment background and your educational background.

Discovery is extremely important because it permits both parties to learn about the facts and issues of the lawsuit before trial. This allows both sides to prepare the case and evaluate the strengths and weaknesses of their positions. During settlement talks, the information you received during discovery can be invaluable. Once the answer is filed, the court will establish a discovery end date by which time all pretrial discovery must be completed.

Written Interrogatories

Part of the pretrial fact-finding process includes written interrogatories authorized by R.4:17-1, which request background information and may question the issues of a case. Your attorney will carefully decide what questions to ask the defendants and then review the answers to determine if there are other witnesses to be deposed or additional material to be obtained. The defendant's attorney may prepare interrogatories for you to complete. Your attorney will assist you in answering the questions. You will answer these questions under oath, even though they are written and you will not be in a courtroom. Interrogatories will usually ask you about the accident, your background and your damages, including any past injuries or problems for which you have sought health care, as well as any previous legal claims with which you were involved. You may also be asked to provide details about any income you lost or information about your past employment. The goal is to build a story about the relevant parts of your life before and after the accident. When you have written your answers, you will sign and certify them as being true and accurate and they will be sent to the defendant's lawyer.

We find that some clients are initially reluctant to answer these questions because they can be personal or stray into topics considered impolite or irrelevant. Your lawyer can and will formally object to an inappropriate interrogatory or to a number of interrogatories that exceeds limits set by the rules of court. However, these questions are usually being asked because they are relevant to your case. Most of the information about your health and your finances is considered “discoverable,” which means it is a fair question during discovery. Your responses help your own lawyer and the other side gather the information they need to evaluate your claim, which helps you get closer to settling your case fairly.

Requests for Admissions

Requests for admissions are another discovery device authorized by R. 4:22-1, and consist of a written request to make admissions of fact and admissions concerning the genuineness of documents. If certain documents are admitted to be authentic or facts admitted as true, there will be no need to prove their genuineness. You might get these requests at any time. If you dispute or deny a request for admissions, you must write down the facts that you believe support your position. Your lawyer should help you with this. Using requests for admissions helps both sides determine which facts are agreed upon, which are disputed, and which must be part of the lawsuit.

It is important to respond to requests for admissions in a timely manner. If you miss the specified deadline, the court will behave as if you admitted to everything the opposing party asserted in the request.

Requests for Production

A Request for Production of Documents and Things, authorized by R.4:18-1, depends on the nature of the case and the information already obtained through informal discovery before the suit commences. Your attorney may request hospital and medical records, doctors’ telephone memoranda, and appointment

books. Requests for production may come with the interrogatories, but both sides are free to request production of documents throughout discovery.

Requests for production should be requests for documents and things that are relevant to the lawsuit, the accident or your damages. This often includes copies of your health care records, receipts or invoices for your health care expenses, accident reports, witness statements and pictures of the scene of the accident. If you are claiming a loss of income, you will probably be asked to provide your tax returns for several years prior to the accident. You may even be asked to produce any notes or diaries you have kept. Either side may request any discoverable document. Your lawyer may review the request for production with you and help you copy the documents and send them to the defendant's lawyer.

Requests for inspection allow your lawyer to inspect property, photograph, test or sample. For example, your attorney may make a motion to inspect a physician's library, appointment book or phone memos. Perhaps your attorney will want to inspect and/or videotape hospital equipment, the surgical suite or delivery room or other locations in the hospital or medical offices.

In addition to requesting documents and evidence from you, the defendant's lawyer may also ask other people or companies for information. Most commonly, he or she may request copies of your medical records directly from your treating doctors. The defendant may also be entitled to request information about you from your employers, schools you have attended or from the military, if you have served. Additionally, if you have applied for Social Security benefits, the defendant's lawyer may request information about your claim from the Social Security Administration. You may feel uncomfortable with these requests, but if the information is discoverable, the defendant's lawyer is entitled to ask for these documents. In fact, you may even be required to sign forms authorizing release of the information.

Depositions

Depositions are the sworn testimony of witnesses taken before trial. Depositions are authorized by R. 4:14-1, and are conducted out of court before a certified shorthand reporter with no judge present. The witness is placed under oath to tell the truth, and lawyers for each party may ask questions. The questions and answers are recorded by the stenographer, and a typewritten transcript is prepared memorializing the sworn testimony. When a person is unavailable to testify at trial, the deposition of that person may be videotaped and used in lieu of live testimony at trial. This is sometimes the case with expert witnesses in the medical profession who are unable to come to court because of his or her practice demands.

A deposition is a little like an oral version of interrogatories. When you give a deposition, you answer questions from the lawyer for the defendant in person, under oath, and usually with all of the parties and their lawyers in the room. A certified court reporter will be hired to take down the questions and your answers. Depositions are usually given in the office of either the court reporter or one of the lawyers. After the deposition is over, the court reporter will prepare a typewritten transcript which is available for purchase. Either side may request a deposition at any time, but the request is most likely to come after you have responded to interrogatories and requests for production of documents.

Many of our clients are nervous before depositions, but there is no need to be nervous. Your lawyer will be there to observe throughout the deposition and can object to inappropriate questions or ask for breaks if you need them. It is essential for you to stay calm, professional and confident during a deposition because this is the first time the other side will evaluate you in person. Your lawyer can advise you on what to wear and how to behave.

Your lawyer should prepare you ahead of time for the questions in your deposition. You may be asked to attend a meeting where you will review all of the written information your lawyer has, as well as any responses you gave to interrogatories. It is especially important to make sure that your testimony is truthful and consistent with these interrogatory responses because the lawyer for the

defendant will probably question you closely about any inconsistencies. This process should also help refresh your memory about the details of your injuries, your treatment and your recovery.

When the deposition begins, you will be required to swear an oath to tell the truth to the best of your knowledge, just as you would in court. At your deposition, you will probably start by reviewing the information in your written interrogatory responses. The deposition is an opportunity for the other side's lawyer to clarify or ask you to explain your written answers, and to obtain additional information from you. As we said, it is important to make sure that your testimony is truthful and consistent with your interrogatory responses, so that the other lawyer does not discover a seeming inconsistency between your oral testimony and your written testimony. Your answers should be based on your own personal knowledge; do not guess when giving an answer. If you do not know or remember the answer to a question, you should say so. Many people feel embarrassed to admit they do not know something or had a memory lapse, but these things are only human. When you are under oath, you are obligated to tell the truth, and it is important to be as straightforward as possible.

Remember that the lawyer for the insurance company is your adversary, not your friend, and may not believe the facts are the way you say they are. If you are asked a question with which you disagree, perhaps because it assumes something you do not believe is true, do not be afraid to say so in order to answer the question. Stay in control; if the lawyer for the defendant puts you in a position where you must speculate, say so. If you do not understand or hear a question, you can ask for it to be repeated or rephrased.

As with the written discovery, you may feel that some of the questions are invasive or do not directly relate to your accident. However, unless your lawyer objects or tells you not to respond, you should answer every question in the most honest way you can. If some of the questions upset you, you can usually take a break during your deposition testimony, although you may have to respond to any unanswered questions first. If you would like a break, you can simply tell your lawyer. If the break is allowed, you will be permitted to get up, walk around, get a drink of water or

just clear your head.

After the other side has finished questioning you, your lawyer is usually permitted to ask you more questions, or clarify an answer you gave earlier. This does not happen in every case, and in many instances, your lawyer may not ask you any questions at all. If this is the case, it does not mean that the lawyer failed to do his or her job; there may be strategic reasons.

In addition to taking your deposition, the lawyers in the case may also depose (take a deposition from) any other witness in the case. While the number of depositions will vary from case to case, depositions are often taken from the defendant, any witnesses to the accident or act of negligence, friends and family members who are familiar with your injuries, representatives from the defendant's insurance company, and your own doctors and health care providers.

Discovery and Settlement

The discovery methods outlined in this chapter are only some of those available in a lawsuit, but these will be used in the majority of cases. Discovery may seem time-consuming, but through this exchange of information, the parties can often get the facts they need to settle the case without a trial. And if the parties are still not able to resolve their case after discovery, the information they exchange during discovery will help them build evidence for their cases and narrow down which facts must be decided at trial.

CHAPTER SIXTEEN

Settlement

Statistically, most cases settle voluntarily, without having to go to trial. Trials take time, are expensive and may make clients nervous. They can also produce unexpected outcomes. From a personal perspective, an experienced personal injury or malpractice lawyer may want to take a case to trial — but that is always the client’s decision. The job of an experienced personal injury or medical malpractice lawyer is to help a client achieve his or her goals. Most of the time, we find that the client wants the matter resolved quickly and fairly, so settlement is always in mind. If no settlement offer meets the client’s goals, the matter can be resolved by trial.

Experienced lawyers also understand that settlement should not be rushed. Settling a case is a *process*. It is a dialogue and can be complex. Different lawyers initiate the process in different ways (who goes first and so forth), but there is always an offer and a series of counter-offers and counter-demands. A settlement negotiation is more than simply passing numbers back and forth; the numbers represent a reasoning process by both sides. It is through this dialogue that the case is, hopefully, resolved. Each side has an opportunity to persuade the other. By exploring the weaknesses and strengths of each side’s case, the parties will generally be able to either agree on settlement or agree that they need the help of a judge or a jury. Either way, your attorney is attempting to make forward progress — and reach reasonable decisions.

Be wary of settlement offers that come very early in this process, even if it is tempting to end the case quickly. After many years of practice, we have found that insurance companies will offer a settlement before the clients and their lawyers can determine the full extent of their damages or before all the liens and other expenses have been determined. To be sure, everyone wants the matter resolved as quickly as possible, but an experienced

personal injury and malpractice lawyer knows that a fast settlement offer by an insurance company can be a trap.

Deciding whether to accept a settlement offer requires you to consider subjective as well as objective factors. For example, there are benefits to amicably settling and ending your claim, and it may also bring personal relief. On the other hand, the time, anxiety, energy and risk assumption required to go to trial may be worth it for the client because of the potential for greater compensation or for an important message to be sent. The decision does not always turn on the money alone. Client objectives vary, and each case and each client is different. The settlement process offers an opportunity for dialogue — and out of this dialogue comes a decision that fits the client in *that* case.

There are numerous factors to think about when considering a settlement offer, but issues to consider start with the amount of money being offered, the conditions attached to the offer and the amounts owed to third parties, such as health care providers or other insurance companies. There are laws and contractual obligations which govern third parties' rights to participate in the distribution of settlement proceeds. These rules are part of every settlement agreement, and you and your lawyer are expected to know them. An insurance company has no duty to explain the rules to you. Third parties such as health care providers might also claim part of your settlement behind the scenes because they may have subrogation rights.

What you and your lawyers must determine is the true *value* of the offer being extended. In other words, you need to know how much of the money offered will actually be received by you after reimbursement of expenses, liens and attorney's fees. To answer this question, the lawyer has to solve the puzzle (so to speak) that is the totality of the client's claim, with the goal of maximizing the claim's value. An experienced personal injury or malpractice lawyer will analyze these and other issues so that the client can focus on the challenge of recovering from injuries and putting his or her life back together.

The lawyer participates in settling cases. However, it is always the client who makes the final decision. The lawyer's job is to

prepare the client to make that decision fully informed. Of course, the lawyer will provide the benefit of his or her education, experience and perspective which will be valuable to clients who may be upset and angry about their injuries. Emotions play a part in decisions on settlements, but they should not be the only criteria. Your lawyer will help you strike a proper balance as you go through the process.

The courtroom may ultimately be the right choice, if you make that decision with the advice of an experienced personal injury lawyer. Your lawyer will work to give you a realistic assessment of the benefits and risks associated with settlement and trial. That way, you can make an informed choice.

Understanding a Settlement Offer

In a settlement, there is always paperwork. Before you agree to a settlement offer, you and your lawyer will discuss whether you understand and accept all of the terms and conditions of the settlement. The insurance company for the at-fault party will ask you to accept money in exchange for your agreement to end the case — releasing the at-fault party from any future responsibility, no matter what happens.

First and foremost, you and your lawyer will discuss whether the amount of the offer is reasonable under the circumstances. Your lawyer should be able to give you a professional opinion on this, weighing the likely outcome of a trial against the certainty and benefits of settling now. Rejecting one settlement offer does not mean you will never get another. In fact, some defendants even expect to go through several rounds of offers and rejections.

Another consideration is any debt, claim or lien that you might owe to health care providers or other parties because of the accident. (We will discuss and define liens in the next section.) If the settlement offer is not sufficient to pay all of these debts, you may be liable for the rest. Sometimes, your lawyer can help by negotiating or using other remedies available under the law to make sure all of your obligations are covered. Depending on the circumstances, your lawyer might be able to convince creditors

to take a lesser amount in exchange for immediate payment. But because this is an uncertain process, it is important to discuss your debts and obligations with your lawyer when analyzing a settlement offer.

At this stage, your lawyer may also talk to you about subrogation, a claim that an insurance company or other party has on the money you recover in your case. For example, if you have medical insurance, it probably covered your initial medical care. But if an auto insurance company is legally obligated to cover those costs, the medical insurer may be entitled to reimbursement from the auto insurer, or from you, out of any settlement you reach with the auto insurer. Subrogation can be complex and depends on state and federal laws as well as individual contracts. Your lawyer should help you understand how it applies to you.

If you have claims against more than one defendant or insurance company, you should also consider whether settling with one defendant could limit or eliminate your right to pursue the other cases. For example, you may have a claim against your own auto insurer for unpaid uninsured/underinsured auto insurance claims. (See Chapter One for a detailed discussion of insurance.) Once you settle with a party, many states require that you notify the other parties involved. If you fail to follow this or other laws, you may lose your right to pursue your other claims.

How Liens Could Affect Your Settlement

Liens are legal claims against personal property, used to secure a debt. Two common examples are health care liens for medical bills which were paid on your behalf or unpaid child support obligations. A lien claim might be a part of your case if you have a large amount of debt stemming from the accident, or unpaid child support obligations and you cannot pay it out of your own pocket. This is particularly common with debts for medical care. If this is the case, the hospital or other medical provider to whom you owe money can eventually put a lien on your settlement or on your home or other property. Liens make it difficult to sell or otherwise make changes to the property.

Resolving lien claims can be difficult because of the many complex laws that apply to them and because holders of lien claims are often slow to respond in writing to questions about their liens. Unfortunately, the law does not always require that lien holders respond to requests for a lien amount within a specific time, and it sometimes takes months to get an appropriate answer. This delay prevents prompt payments of settlement funds to clients like you, and can be frustrating for you and your lawyer. Your law firm should work hard to obtain this information and resolve these issues, so that the settlement can be distributed and you can resolve your case.

For example, if Medicaid or Medicare has paid health care providers for treatment you needed because of your accident, they are entitled to reimbursement of those payments. To ensure that they are paid, they may place a lien on your settlement. Your lawyer will probably have to hold back a part of your settlement equal to the debt until you can negotiate an agreement and repay the agency.

When multiple insurers or debts are involved, this can become quite complex. For example, you might run into complicated lien problems when you have your own private insurance (including a settlement from a personal injury case) but are using Medicare as a secondary insurer. When it is not certain whether Medicare is a primary or secondary insurer, Medicare will make a conditional payment. If it is later determined that some other party was responsible for that payment, Medicare is entitled to a refund from that party or from you or the healthcare provider, if one of you was paid by that party. The federal government may place a lien on your property to recover this type of conditional payment. (It might also be entitled to make a subrogation claim against your settlement.) Again, your settlement funds cannot be distributed until you reach an agreement and pay Medicare.

Ways to Reach a Settlement

In this book, we have made reference to “settlement negotiations.” However, negotiating directly with the defendant’s

insurance company and his or her lawyer is just one way you can reach a settlement. You can also use more formal methods that are collectively called “alternative dispute resolution.” They include mediation and arbitration, both of which are akin to informal trials led by someone specifically trained in resolving disputes. In New Jersey, courts may order the parties to try an alternative dispute resolution method or you may be obligated by a contract to try it. You can also choose this on your own if all parties agree.

Direct Negotiations

The most direct way to reach a settlement is simply to negotiate with the insurance adjuster or the defendant and the defendant’s lawyer. Doing this requires substantial knowledge in two areas: (1) the prospects of your case if you go to trial; and (2) the value of your claim. Here, having an experienced trial lawyer can benefit you greatly. Experienced personal injury and medical malpractice lawyers who have handled hundreds or even thousands of cases like yours understand the risks of how your case is likely to be perceived at trial. They should also be familiar with the courts and juries in your area. They understand how to calculate the full value of your claim, and of course, a lawyer is an experienced negotiator. This levels the playing field against the insurance adjuster or defense lawyer, who will work to minimize your payments to save money for the insurance company.

Once you retain a law firm, your lawyer will handle all contact and negotiations with the insurance company and the defendant. Legally, the insurance company and the defendant can no longer contact you directly once you have retained a lawyer, so the law firm will take care of it for you. Under most circumstances, you do not need to be present for direct settlement negotiations, although your lawyer will keep you informed throughout. Using the information you provided about your case and the information obtained during discovery, your lawyer will build the strongest possible case for settlement and present it to the other side. If they make an offer, your lawyer will present it to you for

a decision, along with his or her advice. As we said before, this is 100 percent your decision.

Mediation

Mediation is a type of settlement negotiation in which an impartial third party helps both sides come to an agreement, using training in dispute resolution methods and legal experience. Mediation is usually conducted through an in-person discussion with all parties, including you, the insurance company and/or the defendant, as well as the lawyers for all parties. Generally speaking, a mediator is a retired judge, a lawyer or other neutral person who has also been trained to mediate disputes. Frequently, he or she has a special certification from the courts or the bar association of your state. However, unlike a judge, a mediator must be paid a fee. Usually, you and the defendant will split this cost evenly. While mediation can be chosen or ordered by the court at any time during your case, it is more likely to occur after discovery has been conducted.

At a mediation conference, both sides will sit down and present their cases to the mediator informally. There is no jury. The mediator will then discuss each party's claims, either in the same room or in private conferences, if necessary. In these conferences, the mediator might ask questions and raise issues to help the parties find a compromise to which they can agree. Because the mediator is experienced in the law affecting your case, he or she will take into account your legal rights, the extent of your injuries and the prospects of your case in a trial.

After the initial mediation conference, you may have a follow-up conference or discuss the matter by telephone. It is important to realize that coming to an agreement in this way can be slow. If you reach an agreement at mediation, it is not binding unless you and the defendant sign papers and take other steps to formalize it. If you do not come to an agreement, you are free to try again or continue toward trial.

In mediation, you are in a way previewing your case for the other side, just as they are previewing theirs for you. That means

it is important to be careful about what you say and to present yourself in a professional manner, just as you would if you were going to trial. A good rule of thumb is to behave as if the room is full of a diverse group of people from your area, some of whom may be antagonistic toward you. Your lawyer will prepare you and your case for mediation, just as he or she would for trial and depositions. If you cannot attend a mediation conference, you should inform your lawyer immediately. Failing to attend might result in penalties or even the dismissal of your case.

Arbitration

Arbitration is another form of alternative dispute resolution. New Jersey Court Rule 4:21A-1 et.seq. sets forth the rules and procedures for arbitrations which take place as part of the court process. The parties can also mutually agree to arbitrate outside of court before a single arbitrator or a panel of arbitrators. Similar to mediation, it brings the parties together before an impartial third party who understands the applicable law and will keep order during discussions. Like mediators, arbitrators are often retired judges or lawyers with experience in the legal area affecting your case, and charge a fee that will usually be split evenly between the parties. But unlike a mediator, an arbitrator does not actively guide the conversation or give opinions. Arbitrators are more like judges who keep order and rule on questions about the law and who eventually decide which party should prevail. In non-binding arbitration, the resulting arbitration award is only a suggestion; in binding arbitration, the decision is usually final.

At a non-binding arbitration, both parties present their cases by preparing written submissions summarizing the facts of the case and providing copies of the supporting evidence and documents as they would in mediation. But instead of holding the conference that a mediator would hold, an arbitrator simply decides which side should prevail and how much the plaintiff might be entitled to in damages. The plaintiff normally gives live testimony at the arbitration hearing so the arbitrator(s) can assess the credibility and believability of the plaintiff. Defendants are also permitted,

if they choose, to testify at an arbitration to tell their side of the story. The point of a non-binding arbitration is to show the parties how an impartial person views their case, which encourages them to settle. The arbitrator's decision is non-binding, so if you do not agree, you are free to continue to trial. However, in some jurisdictions, you may be penalized for this if the court ordered the arbitration or if you go to trial and do not do as well. Your lawyer should be able to tell you about the rules that apply to your case.

Binding arbitration is just like non-binding arbitration, except that both parties agree beforehand to abide by the arbitrator's judgment. You and your lawyer can choose binding arbitration or you may be contractually obligated to use it. Binding arbitration can be advantageous for parties who want to resolve their cases more quickly, and sometimes more cheaply, than they might be able to in court. However, because it is hard to challenge the judgment produced by binding arbitration, it is important to understand before the arbitration that you usually must follow the decision of the arbitrator. In fact, you may be penalized for ignoring or defying that decision. Your lawyer can give you a professional opinion on whether binding arbitration is a good idea in your case.

Closing Your Case

Reaching a settlement can provide some satisfaction in knowing that your legal claim is finally going to be behind you. But you must still complete the closing process, which is an important part of finalizing your case, and can take time.

Usually, you will be asked to sign a formal legal document, called a release, that sets forth the terms of the settlement and concludes all current and future claims against the at-fault party and/or insurance company for these injuries. Because signing this release ends your right to collect more compensation for your injuries from this defendant, you should understand this completely and raise any objections before you sign it. Do not hesitate to bring up questions or concerns with your lawyer. After it is signed, both sides will notify the court that the case has been

resolved and request the court to dismiss the lawsuit.

As part of the closing process, your lawyer may have to address outstanding bills, claims or liens on your settlement proceeds, as previously discussed in the section entitled “Understanding a Settlement Offer.” This may mean that you have to pay some of your settlement to a third party or that part of your settlement payment may be held by your lawyer while questions about payment are resolved.

Settlement proceeds are normally sent directly to your law firm. Personal injury and malpractice law firms have special bank accounts called attorney trust accounts, where they hold money belonging to clients until their cases are finalized. (This is a lot like holding money in escrow for people who are buying or selling a home.) Ethics rules forbid lawyers from using this money for their own purposes. Your settlement check will be deposited into this trust account.

The net settlement proceeds will be released to you after you sign a form called a closing or settlement statement, which typically ends your case and your client relationship with the law firm. It also lists all of the disbursements of the settlement funds, which includes payment of legal fees and costs, outstanding medical expenses, liens and any other debts to be paid out of the settlement, as well as your own payment. Again, you should not hesitate to bring up any questions or concerns about this document. If you have special circumstances or a particularly complicated case, your lawyer may bring up other ways your settlement proceeds might be disbursed or have suggestions designed to serve your best financial and legal interests.

Your lawyer cannot write you a settlement check from the attorney trust account until this paperwork is done and until the bank has confirmed that the settlement funds have “cleared” and are available to distribute. If you are concerned about receiving the money quickly, it is important to take care of the paperwork as soon as possible. As a practical matter, it regularly takes 30 to 60 days from completion of the paperwork until settlement funds are actually distributed.

CHAPTER SEVENTEEN

Trial

Once you have been through all of the detailed preparations for a jury trial, you might see why most people prefer not to go to court. People want their disputes resolved quickly and fairly. While a trial may be fair, it is rarely quick and it is usually expensive. It often takes years to investigate and prepare a personal injury or medical malpractice case. Once the lawsuit is filed, it is placed on the court docket and scheduled for discovery and trial based upon the type of case and in chronological order. There is little certainty as to when the court, counsel and the witnesses will be ready and available to try your case. Trials require months of preparation, even if the trial itself may take only a few days or weeks once you enter the courtroom. Also, trials are frequently postponed and rescheduled.

Fortunately, many cases handled by experienced personal injury or medical malpractice lawyers are settled before the case is called for trial. It is the collective experience of the lawyers collaborating on this book that 90 percent or more of personal injury cases handled by an experienced personal injury lawyer settle before trial. It has also been our experience that medical malpractice cases are more likely to go to trial than other types of personal injury cases.

Cases settle, in part, because an experienced trial lawyer will get the fullest possible information to decision-makers on the other side of the case as early as it can reasonably be shared. Presenting your case to a defendant before trial is important; it lets the other side know that you have a strong case, convincing them that settlement may be a better option for both sides. Remember, only you can decide to settle your case. If the other side does not make a fair offer, a jury will be able to decide the dispute.

An experienced personal injury or malpractice lawyer will, from the beginning, prepare your case as if it will ultimately go to

court. This is not done just in case you do go to trial — it is done because full preparation allows you and your lawyer to make the most compelling case possible in settlement talks. The facts will be gathered. The witnesses will be found. The evidence will be assimilated. The expert witnesses will be consulted and reports obtained. The issues will be understood. The law will be applied to the facts. Demands for settlement will be presented. Through the settlement discussions, an experienced lawyer will learn all about the strengths and weaknesses of your claim. If the claim can be settled fairly, so much the better. If not, you will enter your trial ready for litigation.

The Complaint and Answer

Every lawsuit starts with a written complaint/petition filed in court by the lawyer for the plaintiff. The plaintiff's complaint lays out all of the relevant facts, then lists each cause of action (reason for suing), stated as a separate count. At the end of the complaint, the injured party will sum up his or her request for relief in a "prayer." This is a request for damages, which is financial compensation for a party's physical, emotional, financial and other injuries. The person or entity being sued is called a defendant. After your lawyer files the complaint and has a copy served upon the defendant, the defendant must file a written document of his or her own, called the answer. The answer either admits or denies all the points raised in the complaint. Because the answer includes reasons for these admissions and denials, it is often your first look at arguments the defendant is likely to make at trial. The complaint, answer, and pretrial discovery define the issues that the lawsuit will ultimately incorporate.

Motions

As soon as the case is filed, either side is free to file a motion, which is a request that the court decide a point of law. For example, a defendant may move to dismiss, asking the court to rule that the complaint was filed too late (e.g., if the complaint was not filed

until after the statute of limitations expired). In considering a defendant's motion to dismiss, the court must assume that allegations in the complaint are true, so that any challenge at this stage is made strictly as a "matter of law" — what the law of our state says about a specific situation. Another example is a motion for summary judgment, which asks the court to rule in favor of the party requesting it because essential facts are no longer in dispute (perhaps because of what has been learned in discovery), making a jury's decision unnecessary.

While in the courtroom either side can also present motions orally. Like pretrial motions, these oral motions ask the court to decide a matter of law. For example, a defendant will sometimes move for judgment as a matter of law (called a motion for a directed verdict) after the plaintiff has finished presenting evidence. This motion asks the court to dismiss the case without requiring the defendant to present any evidence, asserting that the plaintiff failed to show that a question of material fact is in dispute. Such a motion can address some or all of the many legal issues involved in trying a personal injury or medical malpractice claim.

Jury and Bench Trials

When your lawyer files your complaint, he or she will most likely request a jury trial. In a jury trial, a group of randomly selected citizens from your area serve as the "judge of the facts." A jury collectively determines who to believe and what to believe, deciding all questions of disputed fact.

After all evidence is presented, the jury will use directions from the judge (called jury instructions) to decide the three most important questions in any civil trial: fault, causation and damages. Questions of fault ask the jury to decide how much fault each party bears for the injuries. Questions of causation ask the jury to decide whose fault caused which injury. At the end, the jury decides damages by assigning a dollar value to each injury it believes was caused by the defendants' actions. The jury does all of this according to the judge's instructions on the law and a

verdict form provided by the judge.

The judge presiding over a trial, who may also be called “the Court,” is “the judge of the law.” His or her job is to preside over all the courtroom proceedings, to keep the trial on track (according to the rules of civil procedure and evidence) and to decide any questions of law. Questions of law can be about either matters of procedure or evidence (such as whether a line of questioning is appropriate) or matters of substance (such as whether the defendant may present a certain technical legal defense).

The judge also instructs the jury on how the law affects the facts they are deciding through the use of jury instructions. For example, if you claim the defendant was negligent, the judge will provide the jury with a written definition of negligence. This definition will be one that has been decided in prior court decisions or by the statutes and regulations passed by the state legislature.

There is another type of trial, called a bench trial, in which a judge decides the issues without a jury. If your lawyer thinks you should consider a bench trial, he or she will discuss it with you in advance. As with all aspects of your case, you will make the final decision, using your lawyer’s advice.

Burden of Proof

As the party seeking financial damages, the plaintiff has the burden of proof, which means you and your lawyer must provide the evidence to prove that your allegations are true. Many people are familiar with the requirement to prove a case “beyond a reasonable doubt,” which is the standard used in a criminal trial. The standard is lower in a personal injury case because you are seeking a payment, not to put someone in prison. Plaintiffs in personal injury trials must prove their cases “by a preponderance of the evidence,” which means the facts you are alleging are more likely than not. You have to prove that the accident or injury was the fault of the defendant or defendants and that you suffered injuries as a result of the wrongdoing.

Presenting and Defending the Case

Because you, as the plaintiff, have the burden of proof, your lawyer will present your case first during trial. After your lawyer has presented all of the evidence in support of your complaint, he or she will “rest.” The defendants will then present the evidence in support of their answer.

After each witness testifies for the side that called him or her, the other side has the right to ask questions. This is called cross-examination. A famous legal quotation describes cross-examination as “the greatest legal engine ever invented for the discovery of truth.” A good lawyer uses this tool effectively, either to show the strength of the client’s case or to show weaknesses in the other side’s case. While cross-examination is frequently portrayed by television shows and movies as hostile, it does not have to be hostile in order to be effective.

The Jury Verdict

After all the evidence has been submitted and both sides have rested, the judge will explain the applicable law to the jury by reading the jury instructions. The jury will then be asked to go to the jury room to discuss the testimony and documentary evidence in secret. Out of the presence of the judge, the lawyers, and the parties, the jury will decide which facts presented are true, apply those facts to the law specified in the jury instructions and then attempt to reach an agreement. In order to reach a verdict, the required number of jurors must agree on each point to be decided.

The number of jurors who must agree in order to reach a verdict varies with the jurisdiction. In New Jersey, a party in a civil case is entitled to six jurors. Agreement by any five of the six jurors is all that is needed in state court. The rule in your state will be explained by your lawyer. If the jury cannot reach a verdict, the court will declare a mistrial, which is sometimes called a “hung jury.” When a trial ends with a hung jury, the case has to be retried before a new jury, starting from the beginning.

Judgment and Collection

If the judge believes the jury's verdict was proper, the judge will sign and file a document called the *judgment of the court*. A verdict in favor of the injured party is called a *plaintiff's judgment*. A *plaintiff's judgment* is a legal document stating that the plaintiff is entitled to collect the payment that the jury decided was fair. It shows that the defendant got the due process he or she was entitled to receive and that the defendant is legally being asked to give up property to pay the money awarded by the jury.

If the defendant has an insurance policy that covers this judgment, that insurer will usually pay it without intervention from the court. However, if the defendant or his or her insurance company does not pay voluntarily, you may need to ask the court to force the defendant to comply. This process is called post-judgment collection procedures and includes requests for documents such as a "writ of execution" or a "writ of garnishment." The purpose of these post-judgment remedies is to seize assets belonging to the defendant so those assets can be sold and the money applied to satisfy the judgment.

If a defendant does not have insurance and does not have assets sufficient to satisfy a judgment, the defendant can file a petition asking that the judgment be discharged. This is done in a bankruptcy court. This is a complicated area of the law and beyond the scope of this book. As a part of the decision to take your personal injury claim through the litigation process, an experienced personal injury lawyer will consider whether a defendant has the ability to pay. This discussion will occur at the beginning of your case. The ability to get paid is always a matter of utmost concern.

The role of an experienced personal injury or medical malpractice lawyer is to figure out the end of a case at the beginning and to work throughout the case to maximize the client's recovery. That work always includes considering whether you will get paid if a verdict is obtained.

Appeals

If either side believes that there was a mistake at trial, it can file an appeal to the Appellate Division of the Superior Court of New Jersey. An appeal is a request to another court, called an appeals court, to reconsider the first court's ruling. Most people do not realize that an appeal can only be made on the basis of an error in the law. A jury's decision, as "the judge of the facts," cannot be overturned on appeal unless the jury's decision was determined to be a "miscarriage of justice" or otherwise the result of an error of law. Appellate courts decide matters of law. Statistically, the overwhelming majority of appeals are denied and the verdicts are not overturned or reversed.

There is no jury in the appeal process. Appellate courts review the transcripts of the trial and the written appellate briefs prepared by counsel, and sometimes they entertain oral argument by counsel. The appellate court judges are required to presume the jury's decisions at trial were correct — as long as the record on appeal contains evidence to support the jury's verdict. A jury's decision can be changed by the appellate court only where there are no facts in the record to support the jury's decision or when the judge who presided over the jury trial allowed the jury to consider facts that should not have been considered, or to incorrectly apply law that was given to the jury. Appellate court decisions are important because they form what is called the common law. The common law is the law of the state, unless a decision of the judicial branch of government is precluded or overturned by a decision of the legislative branch of government. Under limited circumstances an appeal from the Superior Court of New Jersey, Appellate Division, can be heard by the New Jersey Supreme Court.

When the defendant files an appeal, he or she can post a financial bond to stop collection of the judgment. If the appeal fails, that bond will be used to pay the judgment. If you win your case, but the other side appeals, you may have to wait some time before you can collect the compensation you won.

Your lawyer will need to explain this complicated process to you and will counsel you about whether to settle on appeal, given

the increased costs, fees and time associated with the complicated appeals process. All of these decisions will turn on the specific facts and law applicable to your case. An experienced personal injury or malpractice lawyer will explain all of your options and help you make the right decision for you and your family.

It Is the Client's Case

We find that some potential clients are afraid that a lawyer will make important decisions about their cases, such as what settlement amount is fair or whether to file a lawsuit. This is not true. A personal injury claim belongs, at all times, to the client. The lawyer is hired to gather the facts and the law and to show the client how the law will likely be applied and how the facts will likely be interpreted. As the owner of the claim, the client has the right to make the final decisions about certain matters, such as whether to settle.

Experienced personal injury and medical malpractice lawyers know litigation is a means to an end, not an end in itself. The end is justice for the injured client — full and fair financial compensation for his or her injuries and the satisfaction of holding wrongdoers responsible for their actions. Litigation is simply the means that must be applied when there is a no *voluntary* settlement along the way.

An experienced personal injury or malpractice lawyer will begin with the end in mind — preparing the claim from the outset in such a way that both the lawyer and the client are ready for litigation and trial — *if necessary*.

Conclusion

We wrote this book in order to give you, our clients and potential clients, a helpful and relatively detailed guide to the process of a personal injury or medical malpractice claim. We believe this is important information for people who have already decided to pursue a case — as well as for those who want more information before they are ready to decide. As a potential client, you have the right to know to what you're committing. Then, if you become a client, you truly *need* to know about the process; the knowledge will add to your own peace of mind and help us make your case as successful as possible.

However, we know that no book can be detailed enough to address every plaintiff's situation. Each case, each pattern of facts, and each plaintiff is unique. This is why we want to encourage you, once again, to meet with us, if you have not already done so. We can give you more information, tailored to your specific case and your circumstances, about what you can expect if you become a plaintiff,

As a personal injury and medical malpractice firm, Andres & Berger believe that helping people is the most important part of our work. An injury or malpractice lawsuit will help you secure the money you need to pay for health care and other costs of an accident or medical malpractice injury, by cutting through the bureaucracy of insurers, hospitals and other large organizations. Also, indirectly, a lawsuit can help the community by alerting others to the dangers that caused your accident or medical negligence, including the at-fault parties' careless or illegal behavior and the lack of oversight or accountability that allowed those behaviors. In some cases, a lawsuit may even lead to the creation of new laws or force policy changes that better protect our community and our fellow citizens.

But no matter what form it takes, a successful resolution of your case is our goal. There is nothing more fulfilling than being able to make a difference for the better in someone's life. As a

CONCLUSION

plaintiff, you are a partner in that work, and your participation is not just helpful — it is essential. We hope that this book has helped you better understand what you can expect from your case, your own role in making it a success, and how the law firm of Andres & Berger can assist you in obtaining justice.

Appendix

Resource List

Andres & Berger, P.C.

AndresBerger.com

264 Kings Highway East, Haddonfield, N.J. 08033

American Association for Justice

justice.org

“The Mission of the American Association for Justice is to promote a fair and effective justice system—and to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America’s courtrooms, even when taking on the most powerful interests” (excerpted from the AAJ website).

American Bar Association

abanet.org

The Official website of the American Bar Association.

American Board of Trial Advocates

abota.org

An organization dedicated to the preservation of the jury trial system as guaranteed by the Seventh Amendment to the U.S. Constitution. “With a jury, the rights and duties of each of us will be decided by our fellow citizens, not by some bureaucrat or governmental functionary.” ABOTA agrees with Thomas Jefferson and is a leader in the fight to preserve and protect your right to a jury trial. ABOTA is dedicated to “Justice by the People.” Visit the website to review the selection procedure and to search if a specific lawyer has been selected.

American College of Trial Lawyers

actl.com

The organization seeks to “maintain and improve the standards and ethics of the legal profession and the administration of justice.” An attorney must exhibit the highest standards of professional excellence, ethics and collegiality and be nominated by a State Committee or three current Fellows to become a member. There is a rigorous review process before an attorney is invited

to join. Visit the website to review the selection procedure and to search if a specific lawyer has been selected.

The Bar Register of Preeminent Lawyers martindale.com
Martindale-Hubbell offers a national database of attorneys. You can search for an attorney by name to see his or her rating and if he or she has been selected as a Preeminent Lawyer. Visit the website to review the selection procedure and to search how a specific lawyer has been rated.

National Institute for Occupational Safety and Health (NIOSH) cdc.gov/Niosh
Created by the OSH Act, NIOSH generates new knowledge in the field of occupational safety and health and facilitates its transfer into practice for the betterment of workers.

New Jersey Association for Justice nj-justice.org
The website for the New Jersey Chapter of the American Association for Justice.

New Jersey Courts NJCourtsonline.com
The official website of the Courts of the State of New Jersey. Comprehensive information about the court system, legal forms and filing procedures, court calendars, the New Jersey Rules of Court, the Model Civil Jury Charges, and case specific data are included on the site.

New Jersey State Bar Association njsba.com
The official website of the New Jersey Bar Association.

New Jersey Statute Information nj-statute-info.com
A search engine to find specific state statutes by number.

New Jersey Supreme Court njbac.org
Website lists Certified Civil Trial Attorneys (alphabetized by first name).

Occupational Safety and Health Administration (OSHA) osha.gov
U.S. Government agency created to “assure safe and healthful working conditions for working men and women.” The

Occupational Safety and Health Act defines specific safe practices for employees and premises.

SJ Magazine

sjmagazine.net

The magazine publishes an annual issue which highlights lawyers in South Jersey by practice area. Visit the website to review the selection procedure and to search if a specific lawyer has been selected.

South Jersey Magazine

southjersey.com

The magazine conducts an annual readers' poll to determine the "Awesome Attorneys" of South Jersey. Visit the website to review the selection procedure and to search if a specific lawyer has been selected.

State of New Jersey Department

of Banking and Insurance **www.state.nj.us/dobi/index.html**

The Department regulates the banking, insurance and real estate industries in order to protect and educate consumers and promote the growth, financial stability and efficiency of those industries.

State of New Jersey Department of Labor and Workforce

Development—Workers' Compensation **lwd.dol.state.nj.us**

Workers' Compensation benefits include medical treatment, wage replacement and permanent disability compensation to employees who suffer job-related injuries or illnesses, and death benefits to dependents of workers who have died as a result of their employment.

SuperLawyers

superlawyers.com

Website lists "SuperLawyers" which appear in NJ Monthly magazine. These are lawyers who have attained a high degree of peer recognition and professional achievement. Visit the website to review the selection procedure and to search if a specific lawyer has been selected.

White & Woodward – Best Lawyers

bestlawyers.com

This is a compilation of attorneys selected through a peer review process. Lawyers confidentially complete detailed evaluations about other attorneys. Election to the "Best Lawyer" list is considered an honor by the legal profession. Visit the website to review the selection procedure and to search if a specific lawyer has been selected.

We wrote this book as an introduction to personal injury and medical malpractice law for anyone who is the victim of someone else's negligence.

As experienced personal injury and medical malpractice lawyers, we understand that most injury victims and their families are caught unprepared for the life-changing effects of a sudden, serious accident or medical malpractice. This book will guide you through the complex legal system faced by personal injury and medical malpractice victims and their families. We offer a step-by-step explanation—in plain language—of the entire process, from injury to settlement.

This book should not be considered legal advice, but an overview of personal injury and medical malpractice law.

If you have chosen this book, someone has probably been seriously injured or even killed due to medical negligence, a motor vehicle collision, a slip and fall, a workplace accident or another catastrophe caused by someone else's wrongdoing. We wrote this book for you.



Kenneth G. Andres, Jr.

Award Winning
*Andres
&
Berger* P.C.
Personal Injury and
Medical Malpractice Attorneys

Certified by the
Supreme Court of New Jersey
as Civil Trial Attorneys



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