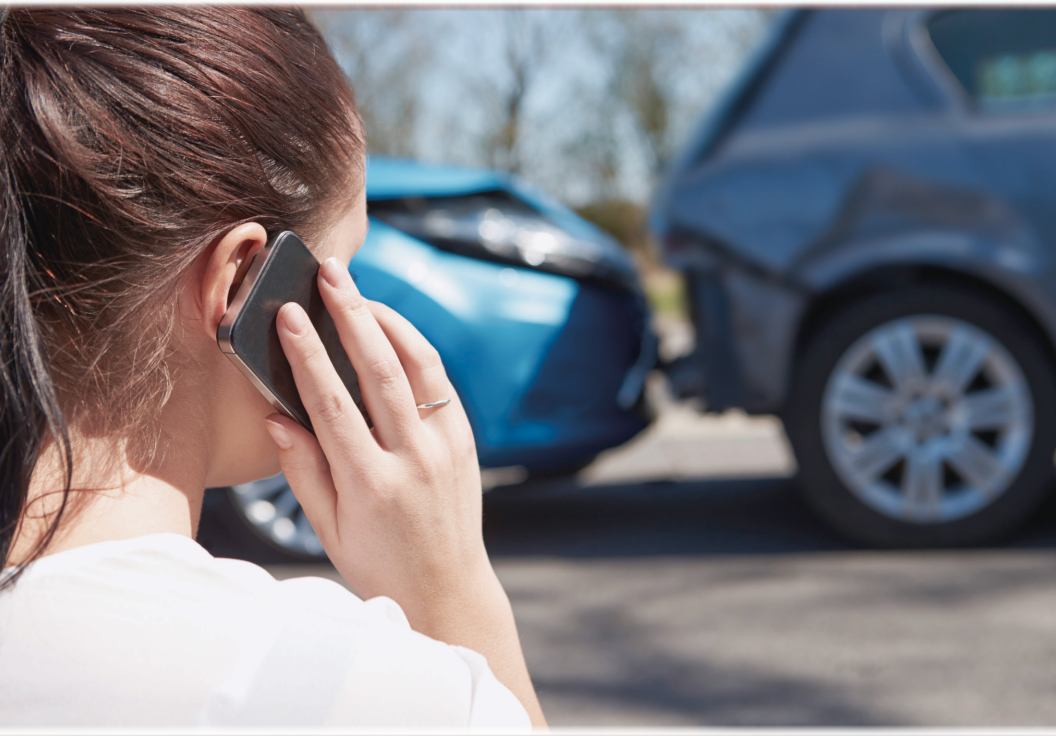
TOP TEN TIPS
IN PERSONAL INJURY CASES



A free informational guide offered as a resource by the law firm of

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TOP TEN TIPS
IN PERSONAL INJURY CASES

IN NORTH CAROLINA

A free guide to knowing your rights if you are injured in a motor vehicle collision in North Carolina

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THE AUTHORS

Andy Dempster

Andrew Ralph Dempster (Andy) grew up in Fayetteville, NC where he graduated from Pine Forest High School. He received his undergraduate degree from the University of North Carolina at Wilmington. He graduated from Campbell University School of Law in 1986.

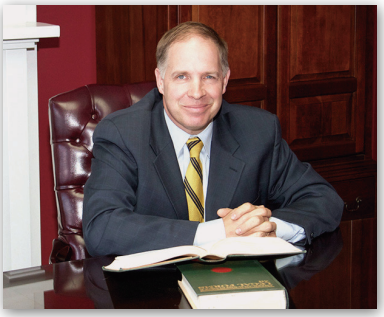
Immediately upon graduation from law school, Andy was sworn in as an assistant district attorney in the 12th Judicial District where he prosecuted in the Superior, District and Juvenile Courts. While in the DA's office he successfully prosecuted a range of criminal matters including homicide, traffic and misdemeanor cases.

In 1990, Andy was elected District Court Judge for the 12th Judicial District and reelected in 1994. He presided over thousands of cases in the civil, domestic, criminal and juvenile courts. He was one of the first District Court Judges in North Carolina to receive a special certification as a Juvenile District Court Judge from the Institute of Government at the University of North Carolina at Chapel Hill. He was very active on the Cumberland County Youth Services Advisory Board and was instrumental in bringing Teen Court to Cumberland County.

Andy went to law school because of a strong belief that with a law degree he could help people who weren't in a position to help themselves. In 1996, Andy left the bench to become a partner in the firm of Smith, Dickey, Smith, Hasty and Dempster. He is uniquely qualified having been a prosecutor and a judge

Andy's major strength lies in his trial ability. He represents seriously injured clients and their children. He feels that best recovery for his clients is only brought about through aggressive representation and many times requires filing a lawsuit. He successfully represents his clients from the settlement stage to a jury verdict. The result has been recovery of millions of dollars for his injured clients and a multi-million dollar recovery in a catastrophic case against a corporate defendant.

Allen Smith



Allen Smith is third generation Fayetteville, North Carolina. His grandfather was the manager of Sears in downtown Fayetteville for 35 years. His Dad Ritchie Smith is the founding Partner of Smith Dickey Dempster. Allen was born at Cape Fear Valley Hospital (now medical center) in 1961. He attended public schools in Fayetteville and graduated from Terry Sanford Senior High School. He received his undergraduate degree in 1984 from the University of North Carolina. He then graduated from The University of North Carolina at Chapel Hill Law School in 1987, where he joined his fathers law practice in Fayetteville. For over 28 years, he has focused on helping those injured by the negligence of others and in work place injuries. He is also state counsel for the National Home School Legal Defense Association.

Throughout his legal career, Allen has handled complex and complicated tort litigation, leading to multiple recoveries on behalf of clients in excess of one million dollars. He also handles small cases, and treats them with just as much enthusiasm and energy as his bigger cases. He has vast experience litigating serious brain injury cases, and back, neck, and other debilitating injuries. He likes using the latest courtroom technology to most effectively present his client's cases. He also has been involved in multiple wrongful death cases and has repeatedly been able to recover significant recoveries on behalf of his clients.

Allen has handled serious injury cases involving most the largest employers in Cumberland County and outside the County, including The City of Fayetteville, Cumberland County, Goodyear Tire, Cape Fear Valley Medical Center. Allen sees clients in the Sanford office, the Fayetteville Office, and our Lumberton Office.

Allen enjoys spending time with his family in his spare time, particularly performing with his family's Bluegrass Band. He also over his career has devoted much of his time to being involved in his church.

Allen believes in honest, aggressive, straight forward advocacy for his clients.
Call him for a free consultation today.

TIP NUMBER ONE:

Giving A Statement To The Insurance Company

Point number one of our TOP TEN TIPS IN PERSONAL INJURY CASES IS A BIG ONE. Do not give a statement to the insurance company without talking to an attorney. This is a pretty basic point but an important one. You must begin with the understanding that the insurance company is your adversary in your claim. Even if you are having to go against your own insurance because the tortfeasor was uninsured, they are your adversary. While you are paying premiums you are a customer, but when you file a claim you become their opponent. Your own insurance agent has no influence in your case. An adjuster is assigned whose job is to limit the exposure of the insurance company. So you at that point are no longer a client or customer, you are a potential plaintiff.

Many come into our office and state; why should I be afraid of this, after all I am just going to tell the truth. It is good if you are truthful, we advise all our clients to be truthful above all things. That being said, there are many pitfalls that you can fall into unknowingly by the way you state things or the subject matters you discuss. For example, we generally do not allow a recorded statement. There are exceptions. You can be in the beginning of treatment and not know the full extent of your injuries. Your neck may be your main problem two weeks out from the injury, but the back end up being just as big a problem. Statements you make early on can limit your recovery. You can also give them information that the insurance company has no right to access; personal information. You may not quite understand how the insurance company is going to defend the case, and give them some ammunition to use against you just by the way you phrase things. Their goal in these situations is to get you to ramble so that you may say something inconsistent; which can happen inadvertently

When we do allow our clients to give statements, it is done based on who the insurance company is and whether it will help settle the case. Some insurers and adjusters are more reputable and reasonable than others. Because we concentrate on representing injured persons, we have the wisdom and background to help with these decisions. We also significantly limit the scope of questions when we do allow recorded statements.

When your insurer is paying for the property damage to your car, you may have a duty to give a statement; or be in danger of not having coverage because of failing to cooperate as an insured. Again, talk to an attorney before you do this. There is a very true saying “you cannot unring a bell”. Our job as attorneys and advocates for our clients is to guide them through the entire process. No case is perfect, there are always issues to be dealt with that affect the value of your claim. Getting experienced, local legal advice early in the process is invaluable. So before you give that adjuster a recorded statement, talk to your attorney. In doing so you very likely will improve the value of your case by not making any blunders or giving the other side ammunition that they most assuredly will use against you.

TIP NUMBER TWO:

Avoid Delays Or Gaps In Medical Treatment

As personal injury attorneys practicing in Fayetteville, NC for over 25 years this issue is one of our biggest obstacles or challenges. There is a saying that doctors in medical school are often taught: “if it isn’t written down it didn’t happen”. What is meant by that is to the doctor, medical documentation is very important. After all, they see sometimes over a hundred patients in a short period of timje and they rely on the medical records to base their opinions or diagnosis on. There are also many medical professionals that look at one medical chart, including nurses and doctors. Documentation is crucial to provide quality health care. In addition, if a patient is experiencing significant pain in an area, they expect the patient to mention it to them and they expect it to be in the medical records. That is why is so important for someone injured in a car wreck not only to seek treatment if they need it, but also to tell the doctors all of their concerns and the issues that they are having. It is important for the case, but it is also very important so that the doctor can have all the information they can about your medical condition to give you the best treatment. In prosecuting personal injury cases, as the plaintiff we have the burden of proof. That means we have to rely on doctors as expert witnesses to provide us with medical opinions to even allow us to get an issue to a

jury. If there are conditions that the injured plaintiff has that they did not mention for some time, we may not get the opinions we need from the doctor.

So it is important to communicate your physical complaints to your medical provider. It is also important to be diligent about going to the doctor. If you wait three or four weeks after your motor vehicle accident to go to the doctor, this is going to cause you problems in your case. It will also hurt your case to go to the doctor, then just not go for 3 months. Insurance adjusters expect you to go to the doctor if you are experiencing any significant pain. While it is true that these same adjusters complain about going to the doctor too much as well, the bottom line is it is extremely important in documenting your claim to go to the doctor regularly. We quite often hear that the reason a person did not go was because of monetary concerns or no insurance. While we understand this reality, insurance adjusters are not persuaded by this argument. Gaps in medical treatment will hurt the value of your case.

Another piece of advice we regularly give is that if your pain changes or elevates to make sure to tell your medical provider. It can negatively affect the value of your case if you delay on communicating a change or worsening of condition. Once again, it also is important in getting the best medical care you can. For example, if you have constantly had back pain, but it begins to significantly radiate down a leg or an arm, this needs to be documented. It is important for your case and it is important information for the medical provider to have.

In short, documenting your claim through your medical records is important to assist us in meeting the burden of proof we have as plaintiffs. It is not only insurance adjusters that will focus on these issues, juries will as well. Having consistent, well documented medical treatment that verifies your subjective complaints and treats them in a regular, predictable, and reasonable manner will go far in helping the value of your claim. Consulting with a local attorney who concentrates their practice in representing injured persons and who know the local treatment options and doctors is also a big help. Consultation with a knowledgeable local personal injury attorney early in the process can help you in dealing with all of these issues.

TIP NUMBER THREE:

Fully Explain The Symptoms You Are Experiencing To Your Healthcare Provider

At first blush this seems like common sense and not worthy of commentary. But it is quite often made complicated by many factors. First of all, in many if not most motor vehicle injury cases, the injured person has more than one injury. Many times one injury is quite serious to the point that healthcare providers do not pay attention to or even take care to document other injuries until the main injury is dealt with or stabilized. Particularly in cases involving surgery this is a common problem. For example a patient may have a serious neck injury that involves chronic, severe pain, to the point that a neck fusion is needed. That same patient may also have a wrist fracture or a bulging disc in the lower back that go undiagnosed for some time because the pain level for the main condition is so unbearable that they just don't focus on any other problems. It is important to consciously think of the rest of your body and any issues or symptoms you are experiencing, particularly if the chronic pain exists for some time. Quite frequently the medical provider might note the less serious conditions and not treat them until the more pressing matter is dealt with. That is fine, the case is only affected negatively when there are multiple visits to the doctor and then after a few weeks or months a condition is mentioned in the medical records for the first time. Because your medical records really are the best documentation of your injury, it is crucial to be thorough and complete in communicating your symptoms to any medical providers. This is not so easy, particularly when you have serious chronic pain in one area that is dominating your thoughts and your life. However, it will make your case go much smoother and even potentially determine whether an adjuster or a jury gives the proper weight to or even considers a medical condition and whether it is causally related to the motor vehicle accident. This situation can also occur when the injured party is on pain medication and does not mention to the medical providers all that is going on medically. Once again, please be careful to fully explain your pain and symptoms.

Once again, if it is not in the medical documentation adjusters typically will give it little or no weight. This can become particularly problematic when the undocumented condition later on becomes more of a problem, or results in surgery. If it is not consistently documented in the medical records prior to that point, defendants will argue that it is not related to the motor vehicle collision or even that it may have occurred from an event unrelated to the vehicle collision.

TIP NUMBER FOUR:

Recovering Diminshed Value On Your Property Damage Claim

We will deal with a few property damage issues in this article, but the most time will be spent on recovering diminished value, because this is the element of damages that most people are not aware that they are entitled to. Furthermore, the insurance company adjuster will not mention it to you unless you bring it up first.

When we handle your personal injury case, we give assistance as needed in your property damage issues. If the car is totalled, the issue is pretty straight forward in that you settle for the fair market value of the vehicle. The most used reference for this is the Kelly Bluebook. NADA car guide is also used. But one of the many questions is what to do when you owe more than the car is worth. This is called "being upside down". Unfortunately in this situation your recovery is limited to the fair market value of the vehicle. Along the same lines, if you have put more money into your vehicle than it is worth, for example putting a $4,000 in a $3,000 car, you can still only recover fair market value. One thing you can do is check with your insurance carrier and with your vehicle lien holder and see if you have "gap coverage". This is insurance to make up the difference between the fair market value and how much you owe.

Another issue with property damage claims is when the tortfeasor's insurance carrier drags their feet in investigating the claim or paying the property damage. If you have full coverage, including comprehensive coverage, you can have your insurer handle the claim. They will have you pay your deductable, but if liability against the tortfeasor is good they will collect against them and refund you the deductable you paid. This is sometimes a good route to go to avoid a lot of delays and headaches.

The final issue to discuss is what happens when your car is to be repaired, and there is a diminished value component to your damages, as discussed above. Usually if the vehicle is damaged greater than 75 percent the insurer will total the car; that is usually your best outcome. If the vehicle is not totalled and the insurer pays for it to be repaired, you should also recover what is known as diminished value. Diminished value is how the fair market value of your vehicle has been diminished or decreased because of the repairs. The more the repairs, the more the impact on diminished value. Another relevant factor is the condition of the car at the time of the collision. If it had already been seriously damaged in a wreck or was in poor shape, that will make your diminished value claim worth less. Also, the newer the vehicle the more the diminished value will be. Beware, insurance adjusters will not bring this up to you, and often will deny it. But it is an important part of your property damage claims. We can refer you to appraisers who can evaluate your vehicle and its diminished value because of the collision. Unless we file a lawsuit, we do this as a courtesy to our personal injury clients. So if you have a personal injury claim with property damage issues, make an appointment with Allen Smith or Andy Dempster for a free consultation today.

TIP NUMBER FIVE:

HIRE A LOCAL ATTORNEY

This would amount to our personal opinion and philosophy as a law firm, and obviously Raleigh law firms that do a lot of advertising to get Fayetteville cases would disagree. We will just provide some of the basis for this opinion by giving some reasons for including this in our Top Ten Tips.

1. Local attorneys have ties to the community. They are more likely to know the local judges and their opinions and biases on certain types of issues that we regularly confront. Local attorneys are also in a better position to be more familiar with issues surrounding picking a local jury in Cumberland County, be familiar with where the jurors live, where they went to high school and other matters. All these issues affect your ability to pick a jury, to evaluate their predispositions or feelings towards the legal justice system, and your ability to connect with a jury. Quite often people end up on juries that are friends of friends of us, or went to our high school, etc… Also, we are familiar with other factors such as civic organizations and other involvements that may give us clues to the unspoken bias of a particular juror that may not come out directly. With the local knowledge that attorneys that handle a large number of personal injury cases, you quite often get a "home court advantage" in your favor when the insurance company for the defendant hires an out of town law firm as well.

2. When you hire a local attorney, you quite often will get more face time with your attorney. Many out of town firms have offices, and publish themselves as local attorneys, yet do not have any attorneys that live in Cumberland County. Many do not hold office hours and delegate a lot of the client interaction to a local paralegal. Some have a local office that is only opened if there is an appointment. If you hire Smith, Dickey & Dempster, you will interact with a paralegal, but our attorneys are in the office most every day, unless they are in court or in a deposition. If you want to make an appointment with an attorney you can usually get in to see your attorney within a couple of days. We always respond to requests to sit down and talk over any issue the client want to discuss.

3. Another advantage to hiring a local attorney is that the best way to hire an attorney, in our opinion, is by word of mouth. Talk to local folks, ask Sheriff Deputies, Courtroom Clerks, or neighbors or business owners about lawyers. Ask someone who has had a local attorney handle their case. Because our law firm is multi-generational, we have been here a while, and plan to continue being here for decades to come. When you practice law in your community and represent your neighbors and friends, it just seems to us that that provides a great incentive to go above and beyond the call of duty. Advertising has certainly changed the law profession. It is certainly ethical and moral for a law firm to advertise; we advertise in certain ways. But we would still maintain a client that has been able to assess the local reputation or even get to know an attorney at a child's soccer game or other civic function is a much surer way of obtaining good, ethical, and effective legal representation. We have a local connection from Allen Smith being 3rd generation Fayetteville to all the attorneys growing up here, to Andy Dempster being elected as a District Court Judge, to attending public schools here, playing sports, and other involvements.

4. Finally, while all we say about hiring local is true, hire a local attorney that has experience in the area of law you need representation. When our senior partner, Ritchie Smith first started practicing law, most attorneys by necessity practiced in many areas. There was a positive side to this. Today, the law has become so complex hiring an attorney that limits his practice to one or two areas of law generally means your attorney should have more expertise in that area. That is certainly the philosophy in our firm; each partner or lawyer focuses on a couple of areas of law.

For all these reasons we encourage you to ask around about our law firm, about our attorneys. We think the general reputation you will hear is that we have been here a long time; from Ritchie Smith starting the firm; to Pitt Dickey coming on board, to Allen Smith joining his dad in his law practice; to Andy Dempster stepping down from the bench as a judge to practice with us; to Andy's son Drew Dempster leaving the District Attorneys Office to practice with us. We live here, and we care about Fayetteville and we care about our neighbors. And our neighbors are quite often our clients.

TIP NUMBER SIX:

Hire An Attorney Experienced In Personal Injury

This is tip number six of our TOP TEN TIPS IN PERSONAL INJURY CASES. Hiring an attorney experienced in personal injury cases. Personal injury is an area that most attorneys say they practice in, even if they only handle five or six cases a year or less. The practice of law has become significantly more complex and specialized over the past twenty five years. The issues in personal injury mirror that. Significant issues not only with the development of tort law, but disbursements. Some health insurance plans need to be paid back. Medicare and Medicaid liens , Tri-care liens, worker compensation liens, Federal ERISA law all impact the amount you put in your pocket. An experienced personal injury attorney will have been there and done that on all these issues. You don't want to be hiring a family law attorney that has no experience in the complexities of personal injury litigation and learning on the job. Make sure your attorney is experienced in your area of law. Some attorneys have some experience, but only in settling cases and not filing lawsuits. Rest assured, the adjusters know the attorneys that are willing to litigate, and those who have a reputation for not doing so. It does affect your recovery.

Allen Smith and Andy Dempster have a full case load of personal injury cases going on all the time. We are always trying to resolve cases short of trial, and are also always litigating those cases that need to be litigated. Allen Smith has been representing injured persons since 1987. He focuses his practicing on representing injury claims, either workers compensation or personal injury/negligence cases, and nothing else. Andy Dempster is a former District Court Judge who has vast court room experience from both sides of the bench. Andy focuses his practice in the areas of personal injury and

criminal litigation. As a team Andy and Allen have handled not only typical soft tissue injury cases, but also catastrophic death and brain injury cases against all types of defendants. They have multiple recoveries in excess of one million up to four million dollars. Allen Smith is also a certified mediator who has mediated cases in that capacity, giving an extra level of experience. Here are some questions to ask a potential personal injury attorney

1. How long have you practiced?
2. What areas of law do you practice in? Have a percentage breakdown.
3. How many personal injury cases have you handled?
4. How many personal injury cases a year do you file suit in?
5. How many personal injury cases have you tried?
6. Please tell me about some of the cases you have litigated and results you have obtained?

These are all great questions to ask. Just like you might go to a transmission shop to work on your transmission, hiring an attorney that has experience and success in the area you need representation in is key. Hiring an experienced attorney with a good track record, who also is well known and has a good reputation in the community; this the best advice we can give you to insure that you will hire the best attorney for your case.

TIP NUMBER SEVEN:

Get Pictures Of Your Vehicle As Soon As Possible

While it is not always imperative that you get pictures of your car, it can be crucial in many types of cases. This issue is one that would be obvious to most people, but it is important enough that it needed to be listed in our Top Ten List.

Lets just list some of the reasons you need to get pictures of your vehicle as quickly as possible.

1. The pictures of the vehicle can help substantiate your version of the motor vehicle collision against a defendant who has given the insurance adjuster a different version of what happened. For example, pictures of where the impact was on your vehicle could validate that the defendant turned into you instead of vice versa.

2. The pictures of your vehicle can help confirm that the collision was significant enough to cause an injury. This is an important issue in soft tissue injury cases, which are back and neck muscle injuries. Quite often the defendant's car has no damage to it and the insurance company takes the position that there was not enough impact for anyone to be hurt; that it was just a "bump". If there is damage to your vehicle that is visible, this can help undercut this argument. This is especially true as newer vehicle are engineered to protect the vehicle, which means the bumpers absorb more impact without much damage up to higher speeds. This also means that there is more motion forward in the car being hit because of the bumper, thereby increasing the risk of neck injuries.

3. Also, if you have a more significant case, sometimes the car is destroyed once you settle the property damage. Unless you purchase the salvage title from the insurance company they can destroy it immediately, and they have no desire to pay storage. In a more significant case often we need to hire an accident reconstructionist for various reasons. Ideally the expert reconstructionist would like to inspect the vehicle personally, but pictures are still better than nothing.

4. It can also protect you if there is damage done by the body shop or at the body shop. A picture of what the vehicle looked like prior to that damage can clarify who has to pay for what on your vehicle. We once had a situation where the vehicle caught fire at the body shop. Without pictures it would have been difficult to determine what the liability insurer had to pay and the body shop responsible for the fire had to pay, for example.

5. Even if you don't think you are hurt, take the pictures. Many don't know they are hurt until hours later or the next morning when the adrenaline stops pumping and they wake up. It also can help with property damage issues as discussed here in any event.

So pull out your phone at your earliest convenience and take a picture of your vehicle if you are in a collision. Also, getting an attorney involved early can also help head off many of these issues. Even if you have hired an attorney, just to be safe, take that picture.

TIP NUMBER EIGHT:

What To Do If You Are Injured In A Motor Vehicle Accident While On The Job

If you were hurt by the negligence of someone other than your employer, and you were on the job at the time or doing some things related to your job; you have two claims. Your first claim is against the negligent third party, who is known as the tortfeasor. You can recover all damages allowed by law against the tortfeasor, including pain and suffering, medical expenses, lost wages and other costs. In certain situations if it goes to trial you can also recover attorneys fees on top of the judgement, so that you recover more and put more in your pocket. Usually these "third party claims" involve motor vehicle accidents, but not always. You can also be injured on the job by someone else's negligence; for example the paving contractor at your place of work does something to cause an injury.

In these situations you also have a workers compensation claim. It is important to file your form 18 with the North Carolina Industrial Commission within 30 days. If you don't file within 30 days it does not automatically mean you have no claim, but your safest bet is to file within 30 days. The workers compensation carrier will send you to doctors they choose, and quite often it is necessary to have an attorney from the beginning to help protect against such issues as the comp carrier sending you to unqualified doctors or overly biased doctors. Quite often doctors refer you to specialists and the comp carrier refuses to approve it. In these situations you need to timely file for a hearing to get the needed treatment.

One of the biggest issues when you have both a workers compensation claim and a motor vehicle accident or tort claim is when to settle. Our position is it depends on the case. There are so many different factors that come in to play on this issue. What we will say is that it really depends on the facts of each case; but in many situations there is a clear answer which should be done first.

The final issue to discuss is the worker compensation lien. If you settle your workers compensation claim first, the workers compensation carrier has a lien on the recovery in the third party claim. Many individuals and even attorneys will work out a negotiated settlement or waiver of this lien as part of the workers compensation settlement prior to the personal injury case being resolved. My position is you should never do this. If you get the workers compensation lien reduced or waived, then in all probability you will not be able to use that element of damages in the third party claim. In other words, if you get a $ 50,000.00 workers compensation lien reduced to $30,000.00, then you in all likelyhood reduced the value of your third party claim by more than $ 20,000.00. The best approach is to settle or try your third party claim, then work on the lien. The way we handle this is to negotiate at that point with the workers compensation carrier. The applicable statute is NCGS 97-10.2. This allows us to reduce the lien automatically by one third. It also allows for us to file a motion in the Superior Court of Cumberland County, or the county where the incident arose, and ask a judge to reduce or waive the lien. We have had great success in reducing and waiving these liens. How much it can be reduced depends on the facts of each case. We can say that we have never had to pay out more than one third of the total recovery, and sometimes less than that.

So it is important in these cases to hire a law firm with experience in both trying jury trials in motor vehicle cases and handling workers compensation claims. Both areas of law involve representing injured persons but most attorneys that do personal injury work do not practice in the area of workers compensation. It is important if the attorney handling your personal injury case does not practice in the area of workers compensation that you seek legal advice regarding if you have a workers compensation case and whether it is worth filing a workers compensation case if you were on the job at the time of your motor vehicle collision. If not, as stated previously, hiring an attorney with experience in both areas would provide you with all the legal advice you need.

TIP NUMBER NINE:

Always Check Your Own Insurance Policy For Medical Payments Coverage

One of the first things you should do when involved in an automobile collision in which you suffer injuries is to get your declarations page from your own insurance policy. On it you will find out whether you have medical payments coverage. This is coverage that is purely contractual between your insurance company and yourself. It is not covered by the North Carolina Financial Responsibility Act. In other words, it is extra insurance that gives coverage in addition to and different from the main areas of coverage covered by statute. Medical Payments coverage, or Med Pay as it is often called, is insurance that you purchase to pay for medical bills sustained by you or your family members or anyone riding in one of your insured vehicles. This coverage is paid without regard to who is at fault. Usually we see the total amount recoverable under Med Pay policies in North Carolina to be $ 1,000, $ 2,000 or $ 5,000. We do see policies occasionally with more coverage, however. If you have $ 1,000 in Med Pay coverage, for example, once your medical expenses reach $ 1,000 your company should pay you that amount.

One of the first objections we hear when we explain this to clients is "I don't want my insurance company to pay for the medical expenses, I want the wrongdoer to pay". My answer is this. The wrongdoer is still liable for the medical expenses. They cannot claim a credit for the Med Pay. If you try your case the jury will never hear about the Med Pay. This is because of a long standing principle of common law called The Collateral Source Rule. The rationale is that if you have been diligent to obtain extra insurance to cover certain contingencies, and have made payments for that coverage, the wrongdoer or tortfeasor should not get credit for it, or a lower verdict, just because you have been responsible. The other advice I give persons concerned with going against their own insurance is that this is extra coverage that you have contracted for an extra premium. If you are not going to use that insurance for the contingency you contracted for, then cancel your insurance! There is no use paying premiums for coverage you do not intend using.

So the general rule in pursuing Med Pay coverage is you go after the coverage in the vehicle you are riding in first, that is primary. If that is not your vehicle, and you have exceeded the Med Pay in that policy, or there is no Med Pay on that primary policy, then you apply for the Med Pay in your own motor vehicle policy. Perhaps most importantly, under North Carolina law your medical payments insurance carrier cannot raise your insurance rates for filing a Med Pay claim. The only way you can be given insurance points that increase your insurance premiums is if you receive certain moving violations, or you are found at fault in a motor vehicle collision.

Medical Payments coverage or bills are sometimes contested, but usually not. This is a straight forward process that our law firm does as a courtesy for our clients for free. It is not part of our contingent fee. Many law firms do charge a flat fee for collecting Med Pay. Our advice and opinion is that law firms should not charge for this service, unless there is some litigation issue involving the Med Pay, which is very seldom. Many reputable chiropractors will also file for your Med Pay for you as a courtesy when you are treating with them.

There are other issues involved in Med Pay coverage as to whether healthcare providers have a lien on Med Pay proceeds, as well as Medicare or Medicaid when they have paid for medical care for injuries in a motor vehicle collision. On these issues, you really need to seek experienced legal counsel as they are more involved than this article will cover.

Bottom line; have your attorney file your Med Pay for you, if your treating healthcare provider has not, and put more money in your pocket.

TIP NUMBER TEN:

Be Very Careful On Health Insurance And Subrogation Issues

This is probably the most difficult issue to cover in a somewhat brief and understandable manner, because it has become so complex. Over the last 25 years over 90 percent of the increased complexities of personal injury law have come in this area. If lien holders are not paid back out of your settlement appropriately, then you face huge liabilities. This area alone really requires legal counsel, in our opinion. You may get a settlement offer that seems fair to you, accept it, then open yourself up to being sued by not recognizing liens. There are also healthcare providers or insurance companies that may seek more than you are required to pay them. In the interest of covering the basics on this issues, we will just list some of the key issues that come up.

Healthcare Provider Liens – When a hospital, doctor, chiropractor, or other health care provider as defined under North Carolina law provides healthcare for injuries in your motor vehicle accident, they have a lien on the recovery. That means that you or your attorney may not disburse those funds without dealing with their lien. The lien must be paid in full with a couple of legislative exceptions. First of all, if the medical provider charges you for obtaining copies of your medical records, then they waive their lien on the recovery. That does not mean you still do not owe the medical bill, it just means they lose their "right" to be paid out of your recovery. The other situation is when you us the lien statute available to reduce liens. North Carolina law provides that the healthcare provider is entitled to no more than one half of what is left out of the settlement after costs and attorney fees are paid. Once again, the individual may still owe the medical bill, but the healthcare provider's lien is limited. Quite often we are able to negotiate with certain healthcare provider's regarding their bills using this lien statute as leverage on behalf of our clients. We are used to dealing with the various healthcare providers in Southeastern North Carolina and know which ones are willing to cut their bills and by how much.

Medicaid Liens – If Medicaid has paid your medical expenses, then they have a lien under federal law. They have a schedule that they pay, like Health Insurance Companies, which is usually a percentage of the total bill. Medicaid limits its lien to one third of the total recovery. If there are other liens, like outstanding healthcare provider liens, all liens are pro-rated and limited to the one third. If a healthcare provider is a participating provider under Medicaid, they cannot claim a balance for the amount of the medical bill that Medicaid did not pay.

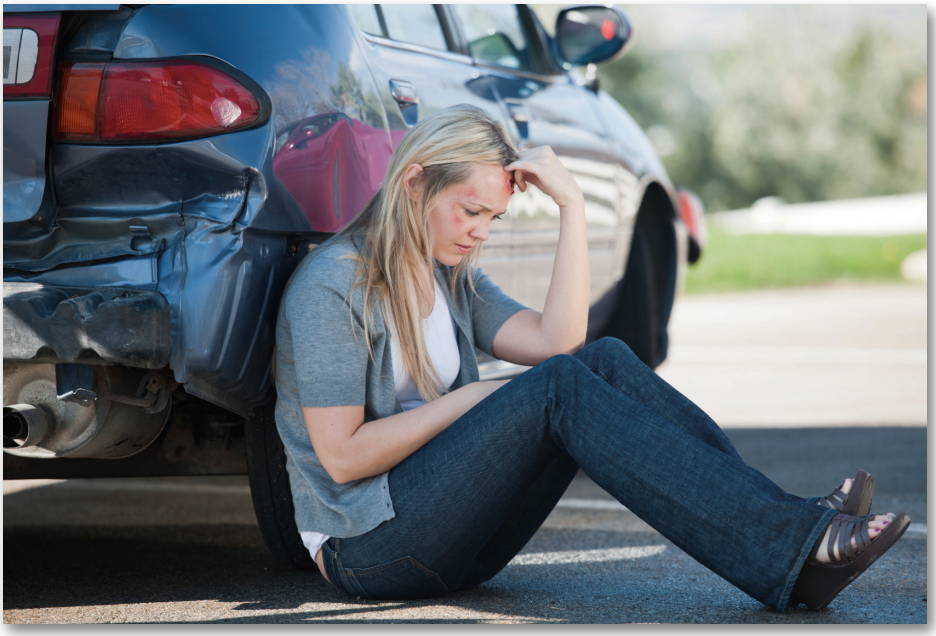
Medicare Liens – These are much more difficult and frustrating to deal with than perhaps all other liens. Medicare liens have no limitation on them like Medicaid liens. If there are limited policy limits and Medicare wants to, they can demand the whole recovery and get away with it. This is a problem that ought to be fixed by Congress. Until that happens, (if it happens), there is still a way to deal with these liens. You are able to reduce them first of all by up to one third for the cost of recovery (your attorney fees in obtaining the settlement or verdict). You can also go through an appeals process that quite often ends up with Medicare reducing their lien. We have never had Medicare take more than one third of the totally recovery, but the fact that they are capable of doing so is a bit unsettling. Like Medicaid, if a healthcare provider is a Medicare Participating provider, they must take the Medicare payment as payment in full of their bill.

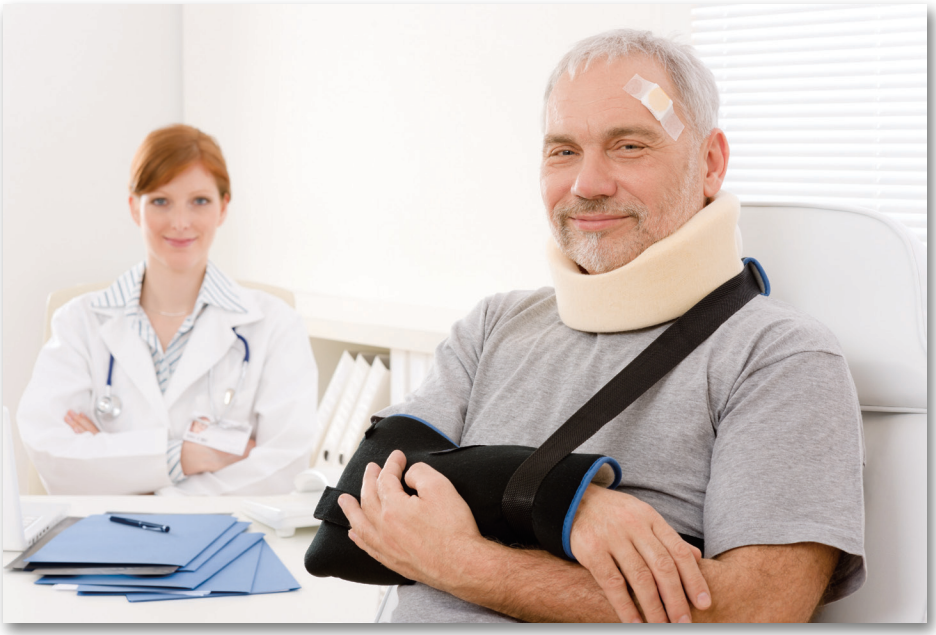
Tri-Care Liens – When an injured person receives treatment through VA, Tri-Care, or active duty soldier that is treated at a military base, there is also a lien on the recovery. While there are no restrictions on these liens, we have always to date through interaction with JAG and through appeals processes when necessary been able to get reasonable reductions when needed to these liens. Because our law firm has been practicing in the Fayetteville/Fort Bragg area since the early 1960's, we have vast experience in dealing with Government Liens of these types.

Health Insurance Right To Subrogation – When a health insurer pays for medical treatment arising out of a car wreck in North Carolina, there is an anti-subrogation provision in the North Carolina Department of Insurance Regulations. In other words, health insurance companies in North Carolina are not allowed to claim a right to be paid back for payments made in this situation. The theory behind this is that the wrongdoer or tortfeasor should not be allowed to get the benefit of the diligence of a plaintiff who has health insurance to cover any medical expenses. The big exception to this is Federal self-insured health plans under a federal statute entitled ERISA. An ERISA plan pre-empts state law and has a right to a lien at this point. Plaintiff attorneys have been arguing for years that this is a right to reimbursement and not a lien. The applicable federal courts unfortunately have clarified at least at this point that this is a lien.

This lien is not limited, and ERISA plans often attempt to take the whole settlement if the lien exceeds the policy limits. Once again, we have a good track record at negotiating with the ERISA plan and getting reasonable reductions in these liens. Because this lien requires a self-insured ERISA plan, it is usually true that very large employers typically have ERISA plans, because they are the only types of employers with the financial ability to be self-insured.

As you can see, this is a very nuanced and complex area of law. It is imperative that you seek experienced legal advice on subrogation and liens in your personal injury case; quite often they will earn their fee just on what they are able to do for you in this area alone.





ARTICLES NOT COVERED BY OUR TOP TEN TIPS
IN PERSONAL INJURY CASES

We are providing articles on issues that go beyond our top ten tips because there are some topics that might be helpful to the general public that we did not cover in our Top Ten Tips. Here they are:

CHIROPRACTIC TREATMENT AND PERSONAL INJURY CASES

For years now chiropractic care has been a medically accepted treatment alternative for soft tissue injuries in motor vehicle accidents. In fact, they are more accepted as a positive form of medical treatment than they ever have been. Chiropractors attempt to assist the body to heal itself naturally, without using pain medications or muscle relaxers. Many people don't know that North Carolina law allows Chiropractors to prescribe medication, they just don't because they believe as a profession in natural healing in soft tissue injuries. It is also not well known that Chiropractors in North Carolina are by law allowed to have hospital privileges.

The types of injuries that chiropractors treat are called soft tissue injuries, which is another word for muscle injuries. The chiropractor uses several different methods, or modalities, to treat the muscle injures. These are typically injuries along the spine, either back or neck. The chiropractor will use hot and cold, adjustments to the spine when it is out of alignment due to trauma or other reasons, and electro stimulation. These methods allow natural healing at a much quicker pace than if the injury is left on its on to heal.

Chiropractors also use x-rays to help in their diagnosis and treatment. They evaluate x rays different than medical doctors though. A medical doctor is mainly ruling out a fracture when he orders an x-ray. A chiropractor is ruling out fracture, but is also looking at the alignment of the spine to assist his diagnosis of what adjustments to the spine need to be made.

One issue that insurers often complain about is when plaintiffs treat simultaneously with a physical therapist and a chiropractor. While this is not exactly true, it is important to discuss this issue with an attorney experienced in litigating these issues. We have seen clients who tried physical therapy that was not effective to decide to get chiropractic care, and it be effective. While defendants don't argue as much on this issue as simultaneous treatment, they do make the argument. Of course, defendants quite frequently in any type of case like to argue that the plaintiff over-treated. Once again, it is important to get good legal advice throughout the process on these issues.

It is important in these types of cases to seek treatment early after the collision, not only to get the answers you need to heal, but to document your claim. A delay in seeking treatment or a big gap in treatment will have a very negative impact on your claim or case.

Our firm has handled thousands of cases involving chiropractic treatment. We have also been trying these types of cases for over 40 years. While Chiropractic has become much more accepted as a field of healthcare, insurance companies have been more aggressive than ever in attacking Chiropractic. The obvious reason for this is to limit recovery of those with soft tissue injuries. In spite of this attack, we are still recovering and pursuing these cases, and in the vast majority of situations we see the plaintiff is better off both physically and in their outcome in their claim when appropriately seeking chiropractic care.

PRE-EXISTING CONDITIONS IN PERSONAL INJURY CASES

Pre-existing Conditions quite often play a significant role in personal injury cases. A pre-existing condition is a medical condition that existed prior to the accident or injury that is subject of the claim or lawsuit you are litigating or presenting. I will just state some obvious points with regard to pre-existing conditions to highlight the law and some of the recurring issues we see:

1. The aggravation of a pre-existing condition is compensable. If you reinjure an old injury, or aggravate it, the defendant is liable.

2. The challenge with pre-existing conditions is mainly with the certainty of presenting your damages. When you injure your back in a car collision and have never had a problem with your back, it is relatively straight forward and easy for a treating doctor to give an opinion that it is related to the trauma from the incident. When you have been being treated prior to the incident, the doctor has to try to make a determination which part of the plaintiff's condition is related to the incident in the lawsuit. Since the plaintiff has the burden of proof, this can be challenging depending on the facts. On top of these issues, Plaintiffs are always trying to make their claims black and white. Defendant's main tactic is to muddy up the water, to try to make the claim appear less certain. That is why they try to use pre-existing conditions so often.

3. Some pre-existing conditions are red herrings. In other words, they are rabbit trails the defendant would like the jury to run down. For example, many people of degenerative disk disease, and have no symptoms or pain from it. When a traumatic event happens, often that makes the degenerative disk disease symptomatic. Under the law, the defendant is liable for the exacerbation. That being said, you have to be very careful with your jury selection and evidence to make sure the jury does not chase this rabbit.

4. This point is common sense, but the medical history of the pre-existing condition is extremely important. If you were having ongoing significant pain and getting treatment for it up to the date of the accident, it makes it really challenging in proving your damages. We have had clients who were on their way to pain management when they were in a collision. On the other hand, if you had surgery or treatment for a condition 15 years prior to the incident, and were doing fine and stable until the wreck caused your condition to deteriorate significantly, that is not as much of a problem to deal with.

5. One of the worse things you can do when you have a pre-existing condition is to not be truthful about it. When you are asking a jury to compensate you for an injury, credibility is everything. If you get caught lying or you forget your pre-existing condition, it will seriously impact the value of your claim in a negative way. This includes the testimony you give at deposition or trial under oath, or the history you give to medical doctors.

6. Quite often adjusters bring up pre-existing conditions that have nothing to do with the injury you suffered in the claim being presented. We deal with this regularly and adjusters and defense attorneys typically do not get very far with these arguments.

7. There is a doctrine under common law called "The Egg Shelled Skull " Rule. It basically stands for the proposition that if you are more prone to injury, the example given being having an egg shelled type of skull, and you are injured where the injury was much more serious because of this condition, the defendant is still liable. The defendant takes you as he finds you. That being said, there is another doctrine called peculiar susceptibility that argues that if you have a peculiar susceptibility that the general public is not susceptible to, then defendant is not liable for that. These doctrines seem to contradict each other in some ways. It takes an experienced and seasoned attorney to deal with these issues.

For all the reasons stated above, your medical history is important. Make sure you are being totally up front. Also, ask you parents or spouse about your medical history when getting into these situations to see if they recall issues or conditions that you do not. Pre-existing conditions are a challenge, but they usually can be overcome and dealt with good pro-active preparation and being deliberate in preparing the medical experts that will be testifying at trail.

LOST WAGES IN PERSONAL INJURY CASES

Lost earnings from your job are recoverable in personal injury actions. Here are some of the main issues that practically arise regularly on this issue.

1. MEDICAL DOCUMENTATION – A medical provider that can qualify as an expert witness must document that you were unable to work during the time period you claim. So the doctor must specifically state in a medical record or other note that you are unable to work. This can take the form of a blanket statement that you are unable to work, or a statement that states your limitations. Where the doctor places limitations and restrictions on you, you must be able to prove that your job description did not allow you to work under those restrictions. If your employer offers to allow you to modify your job duties (offer light duty) to keep you within the restrictions, you have a duty to go back to work under that condition. (See article on Doctrine of Failure to Mitigate Damages on this website)

2. PROVING YOUR WAGES – Typically we give our clients a form for their employers to fill out to document this issue, although we would use a representative of the employer if the case goes to trial. This documents what the employee truly lost. There are a few different approaches to how this could be done when your hours vary. If you know what your hours would be, then that would be the amount. Overtime and bonuses, if they are not speculative, should be included in your lost wage claim. One approach we may use is an average of your wages over the prior year.

3. UNREPORTED INCOME – If you are self-employed and do not report to the IRS all of your income, you are going to have a hard time with your lost earnings claim. We advise clients in these situations to only ask for their reported income. The first reason for this is that it inevitably will anger some or all on the jury who pay income taxes on all their wages, and it will not only hurt the lost earnings part of your case, but other elements of damages. Secondly, it will hurt your credibility as a witness, affecting as I just stated another element of damages; the injury portion. Finally, you would be getting up on the witness stand and stating under oath that you lied to the IRS opening yourself up to issues with a very powerful federal agency.

4. VACATION OR SICK TIME – If you have to use your vacation or sick time because of the injury, this is compensable. This is a benefit you had to use up because of the negligence of the defendant. We always include this in our lost earnings analysis. Defendants argue about this, both adjusters in negotiation and attorneys at trial, but it is compensable. That being said, it is not quite as certain an issue at trial as those losses of earnings that came directly out of your pocket.

5. JUROR BIAS ON LOST EARNING CLAIMS – One issue that we deal with is when we have clients that make, relatively speaking, very good livings and have very large lost earning issues. There are juror's that don't want to give wealthy white collar or even highly paid blue collar workers the full value of their lost earnings claim for various issues; political, personal or otherwise. The only solution to this problem is being very careful and wise in selecting a jury. Having an attorney experienced in personal injury litigation and local knowledge of the community is helpful for these types of issues.

6. LONG TERM LOST WAGES – If the plaintiff is going to be unable to go back to work ever, or it is uncertain, it is important to get extra expert witness support for trial. This could just involve the treating physician. It can also involve hiring a vocational rehabilitation expert to testify about the impact of the injury on your ability to make a living. It could also involve hiring an economist to testify as to the present value of your wage loss. Our firm is experienced in litigating these types of cases and regularly hires these types of experts to assist our clients in litigating and pursuing these types of claim.

Like all issues in litigation, lost earnings claims can contain traps and pitfalls for the unaware. It is important to get good legal advice early in the process so that you do all that is necessary to document your legitimate claims in your personal injury claim.

CONTRIBUTORY NEGLIGENCE

The doctrine of contributory negligence is often a big hurdle in personal injury cases. The doctrine comes from English Common Law and indirectly from the common law principle of unclean hands. The crux of the doctrine is this; if the plaintiff is at fault in any way in causing his injury, this is a bar to him recovering any damages. Practically what this means is that if a jury decides that the defendant was negligent, but causally he was 99 percent at fault and the plaintiff is only one percent at fault, then the plaintiff is barred from recovery.

Historically this was the law in a majority of states, but in the last 20 years there are only 3 or 4 states that still retain the doctrine of contributory negligence. Unfortunately, North Carolina is one of them. The states that have rejected contributory negligence have done it legistlatively and replaced it with the Doctrine of Comparative Negligence. With Comparative Negligence if the plaintiff is found 25 percent at fault then the award is reduced by 25 percent. This allows a great deal more equitable consideration than the harshness of contributory negligence.

It is important to recognize early in your case whether there is a contributory negligence issue. There are ways to deal with it factually, as well as legally. There is an affirmative defense called the last clear chance doctrine, and there are also instances where the defendant is grossly negligent where mere ordinary negligence is not sufficient to bar a plaintiff's claim. Contributory negligence comes into play in all types of tort cases, motor vehicle cases, premises liability cases; any case involving negligence. Contributory negligence is perhaps most challenging in premise liability cases, or what some call slip and fall cases. In these cases you have to prove negligence by the landowner; which would be a dangerous condition the defendant knew of or in the exercise of reasonable care should have known of. The challenge comes in the fact that if the condition is really obviously dangerous, it opens the plaintiff open to the argument that he or she should have recognized and seen the dangerous condition.

So while contributory negligence is a challenge, it is a reality that Smith Dickey & Dempster has been dealing with for decades. Get your free legal consultation before you give a written or recorded statement, as you may unintentionally open yourself up to a contributory negligence argument by the defense.

MINOR IMPACT SOFT TISSUE INJURY CASES

In the last 10 years there is an acronym for a type of case; MIST – Minor Impact Soft Tissue Injury Case, that the insurance companies have come up with. It basically means a muscle injury to the neck or back is claimed and there is little or no property damage done to the vehicles involved. These have become very challenging to prevail on. We will start with the bad news. About 10 to 12 years ago the insurance companies started trying a lot of these types of cases, and to be honest have done very well in a large number of them. They argue basically that if there is no damage to the car then it is not credible that the plaintiff was injured. Add to that argument that soft tissue injuries do not show up on x-rays or MRI's and are for the most part subjective in nature and it becomes a stronger argument. Then add the affect mass lawyer advertising, insurance company propaganda and other cultural issues have had on the reputation of the civil justice system and it becomes a bigger challenge. We don't start out on a level playing field. As plaintiff's we have the burden of proof and there is such a bias that we have to overcome from the beginning to pick a fair jury that these cases are particularly tough. The other challenge is typically the amount of money involved does not make it feasable to hire an expert witness to testify as to the force of impact.

Now the good news; a good number of these cases can be won. Many law firms turn all cases down with less than $ 1,000 in property damage to the plaintiff's car. Here at Smith, Dickey & Dempster we

take a much more nuanced and practical approach. We will talk to you about your case, look at ALL the facts, and be up front to you about whether yours is a case worth pursuing. There are many factors to consider; the size of the vehicles, the damage done to EITHER vehicle, and any other factors that might help a jury believe in the credibility of your claim. It is important to sit down with an attorney at the beginning of your claims process who will tell you the truth about your claim, and do it based on experience. We have tried many of these cases, some successfully, and some not as successfully. We will tell you from the beginning whether your injury claim is worth pursuing. That way you can know your chances of getting your medical bills paid from the beginning. We do understand that modern vehicles are engineered to protect the vehicle and even the bumper, and that can increase the velocity of the movement of the neck in a whiplash situation. Older cars the fender used to absorb more of the crash, while modern bumpers push the vehicle forward, causing more motion. We can sit down with your medical records and explain the findings by medical providers that are objective in nature and cannot be faked. We will look at the whole case. Another advantage in these cases that are smaller is that in many situations you can recover attorney fees if you prevail. That means that the attorney gets paid separate from the award and you can keep the whole jury award for yourself after paying costs and medical expenses. Our firm has been quite successful at this, and are happy that this means our clients get to keep more of the award.

So if you have a MIST case, give us a call. We will be glad to sit down with you and shoot straight regarding whether YOUR claim is worth pursuing.

HOW MUCH AUTO INSURANCE DO YOU NEED?

We often get asked this question, and it is a very important question to ask and to answer. Unfortunately, we deal with injured persons who find out too late that they should have had more motor vehicle insurance than they had; usually much more. This article is an attempt to warn folks ahead of time so that they can have adequate coverage if they do suffer significant injuries in a personal injury case. The first thing do address is the myth that many insurance agents seem to promote; in that they are selling “full coverage”. That term really does not mean much, it usually means that they have liability insurance, Uninsured Motorist Coverage, and possible medical payment coverage. Unfortunately, it could also mean that you only have the minimum limits required by North Carolina law, which is $ 30,000. That is just not enough. That is the first misconception addressed. I will address the types of insurance below, and give advice as we go.

Liability Insurance – This is the insurance you have to protect your assets and to be paid to others if they are injured by your negligence or someone who is driving your vehicle and is negligent. How much of this you need depends on whether you have personal assets that need protecting. If you do, we recommend at least $300,000/$500,000 coverage. That means that it covers up to $300,000 per person and a maximum of $500,000 per accident. This is not that expensive. We also recommend a $1,000,000 umbrella in most situations. It is a very good bargain, usually less $ 200 to @ 250 per year.

Underinsured Motorist Coverage – (UIM) this is coverage that protects you if you are in a motor vehicle collision. It protects you if you are seriously injured and the tortfeasor only has minimum limits or no much more than minimum limits. We always recommend at least $300,000//$500,000 in this situation as well. Just a couple of weeks in the hospital can now run up bills in excess of $200,000. Once again, with medical costs today most everybody should get $1,000,000 in coverage if possible, as it is relatively inexpensive insurance. This is insurance that protects you. The need for more insurance would be similar to an analysis for life insurance. If you are the main breadwinner in your family, or have many depending on you financially, it is important to have UIM coverage that is sufficient. What type health insurance you have could enter into this analysis as well. If you have health insurance that does not allow the insurer subrogation rights (getting paid back out of the settlement), this could affect how much UIM you think you need.

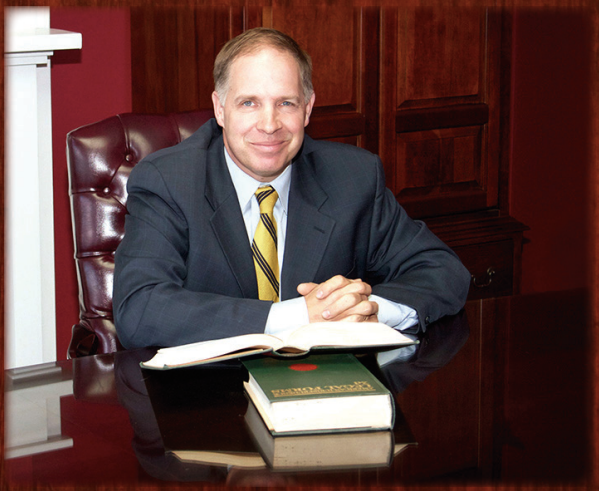
Uninsured Motorist Coverage – (UM) this is also coverage that protects you. The only difference between this and UIM is that this protects you when you are injured by someone without insurance. The same statements I made about UIM would apply here.

Medical Payments Coverage – This is coverage that pays your medical bills up to the amount contracted for. Typically we see it in amounts of $ 1,000 $ 2,000 or $ 5,000. Occasionally we see amounts greater than that. Med pay is paid out regardless of who is at fault in the collision. The vehicle that you are in is the primary policy, and your own policy will cover members of your own household even if you are not in your insured vehicle as secondary coverage. Our opinion on Med pay is that it is good coverage, it is affordable coverage and it is helpful. However, we would encourage that it is more important to have higher amounts of Liability and UM and UIM.

We meet with clients all the time that have cases that do not have enough coverage. Whether it is a widow who lost her husband with 3 children or a brain injury, there is nothing worse than having these types of cases with only $ 30,000 in coverage. Do yourself a favor now, protect you and your family by having adequate automobile insurance coverage.

CONCLUSION

We hope that our Top Ten Tips in Personal Injury Cases has been of some benefit to you in explaining some of the issues facing you in your personal injury case. Remember that with the development of tort law and especially rights of subrogation or liens from health care providers and health insurance companies, as well as Medicare and Medicaid liens and other government liens, personal injury litigation has gotten extremely complex. Please consult a local, experienced attorney who focuses their practice in representing injured persons. Word of mouth is the most reliable way to hire an attorney; hire a law firm that has a well established reputation in your community. We would appreciate the opportunity to give you a free consultation today.



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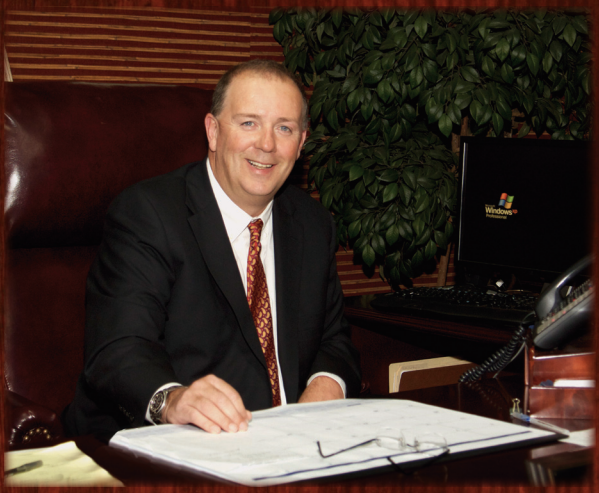

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