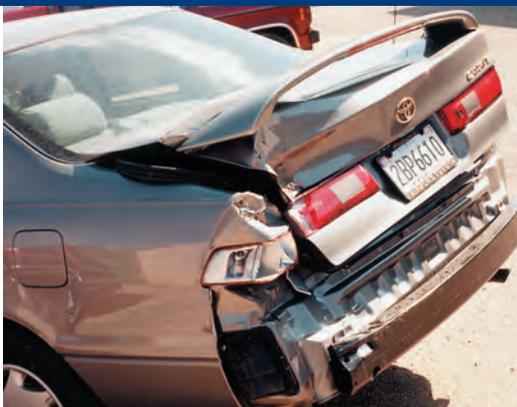


*Motor Vehicle Collisions:*

# A Victim's Handbook<sup>®</sup>

*Alabama Edition*



*A summary of legal rights for injury victims and their families*

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*Infotech Publications #17.1212*  
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# Motor Vehicle Accidents: A Victim's Handbook

- Alabama Edition -

## PREFACE

Being injured in a motor vehicle accident, or having a family member injured or killed in a motor vehicle accident, is a tragic reality faced by thousands of Alabama citizens each year. The resulting grief, aggravation and frustration are greatly increased when the accident was caused by the fault of someone else. The individual or families confronted with this situation find themselves facing a number of questions and important decisions. Some of those questions and decisions involve the legal rights of an accident victim.

This handbook is designed to provide general information on Alabama law for victims of a motor vehicle accident. Some of the material in this handbook was originally generated for use in various courses and seminars taught by the authors for lawyers and paralegals. Throughout this handbook the reader will find abbreviated references cited with the general principles of law. A reference guide can be found in the appendix and most of these references can be found in a local county public law library.

This handbook is intended for the purpose of offering legal advice as to the merits of a particular legal claim and it is not intended to be an authoritative legal text on motor vehicle accident law in Alabama. The reader is reminded that the law is a dynamic subject and constantly changing through judicial interpretations and legislative acts. Any questions

about the application of the information contained herein should be directed to a competent and experienced attorney. This handbook is provided as a service of Boteler, Finley & Wolfe, Attorneys at Law, for the purpose of providing their clients and interested persons with general information about victims' rights regarding motor vehicle accidents in Alabama. To the extent anything contained within this publication may be construed as an attorney advertisement, Alabama Bar Association regulations require the following disclaimer:

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## THIS PUBLICATION PROVIDED AS A COURTESY OF BOTELER, FINLEY & WOLFE, ATTORNEYS AT LAW

Today's law firm of Boteler, Finley & Wolfe was established in 1999 and is located in the historic Burns-Sparks building in the mid-town area of Mobile, Alabama. Mark Wolfe has practiced law since 1987. Mark has an AV rating by Martindale-Hubbell. This is the highest rating that can be attained by a lawyer and only 15% of lawyers have an AV rating. The rating is based upon peer review assessments by other local attorneys and local judges. In 1999 Knox Boteler joined the firm and in 2008, Karlos F. Finley joined the firm. The attorneys at Boteler, Finley & Wolfe have handled over 4500 personal injury claims and cases. These cases have ranged from catastrophic injury and death cases to the most common automobile accident injury cases involving soft-tissue injuries. With over 40 years of combined legal experience, the attorneys at Boteler, Finley & Wolfe have established a reputation with local insurance adjusters and insurance defense lawyers as being well prepared and aggressive advocates for injury victims. This philosophy of representation is reflected in the law firm's mission statement:

*committed to helping injury victims and their families for over twenty-five years*



The attorneys at Boteler, Finley & Wolfe are active in numerous professional organizations that advocate laws on behalf of injury victims and consumers. They devote their time and financial resources to actively promoting and protecting the rights of injury victims and their families. But more importantly, the attorneys at Boteler, Finley & Wolfe are active in their community and churches. Each year they donate their time and money to numerous charitable projects and groups in the South Alabama area. The majority of new cases at BF&W come from referrals and recommendations of former clients. This fact encourages the attorneys at Boteler, Finley & Wolfe to strive for complete and full client satisfaction. This reliance on excellent service to each and every client helps distinguish BF&W from many of the other attorneys in our area who rely only on advertising for new clients.



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CHAPTER ONE

# *General Information*

- Overview of Legal System
- Overview of a Civil Lawsuit



# GENERAL INFORMATION

## Overview of the Legal System

The American Legal System is divided into two main areas: Criminal Law and Civil Law. Criminal Laws are designed to protect all of the people against certain types of behavior or actions. The main objective of Criminal Law is to punish the wrongdoer for committing a crime against the people. That is why the prosecution of a criminal case is brought by the state, e.g. *The State of Alabama vs. John Doe*.

Criminal laws are designed to protect all people of the state. Civil laws are designed to protect individual rights and provide compensation for individuals. While a crime is a wrong committed against the people of the state, a tort is a wrong committed against an individual. A person who commits a tort is called a tortfeasor.

The victim of a tortfeasor has a “cause of action” against the tortfeasor for damages caused by the tortfeasor’s behavior. Unfortunately, the state does not prosecute tortfeasors. Rather the victim of a tort must bring their own lawsuit against the tortfeasor to recover monetary compensation for the injuries and damages, e.g. *Mary Smith vs. John Doe*.

Alabama recognizes a variety of torts and allows victims of a tortfeasor to be fairly and reasonably compensated for their injuries and damages. In certain types of tort cases, the law also allows for the victim to recover punitive or punishment damages from the tortfeasor.

Before a person is legally entitled to recover compensation from a tortfeasor, he or she must prove that a tort was committed and the victim’s damages were the proximate result of the tortfeasor’s action. Also, in a tort case there may be specific defenses available to the tortfeasor. These defenses may prevent the victim from recovering compensation.

## Overview of a Civil Lawsuit

In many instances a victim of an automobile accident can recover compensation from the tortfeasor (at-fault driver), or his insurance company, without having to file a lawsuit. However, if a dispute arises among the parties as to any aspect of a victim’s claim, the victim may have no alternative but to file a lawsuit against the at-fault driver. What follows is a brief summary of the legal procedures related to such a lawsuit.

The rules concerning Civil lawsuits are contained in the Alabama Rules of Civil Procedures (hereinafter abbreviated as ARCP). In Alabama, a civil lawsuit is started by filing a Complaint wherein the victim states his or her

claim for relief against the tortfeasor. ARCP 3 (c). The victim is now referred to as the Plaintiff and the tortfeasor is the Defendant. Collectively, the Plaintiff and Defendant are known as the “parties” to the lawsuit.

Upon being served with a Complaint, the Defendant must file a response, which is called an Answer. In the Answer, the Defendant will state the reasons why he or she believes the Plaintiff is not entitled to a monetary recovery. ARCP 12 & 13.

It is important to remember that the Plaintiff has the burden of proving the allegations contained in the Complaint. Unlike a criminal case, the burden of proof in a civil case is not “beyond a reasonable doubt.” Alabama law requires the Plaintiff to prove the allegations in the Complaint to a “reasonable satisfaction.” Alabama Pattern Jury Instruction Civil 8.00 (hereinafter abbreviated as APJI).

The filing of the Complaint and Answer is generally referred to as the Pleadings. Once the Pleadings have been filed, the next phase of the civil lawsuit is known as Discovery. The purpose of this phase of the lawsuit is to “discover” information and documents related to the issues in dispute.

The two main discovery methods are interrogatories and depositions. ARCP 26 - 37. Interrogatories are written questions from one party to the other. ARCP 33. A deposition is when a party or witness appears before the other party’s attorney and answers questions. The responses are usually recorded by a court reporter and transcribed. ARCP 30.

After discovery is complete the case then proceeds to trial. The trial may be a bench trial or a jury trial. A bench trial is where the judge decides the disputed facts. A jury trial utilizes a jury to resolve the disputed facts. ARCP 39. In both types of trials, the judge’s responsibility is to rule on and resolve any legal questions or legal issues that may arise.

At the conclusion of the trial the jury, or judge if it is a bench trial, returns a verdict. The parties have a right to appeal the verdict if they are dissatisfied with the result. Generally, on appeal conclusions of fact cannot be challenged. Rather, the main focus on appeal is the judge’s decisions on legal issues and applicable law.

## CHAPTER TWO

# *Theories of Recovery*

- Negligence
- Wantonness and Willfulness
- Wrongful Death
- Negligent Entrustment
- Dram Shop Action
- Product Liability
- Agency



# THEORIES OF RECOVERY

## Negligence

The most common tort arising from an automobile accident is negligence. In Alabama, negligence is defined as “the failure to use reasonable care to prevent harm to oneself or others.” APJI 28.01. Every person who operates a motor vehicle on a public highway in Alabama is “under a duty to exercise reasonable care to avoid inflicting injury and/or damage upon others who may be lawfully using the same public highway. Reasonable care means such care as a reasonably prudent person would exercise under the same or similar circumstances.” APJI 26.00.

Alabama has adopted certain laws known as “Rules of the Road” which can be found in the Alabama Code Sections 32-5A-1 through 32-5A-266. Drivers on the public highways of Alabama have a legal duty to obey the Rules of the Road. “The violation of certain of these Rules of the Road by persons using the public highway is negligence as a matter of law.” APJI 26.11. Alabama law also requires that, “a driver of a motor vehicle must keep a lookout for those who are also using the highway and must exercise due care to anticipate the presence of others upon the highway.” APJI 26.08.

To put it simply, drivers of motor vehicles must pay attention, obey traffic laws and be careful. Before any monetary recovery can be obtained against a negligent driver it must be proven that the negligence caused or contributed to the damage and injuries complained of by the victim. “The cause of harm is that cause that naturally and probably brings about the harm.” APJI 33.00.

To recover money for negligence it is not necessary to show that the at-fault driver’s actions were intentional, deliberate or reckless. The victim of a negligent driver is entitled to recover compensatory damages from the at-fault driver. Compensatory damages are defined as monetary compensation to the victim to compensate him or her for the injury and other damages which have been inflicted upon him or her as a proximate result of the wrong complained of. APJI 11.02.

## Wantonness and Willfulness

Another fairly common tort that arises from an automobile accident is wantonness. The tort of wantonness most frequently arises when the at-fault driver was intoxicated at the time of the accident. Under Alabama law wantonness is the conscious doing of some act, or omission of some duty, with knowledge of existing conditions and an awareness that the act, or omission of some duty, will likely or probably result in an injury. APJI 29.00. Before a party can be found liable for wantonness, it must be shown that he or she consciously and intentionally did some wrongful

act or consciously omitted a known duty with a reckless indifference to the consequences. APJI 29.00. Because an intoxicated driver disregards the dangers of driving under the influence, such behavior is often deemed as wanton. As with negligence, it must be proven that the injury or damage complained of was proximately caused by the wantonness. A purpose, intent or design to injure is not an element of wantonness. APJI 29.01. The tort of willfulness contains all of the elements of wantonness along with an additional requirement. To be guilty of willfulness a tortfeasor must have a purpose, intent or design to injure. APJI 29.03.

If the at-fault driver is determined to be guilty of wanton or willful behavior the victim may be entitled to recover punitive damages from the at-fault driver along with compensatory damages.

## Wrongful Death

Under Alabama common law no tort action was recognized for wrongful death; however, as early as 1852 the Alabama Legislature identified the need for such a cause of action. Today a wrongful death action may be brought “for the wrongful act, omission, or negligence of any person, persons or corporations, his or their servants or agents...provided the deceased could have commenced an action for such wrongful act, omission, or negligence if it had not caused death.” Alabama Code Section 6-5-410 (a). “Damages in this type of action are entirely punitive, imposed for the preservation of human life and as a deterrent to others to prevent similar wrongs.” APJI 11.18.

## Negligent Entrustment

This tort is an action brought against the owner of the motor vehicle because the owner knew or, by the exercise of reasonable care, should have known that the at-fault driver was incompetent to use or operate the motor vehicle. APJI 28.20. Examples of this cause of action involve entrusting a vehicle to an unlicensed minor, a driver with a revoked or suspended drivers license or drivers with poor driving records. This tort is often invoked against Commercial Trucking companies who have hired an incompetent driver. Before recovery can be had against the owner, it must be proven that the accident and resulting injury or damages were proximately caused by the other driver’s incompetence. *Keller vs. Kiedlinger* 389 So.2d 129 (Ala. 1980).

## Dram Shop Action

This action, like a wrongful death action, arises from statutory law. An action or claim under the Dram Shop law is against an individual or entity that provided the at-fault driver with intoxicating liquors or beverages contrary to the provisions of law. “Every wife, child, parent, or other person who shall be injured in person, property, or means of support by an intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as punitive damages.” Alabama Code Section 6-5-71 (c). Furnishing liquor to a minor and selling liquor to a person who is visibly intoxicated are the two most common violations found in a Dram Shop action. Besides proving a violation of law, the victim must also prove that the liquor or beverage caused the intoxication of the at-fault driver and that the accident and resulting injury or damage was a consequence of the at-fault driver’s intoxication. APJI 36.93.

## Product Liability

This cause of action arises when a person is injured or killed in an automobile accident as a result of a defect in the vehicle. A products liability lawsuit is one of the most expensive and complex types of cases to litigate. In the context of an automobile “products liability” case the crashworthiness of a vehicle may be an issue. To successfully litigate a crashworthiness case against an automobile manufacturer, a victim must prove the following five elements:

- 1) The victim was involved in an automobile accident;
- 2) The automobile in which the victim occupied was manufactured by the defendant manufacturer;
- 3) At the time of the accident, the automobile in question was in substantially the same condition as it was when it left the manufacturer;
- 4) That the automobile was defective (unreasonably dangerous as designed);
- 5) The defect in the automobile proximately caused the plaintiff’s injuries. APJI 32.22.

To prove a product “defective” the victim must prove that a safer, practical alternative design was available to the manufacturer at the time it manufactured the automobile. APJI 32.22. In proving a safer, practical alternative design, the victim must show that the injuries would have been eliminated or reduced by the alternative design and the utility of the alternative design outweighed the utility of the design actually used by the manufacturer. APJI 32.22. Crashworthiness is not the only context in which a products liability claim may arise from an automobile accident; but, it exemplifies the complexity of a products liability claim. Defective seat belts, defective tires, defective braking systems, defective steering systems, defective suspension, defective seats and defective gas tanks are examples of some other products liability claims that have arisen from automobile accidents. As with crashworthiness, any products liability claim against a manufacturer requires the victim to prove many elements before compensation can be awarded.

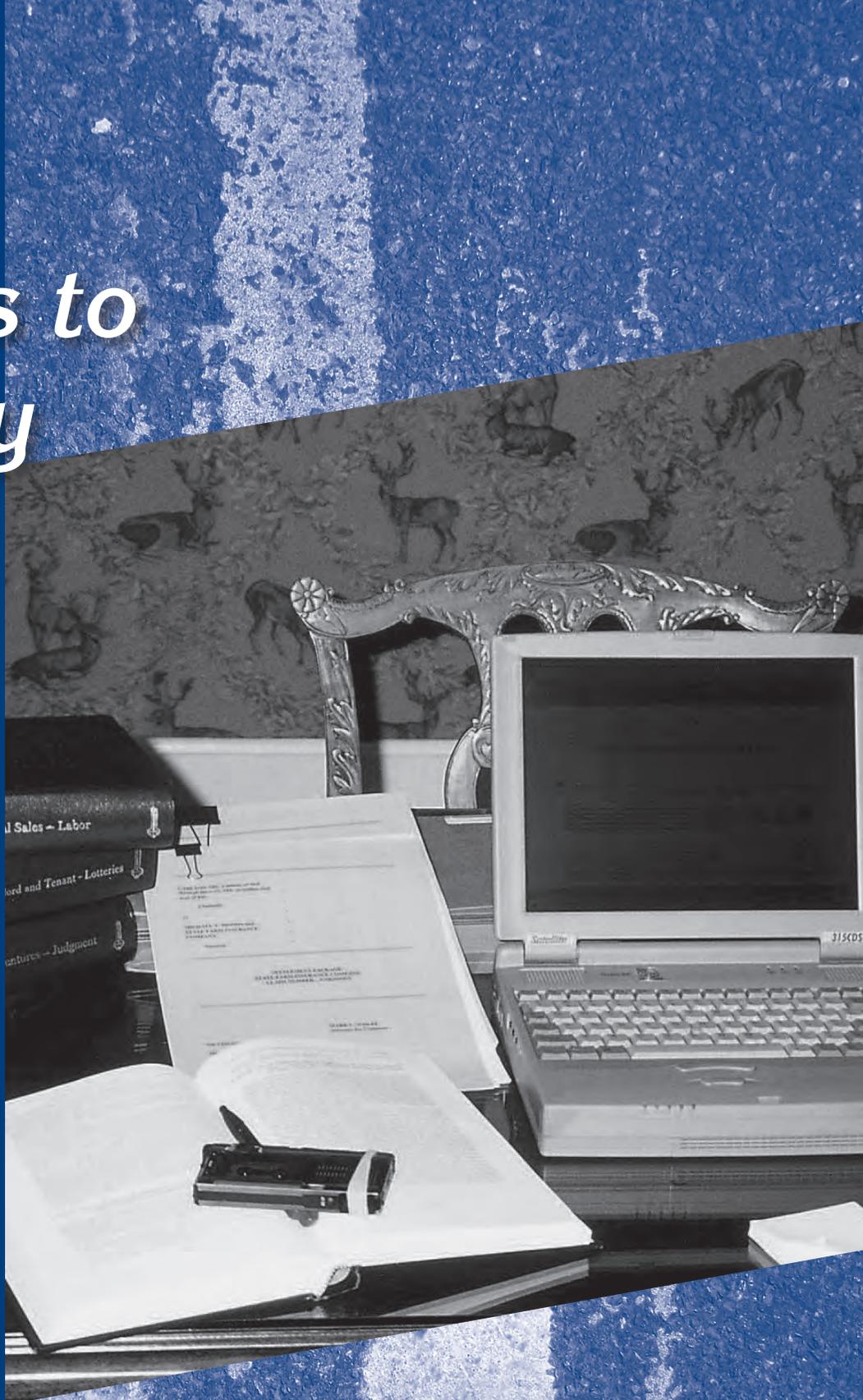
## Agency

Agency is not a specific cause of action; however, it is an issue that sometimes arises in a motor vehicle accident. Like negligent entrustment, agency may give rise to a cause of action against a party other than the at-fault driver. This issue often arises when the at-fault driver is driving a motor vehicle for his or her employer. “An agent is a person who, by agreement with another called the principal, acts for the principal and is subject to his control.” APJI 3.00. “A principal is liable to others for the negligent acts or omission of his agent, done within the scope of his employment and within the line of his duties.” APJI 3.06. “When an agent is engaged to perform a certain service, whatever he does to that end or in furtherance of the employment is deemed to be an act done within the scope of the employment.” APJI 3.01. “When an agent commits wantonness within the line and scope of his employment, his principal is liable for such wantonness regardless of the principal’s lack of actual participation in such wantonness of his agent.” APJI 29.02.

## CHAPTER THREE

# *Defenses to Recovery*

- Statute of Limitations
- General Denial
- Contributory Negligence
- Assumption of the Risk
- Sudden Emergency
- Mechanical Failure
- Guest Statute
- Act of God



# DEFENSES TO RECOVERY

## Statute of Limitations

The term “statute of limitations” refers to the period of time someone has to bring an action in court against the person and/or business who was at fault. In automobile accident cases, Alabama law provides that generally an individual, or the estate of an individual who was killed in an accident, has two years from the date of the accident to bring a lawsuit for negligence against the at-fault driver. Alabama Code Section 6-2-38 (a) and (e). There are exceptions to this rule for children and people who are mentally incompetent at the time of the accident.

This means if a civil action against the at-fault driver is not filed with the court within two years of the accident the case may be barred and no monetary recovery from the at-fault driver will be allowed.

Note: If the at-fault driver was an employee or agent of a governmental agency (city, county, state, federal) at the time of the accident, specific notification requirements **must** be complied with to preserve the two-year statute of limitations. This time period may be as short as six months. If you believe you may have a claim against a governmental agency you should contact an attorney immediately to determine how and when you should notify the governmental agency of your potential claim.

## General Denial

When attempting to recover monetary compensation from an at-fault driver, several defenses may be encountered. Simply put, a “defense” is an assertion that, if proven, may act as a bar to recovery. There are two types of defenses that may be asserted. A general defense and an affirmative defense

A general defense is usually a denial of responsibility. That is, an adverse driver (or someone from his or her insurance company) denies that they were responsible for causing the accident. This type of defense is often asserted in an intersection collision where both drivers claim to have had a green light.

An affirmative defense is where the adverse driver basically states that he or she may have caused the accident, but the victim is still not entitled to recover money from them. The most common affirmative defense encountered under Alabama law in motor vehicle accidents is contributory negligence. The defendant has the burden of proving all elements of an affirmative defense

## Contributory Negligence

Alabama is one of only four states that still recognizes the affirmative defense of contributory negligence. “Contributory negligence is negligence on the part of the Plaintiff that proximately contributed to the alleged injury, death or property damage.” APJI 30.00. If the Plaintiff proximately contributed to the accident, then the Plaintiff cannot recover compensation from the at-fault driver for the at-fault driver’s negligence. APJI 30.02. Theoretically this doctrine of law means that if the alleged at-fault driver was 99% responsible for the cause of the accident and the victim contributed 1% to the cause of the accident, the victim is not legally entitled to recover compensation. The harshness of this doctrine is why 46 other states have adopted some form of “comparative” negligence. Comparative negligence compares the alleged negligence of the plaintiff and defendant and allows for the apportionment of damages based upon the percentage each party contributed to the accident.

Some attorneys believe that jurors will overlook or forgive minor aspects of contributory negligence; however, the existence of this defense must not be overlooked when evaluating a potential claim against an at-fault driver.

It is important to remember that contributory negligence is not a legal defense to causes of action based upon wantonness and/or willfulness. APJI 30.02.

It is also important to remember that the defense of contributory negligence is generally not applicable against guests or passengers in a motor vehicle. APJI 26.06. This means that under some situations the passenger and/or guest in a motor vehicle may be entitled to recover compensation from the at-fault driver but the driver cannot.

## Assumption of the Risk

Assumption of the risk is another affirmative defense that may act as a defense for an at-fault driver. This defense has evolved from the doctrine of contributory negligence. As with contributory negligence, it may not be asserted as a defense to a cause of action based upon wantonness and/or willfulness. To avoid liability under this theory of law, the tortfeasor must prove three elements., the victim had knowledge of the existence of the dangerous condition; , the victim appreciated, or knew of, the danger and, the victim failed to exercise care for his or her safety by putting himself or herself in the way of the known danger. APJI 30.05.

## Sudden Emergency

This doctrine of law recognizes that someone confronted with an emergency situation may not have time to make a perfect decision. Alabama law holds that if a person, without fault of his own, is faced with a sudden emergency, he or she is not to be held to the same correctness of judgement and action as if he or she had time and opportunity to fully consider the situation. The fact that he or she does not choose the best or safest way of escaping peril or preventing injury is not necessarily negligence. The standard of care required in an emergency situation is that care which a reasonably prudent person would have exercised under the same or similar circumstances. APJI 28.15. This “defense” can also be raised by a victim when the at-fault driver asserts the affirmative defense of contributory negligence. It is important to note that this defense is not applicable if the party asserting it caused or contributed to the dangerous condition in the first place.

## Mechanical Failure

Owners or operators of motor vehicles also have certain duties imposed upon them to make sure their motor vehicle is in a reasonably safe condition before operating it on a public highway. However, if the owner or operator of a vehicle, without knowledge of a defective condition, experiences a mechanical failure and such mechanical failure is the sole proximate cause of the injury or damages, the owner or operator cannot be held liable. APJI 26.14. Many times in “mechanical failure” accidents, e.g., “my brakes went out,” the question becomes whether the mechanical failure was known or reasonably foreseeable to the owner or operator.

## Guest Statute

Alabama law makes a distinction between a “passenger” and a “guest.” This distinction becomes important if someone is injured or killed in an accident while riding in an automobile and the accident is the fault of the driver of the car occupied by the victim. Section 32-1-2 of the Alabama Code states: “The owner, operator or person responsible for the operation of a motor vehicle shall not be held liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor in or upon said motor vehicle, resulting from the operation thereof, unless such injury or death is caused by the willful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle.” Simply put, in Alabama a guest in a motor vehicle cannot recover against the owner and/or operator for damages suffered by the guest as a result of the operator’s negligence.

Alabama law defines the term “guest” as one who is invited to enjoy the hospitality of a driver of an automobile only for his or her (the rider’s) benefit without making any payment or conferring any material or tangible benefit upon the driver. APJI 26.05.

A passenger can recover from the owner and/or operator for the damages suffered as a result of the operator’s negligence. Alabama law defines a “passenger” as one who is carried in a vehicle for hire or reward or for the material benefit, present or anticipated, of either the driver or of both the driver and rider, which benefit arises out of the transportation provided. APJI 26.04.

Alabama law recognizes two situations wherein a “guest” may become a “passenger” and thereby allowed to recover from the owner and/or operator for damages suffered as a result of the operator’s negligence.

1. “A misrepresentation by the driver or another which induces one to become a rider in the automobile causes the rider to be a passenger and not a guest.” APJI 26.25.

2. Also, a guest’s protest against the operator’s driving can change the guest status to that of a passenger. APJI 26.26.

It is important to remember that the guest statute only prohibits a victim’s right of recovery from the owner and/or operator for “negligence” of the operator. A victim can recover if the operator’s conduct was wanton and or willful or if the accident is caused by someone other than the owner. On this point, potential claims under Dram Shop or Product Liability theories should not be overlooked.

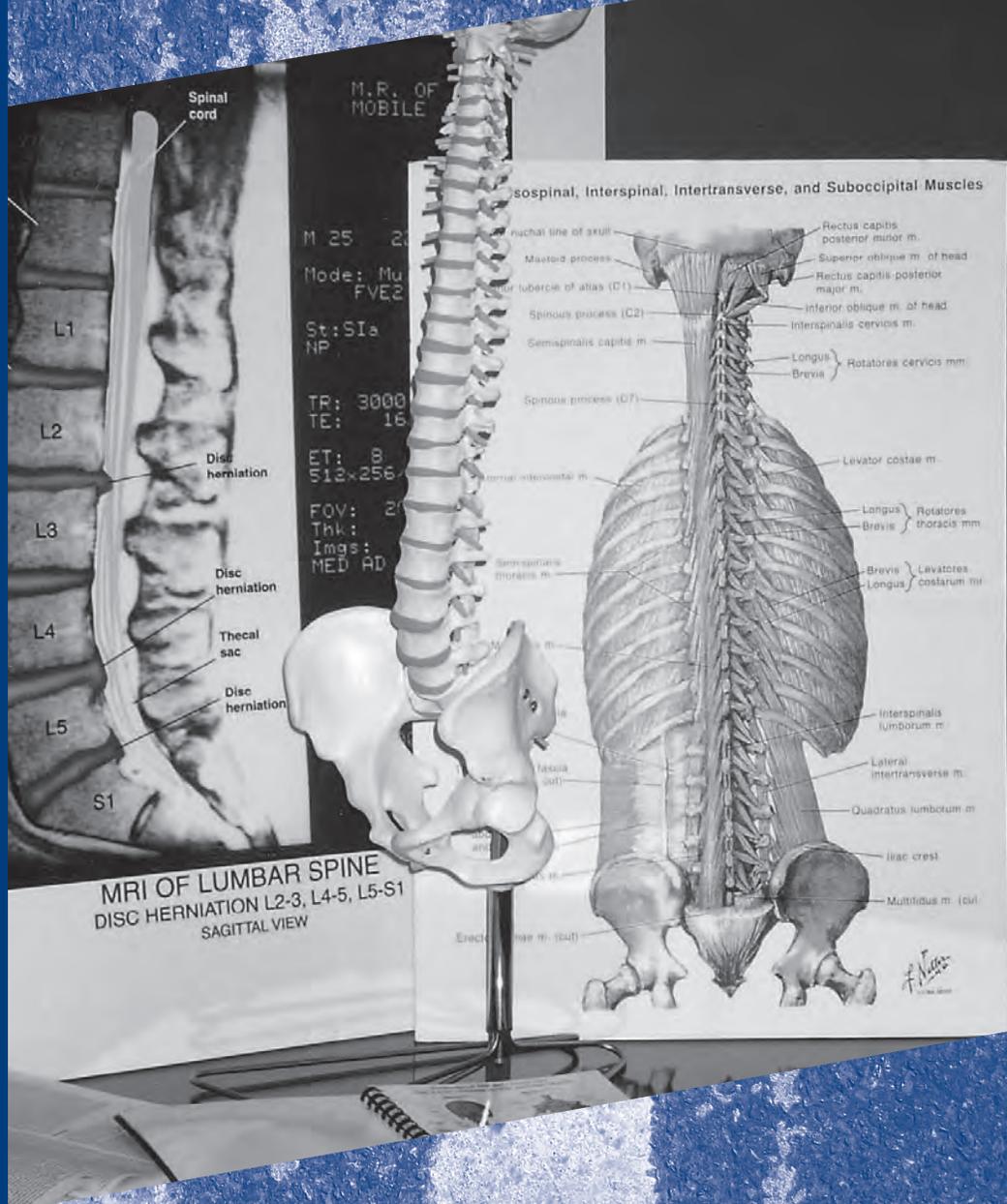
## Act of God

An “act of God” is a cause which no human prudence or power could prevent or avert. A tortfeasor is not liable if the injuries or damages complained of were caused by an “act of God.” APJI 28.18. Alabama law defines “act of God” as an unusual and extraordinary manifestation of the forces of nature that could not, under normal conditions, have been anticipated or expected. It applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality would afford no reasonable warning of them. APJI 28.18.

## CHAPTER FOUR

# Damages

- Proximate Cause
- Compensatory Damages
- Property Damage
- Personal Injury
- Other Damages
- Punitive Damages



# DAMAGES

The term “damages” means the amount of monetary compensation the victim is legally entitled to recover from the at-fault driver and/or his insurance company. In civil actions, such as those arising from a motor vehicle accident, Alabama law recognizes two types of monetary damages. These are compensatory damages and punitive damages. Before a victim can recover any damages from the at-fault driver he or she must prove that the injury or damage suffered was caused by the at-fault driver. APJI 11.01.

## Causation

Alabama law defines “the cause” of an injury (or damages) as “the cause of harm is that cause that naturally and probably brings about the harm.” APJI 33.00. This means in an automobile accident claim or case the issue of causation appears twice. First, did the actions of the other driver cause the accident? Second, were the victim’s injuries or damages caused by the accident? If the victim cannot prove both of these aspects of causation then he or she may not be legally entitled to recover from the other driver.

## Compensatory Damages

The purpose of compensatory damages is to “fairly and reasonably compensate the injured party for the loss or injury sustained.” APJI 11.02. In the context of an automobile accident, compensatory damages encompass both property damage and personal injury.

## Property Damage

A motor vehicle is “personal” property. In Alabama the “measure of damages for the damage to personal property is the difference between the reasonable market value of the property immediately before its damage and the reasonable market value immediately after its damage.” APJI 11.23. For example, if a vehicle was worth \$15,000.00 immediately before an accident, and \$5,000.00 immediately after the accident, then the measure of damage would be \$10,000.00. For practical reasons most insurance adjusters utilize repair estimates as a guideline for the difference between before and after market value. The repairs should return the vehicle to its pre-accident condition.

Another aspect of property damage is “loss of use.” APJI 11.23 states, “The loss of use of a personal automobile during a reasonable period for repair is an element of recoverable damages in addition to the difference between the before and after reasonable market value.” Case law in Alabama

has further held that damages such as towing charges and depreciation may also be recoverable as an element of property damage.

## Personal Injury

Monetary recovery for personal injuries from the at-fault driver (or his insurance carrier) can be classified as “economic” or “non-economic”. Economic damages are those damages that can be documented or calculated to a monetary certainty, e.g., medical bills and lost wages. Non-economic damages are those damages that cannot be documented or calculated to a monetary certainty, e.g., mental anguish and physical pain and suffering.

### *Medical expenses and future medical expenses*

The at-fault driver, or his insurance carrier, is responsible for all reasonable expenses necessarily incurred for doctors’ and medical bills which the victim has paid, or the victim’s insurance carrier has paid, or become obligated to pay. Also, the amount, if any, of reasonable expenses for medical care, treatment and services reasonably certain to be required by the victim in the future. APJI 11.09.

### *Loss of earnings*

If a victim is unable to work because of injuries suffered in an automobile accident, then the victim is entitled to recover what he or she was reasonably certain to have earned during the period of disability. APJI 11.10. A victim is also entitled to compensation for any permanent diminished capacity to earn wages caused by a permanent disability.

### *Non-economic damages*

What follows are some areas of non-economic damages recognized in Alabama:

- Physical pain and suffering,
- Mental anguish,
- Permanent injuries and disabilities, and
- Disfigurement.

It is important to realize the Alabama law provides no fixed monetary standard for compensating the above claims for non-economic damages. Rather the amount of compensation is left to the “good sound judgement and discretion” of the jury to award an amount that “reason-ably and fairly” compensates the victim. APJI 11.05.

Alabama law also allows the victim to recover for the aggravation of a pre-existing condition or a disease proximately related to the at-fault driver’s actions. APJI 11.08.

## Other Damages

Alabama recognizes several other types of claims for compensatory damages. These are sometimes called “derivative” claims because they are derived from the victim’s claim.

### *Loss of Consortium*

The spouse of a victim may also have a claim against the at-fault driver, even if the spouse was not injured or even involved in the automobile accident. This is known as a claim for loss of consortium. A husband’s consortium claim recognizes the right of a husband to “his wife’s company, fellowship, cooperation and assistance in the marital relationship as a partner in the family unit.” APJI 11.13. A wife’s consortium claim “includes love, companionship, affection, society, comfort, solace, support, sexual relations and services.” APJI 11.13-A.

### *Medical Expenses for Spouse or Child*

If a parent or spouse becomes obligated to pay medical expenses for the care and treatment of a spouse and/or minor child because they were injured by an at-fault driver, then the spouse is entitled to recover the reasonable expense for such care and treatment. APJI 11.14.

## Punitive Damages

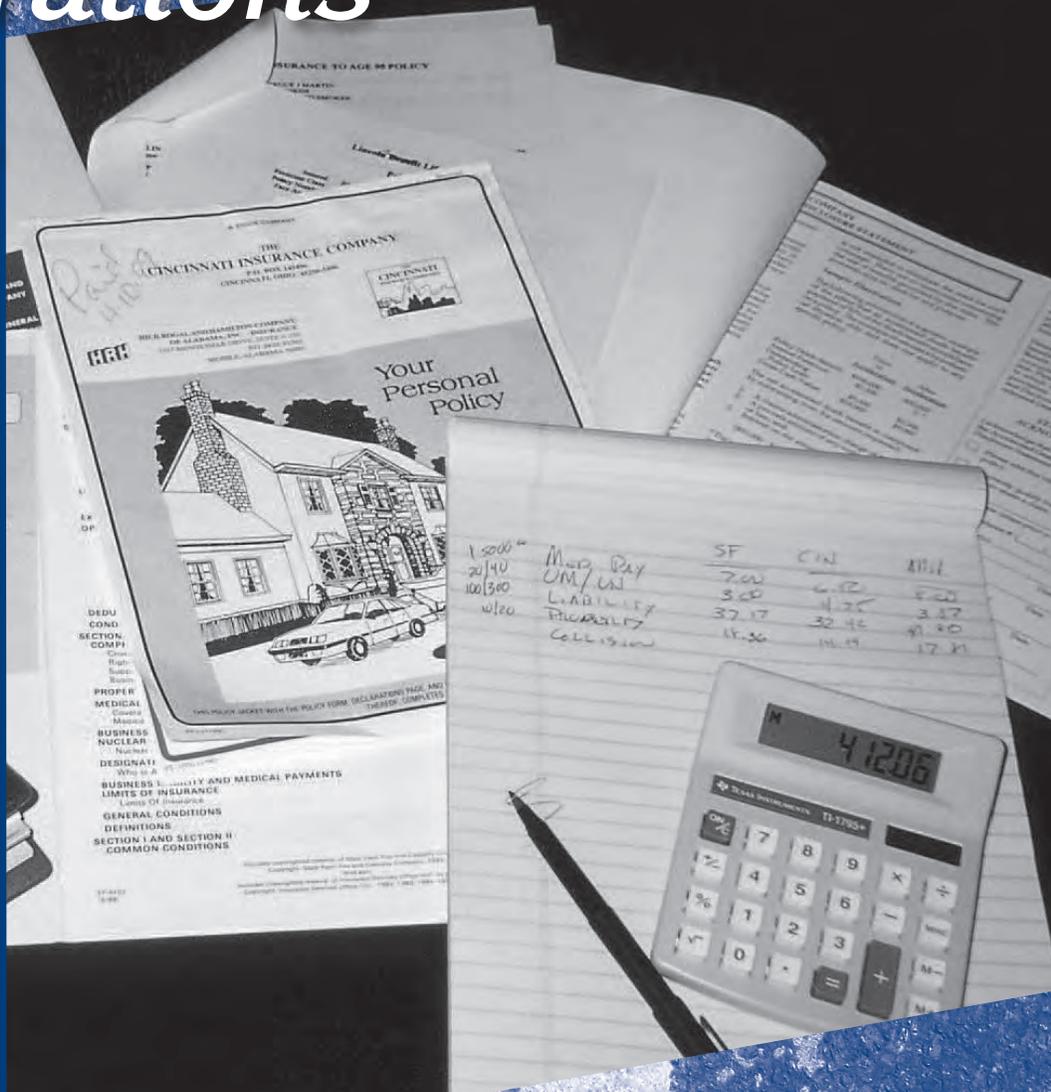
As indicated earlier in this handbook, certain torts allow for the possible recovery of punitive damages as well as compensatory damages from the at-fault driver. The purpose of awarding punitive damages is to allow monetary recovery for the victim by way of punishment to the at-fault driver, and for the added purpose of protecting the public by deterring the at-fault driver and others from doing such wrong in the future. APJI 11.03. For a victim to be entitled to recover punitive damages, he or she must prove by “clear and convincing evidence” that the at-fault driver consciously or deliberately engaged in “oppression, fraud, wantonness, or malice” with regard to the victim. APJI 11.03. Examples of cases where punitive damages have been allowed in motor vehicle claims include drunk drivers, reckless drivers, drivers who speed through school zones and drivers who change lanes without signaling.

Alabama law defines clear and convincing evidence as “evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion.” APJI 11.03.

## CHAPTER FIVE

# Insurance Considerations

- General Information
- Liability and Casualty Coverage
- Medical Payment Coverage
- Uninsured / Underinsured Motorist Coverage
- Subrogation
- Conclusion



# INSURANCE CONSIDERATIONS

## General Information

Before reviewing and discussing various insurance coverages and issues, it is important for accident victims to understand the insurance claim process and the roles of insurance adjusters. Despite all their catchy slogans, insurance companies are not “on your side”, “good neighbors”, etc. An insurance company is a business that makes money by collecting more in premiums than it pays out in claims.

## Coverage and Liability Issues

When an insurance claim is presented, that claim is given to an adjuster to review and handle. Some insurance companies have local adjusters and others have adjusters that work out of a regional office. Some companies use independent or third party adjusting companies to process and evaluate claims. Adjusters work for the insurance company and it is **not** their job to tell a claimant what his or her legal rights are. In fact, in a liability claim, their job is to resolve the claim in a way that is most favorable for their insured.

When a liability claim is presented, an adjuster first determines whether the policy is in effect and if coverage for the claim is available. Sometimes these early coverage issues can delay the processing of a claim for several weeks while the company determines if coverage exists. Once coverage is established the adjuster then tries to determine whether their insured was “at-fault” in the accident and, if so, what defenses to the claim may be available. Once this issue has been resolved then the adjuster may seek to settle or pay the claim. **Remember, in an automobile accident liability claim, the property damage claim and the personal injury claim are separate claims that can be resolved separately. However, just because the company agrees to pay on the property damage claim does not legally obligate the company to pay on the personal injury claim.**

## Liability and Casualty Coverage

Generally, policies of automobile insurance contain two areas of coverage. One area, commonly known as liability coverage, covers damages caused by the policyholder to others. The other area, commonly known as casualty or collision coverage, covers damages caused by others or by the policyholder, to the insured vehicle.

Within these two general types of coverage there may be several types of coverage available. The policyholder pays a premium for the specific coverage desired and the amount of coverage available. Some people choose only to buy “liability” coverage, while others opt for “full coverage.” If a

person is unsure of what coverage he or she has, a review of the declarations page of the policy should indicate the type and amount of coverage provided. Also, consultation with an insurance agent may help clarify coverage questions.

## Medical Payment Coverage

Medical Payment coverage, commonly called Med-Pay, is a specific coverage for medical bills incurred when someone is injured while occupying the insured vehicle. Med-Pay coverage usually pays regardless of whether the insured has other medical insurance and Med-Pay coverage is not based upon fault or non-fault. For these reasons most insurance companies limit the amount of Med-Pay coverage to \$1,000.00 or \$2,000.00. Also, the insurance policy will set forth a time limit for the presentation of a Med-Pay claim.

## Uninsured/Underinsured Motorist Coverage

Alabama law recognizes that many drivers either do not carry insurance coverage or may not carry a sufficient amount of coverage. For this reason, all policies of automobile insurance sold in Alabama must contain uninsured/underinsured motorist coverage. Ala. Code Section 32-7-23 (a). This coverage must be provided unless specifically rejected by the insured in writing

Uninsured motorist coverage provides benefits to the policyholder for personal injuries caused by an uninsured motorist. In effect, this type of coverage allows the victim (or victims) to recover compensation from his or her own insurance carrier just as if the at-fault driver actually had liability coverage.

Underinsured motorist coverage allows the victim to recover compensation from his or her insurance carrier for personal injury damages that exceed the liability coverage available to the at-fault driver.

Alabama case law has held that punitive damages may be recoverable in an action for uninsured/underinsured motorist benefits. However, it is important to remember that the insurance carrier can assert any defense that may be available to the uninsured/underinsured driver.

Before an insurance company has to pay uninsured/underinsured motorist benefits, the claimant must show or prove that the accident and resulting injuries were caused by the at-fault driver. Generally, this type of coverage does not apply to property damage caused by the at-fault driver.

The amount of uninsured/underinsured motorist coverage may be increased beyond the amount of coverage stated on the declarations page of the policy if the policyholder has more than one vehicle on the policy. This is known as “stacking” coverage. Ala. Code Sec. 32-7-23 (c).

The resolution of a liability claim may jeopardize the availability of underinsured motorist benefits. For example, acceptance of the at-fault driver’s liability limits without obtaining the consent of the underinsured carrier may void recovery of additional insurance benefits. **It is important that the victim of an automobile accident fully and completely understand the legal ramifications of resolving this type of claim prior to accepting a settlement or signing a release.**

Once an insurance carrier pays uninsured/underinsured motorist benefits to the victim or victims, the insurance company then has a right to sue the at-fault driver to recover the amount of money it paid to the victim. This right of recovery is generally known as subrogation.

## Subrogation

Subrogation allows an insurance company, under certain situations, to recover money it has paid on behalf of a victim as a result of the actions of an at-fault driver. In the context of an automobile accident case, health insurance companies often seek to be reimbursed by the victim for medical bills it paid if the victim makes any recovery from the at-fault driver or his or her liability insurance.

Many health insurance policies have a provision allowing for subrogation against a victim’s recovery from an at-fault driver; however, some do not and the victim should clarify this issue with his or her health insurance carrier.

## Conclusion

As demonstrated by the brief synopsis of some insurance considerations above, issues of coverage and rights of recovery can be complex. Many victims of an automobile accident will have to deal with an insurance company and face insurance issues in their attempt to recover fair and reasonable compensation. This process can be aggravating, frustrating and confusing. It should be remembered that insurance companies have attorneys to advise their adjusters on legal issues related to claims. The information in this section is not intended or designed to cover all the various insurance issues that may arise in an automobile accident case. The reader is advised to seek counseling from a competent and experienced attorney for any questions regarding insurance issues.

# Understanding Insurance Companies

The following example best describes how an insurance company works when handling a claim. Keep in mind that almost 70% of all injury claimants settle their injury claim without ever consulting with an attorney. The majority of people rely on the insurance company to do the “right thing” and pay them what they are owed on a claim. Adjusters are trained on how to talk to claimants so as to discourage them from consulting with an attorney. This is because insurance industry studies show claimants who are represented by an attorney recover substantially more than those who are unrepresented and relying on the insurance company to do the “right thing”.

For the purpose of our example, let’s suppose that in a nearby room are ten people and you owe each of them one thousand dollars. Now imagine only three of those people have actually talked to an attorney and know you owe them a thousand dollars. Seven of the people in the room know you owe them some money but they really have no idea how much you actually owe them. Now suppose someone comes in and gives you ten thousand dollars to go pay your debt to those ten people. They also tell you that if any of that ten thousand dollars is left over after you have paid off the ten claimants, you get to keep the remainder. What are you going to do?

The morally correct thing to do would be to pay each person a thousand dollars and close their claim. However, if you were a business, the “right thing” to do would be to call each claimant aside and try to settle their claim as cheaply as possible. “Look I know I owe you some money, don’t I owe you about \$200.00?” ..... “What? You say I owe you \$500.00..... well how about \$350.00 and you sign this release saying I’ve paid my debt to you in full.”

You get the picture. This is exactly how insurance companies handle claims and why they do not want claimants seeking advice from an attorney.

CHAPTER SIX

# *Hiring an Attorney*

- Contingency Fees
- Do You Need An Attorney?
- Selecting An Attorney
- About Case Evaluation



## HIRING AN ATTORNEY

For accident victims and/or their families the decision to hire an attorney can be a very important one. This decision can become difficult because of an abundance of anxious attorneys clamoring to represent accident victims, and insurance adjusters who are constantly telling victims that they don't really need an attorney. The material that follows provides some information that may help when making the decision whether or not to hire an attorney.

### Contingency Fees

Today most people are aware that attorneys represent accident victims and/or their families on a contingency fee. That is, the attorney's fee is a percentage of the monetary recovery obtained for the victim. If there is no monetary recovery for the victim then the attorney receives no fee. While this sounds straightforward, there are several things the victim should consider prior to signing a contingency fee representation agreement.

#### Percentages and Application

Alabama law does not directly regulate the percentage an attorney can charge a client under a contingency fee agreement. Fees generally range from 33⅓% to 45%; however, they may be more or less depending on the type of case. The standard fee is one-third (33⅓%) for a typical bodily injury claim arising from a motor vehicle accident.

Just as important as the percentage charged is what the percentage will be charged against. For example, a 25% fee charged against all monetary recovery may cost the victim more than a 40% fee charged against just the monetary recovery for bodily injury. Consider the following recovery example:

Property Damage \$10,000.00  
Med-Pay Recovery \$ 2,000.00  
Bodily Injury \$15,000.00

Total Recovery \$27,000.00

a) 25% of the total recovery equals \$6,750.00 in attorney fees (.25 x \$27,000).

b) 40% of the bodily injury recovery equals \$6,000.00 in attorney fees (.40 x \$15,000).

In example b), the \$750.00 savings is important but also important is the fact that no fee is charged on the property damage recovery or Med-Pay recovery. Many times these claims can be resolved prior to the bodily injury claim. Obviously if it is going to take \$10,000.00 for the victim to repair or replace their damaged vehicle, paying the attorney \$2,500.00 of that money could prevent the repair

or replacement of the damaged vehicle. Therefore, it is important to understand how the contingency fee will be applied to the various potential recoveries. You should ask the attorney if he or she charges a fee on med-pay payments or property damage settlements.

#### Expenses

Another aspect of contingency fee representation agreements that should be reviewed is the handling of expenses. Some attorneys require the client to pay all expenses associated with a claim and/or case. On the other hand, attorneys and law firms that concentrate their practice on injury cases advance litigation expenses for the client and get reimbursed for those expenses if there is a monetary recovery. The reimbursement of those expenses may be in addition to the percentage charged as attorney fees.

Litigating a case, even a simple automobile accident case, can be very expensive. Filing fees can range between \$159.00 and \$329.00. Depositions cost between \$150.00 and \$350.00 each. Doctor's charge \$500.00 to \$1,000.00 an hour to give a deposition. Also, some cases require the hiring of expert witnesses to reconstruct the accident or calculate speed. Products liability cases involve expert review of the alleged defective product, such as a tire or seatbelt. In addition, serious personal injury cases such as paralysis or brain damage require the hiring of vocational, medical, economic and lifecare experts. Along with these expenses there are numerous miscellaneous expenses that may be incurred. If you enter into a representation agreement which requires you to pay expenses, make sure you have an estimate as to how much the expenses will be and make sure you have that amount available. The inability to pay the costs to properly work-up and present your case could be the difference in receiving compensation or not receiving compensation for the injuries and damages suffered.

#### Get a Copy of Your Fee Contract

Alabama law requires that all contingency fee agreements be in writing. (ARPC 1.5 (c) You should retain a copy of the signed fee agreement.

#### Get a Distribution Schedule

When your claim or case is concluded, you are entitled to receive a distribution schedule showing how the proceeds were distributed. "Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination." ARPC 1.5(c).

## DO YOU NEED AN ATTORNEY?

Many times insurance companies attempt to settle claims with victims, and/or their families, directly and prior to an attorney becoming involved. It should be noted that not every automobile accident situation requires the involvement of an attorney. This may be especially true when only property damage is involved. However, accident victims should remember that insurance companies make their money from the difference between premiums collected and claims paid. Also, as previously stated, the insurance adjusters have the benefit of consulting with their retained attorneys. Furthermore, if a victim is dealing with an adjuster for the at-fault driver's insurance company, that adjuster has no obligation or duty to inform the victim of his or her rights. In fact, such an adjuster may have to handle the matter in a way that represents the best interest of the at-fault driver. If the goal of an insurance company is to pay the victim as little as possible, then it makes sense that the victim should have someone working for him or her whose goal is to recover as much as possible. Between these two extremes, fair and reasonable compensation is usually found.

Remember, once a claim or lawsuit is settled and a release executed, the victim will generally be prevented from seeking any further compensation from the released party.

## SELECTING AN ATTORNEY

In years past, prior to advertising, attorneys obtained new clients through their reputation and recommendations of former clients and members of the community. While many attorneys still rely solely on this method of client development, others utilize advertising as a means of acquiring new clients. Some unethical attorneys may even attempt to directly solicit a potential client even though this is a direct violation of Alabama law. "A lawyer may not solicit, or cause to be solicited on his behalf, professional employment from a prospective client, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person or by telephone." ARPC 7.3. This rule does not prohibit a direct mailing to a prospective client. All direct solicitations should be reported to the local Bar Association and/or the Alabama Bar Association.

When selecting an attorney it is important that the victim trust the attorney selected and have confidence in his or her ability to adequately and fairly represent the victim's interest. An attorney should not be selected just because he or she has a catchy advertisement on television or is the first to show up at the victim's hospital room.

You should inquire about the attorney's experience, including courtroom experience, and previous results in other similar type cases. You should ask the attorney to show you articles reported in the local newspaper about cases and settlements they have handled. You should ask whether the attorney has ever been disciplined or suspended by the State Bar Association. Also, ask whether any clients have ever filed grievances against the attorney. You should ask which attorney would be doing the majority of work on your case and meet with that attorney prior to signing a representation agreement. Finally, you should ask the attorney about the time and resources that will be needed on your case. This is to make sure that attorney and his or her law firm has the financial resources and personnel for your case.

Once you have decided upon an attorney and/or law firm, you should make sure that you fully understand the terms of the representation agreement and you should retain a copy of the agreement.

## ABOUT CASE EVALUATION

An attorney has an ethical obligation to represent the best interest of his or her client. Sometimes a conflict may arise as to what the client wants and what the attorney believes is in the client's best interest. Sometimes such conflicts arise when settlement negotiations are ongoing. A client may read in the paper about a one or two million-dollar verdict in California for a "broken fingernail." The client may begin to feel that their case should be worth just as much or more. Unfortunately, the American media has a habit of sensationalizing large jury verdicts without reporting on the underlying facts or circumstances that contributed to the large verdict. Furthermore, the media doesn't report on the thousands of other cases where the victim comes away uncompensated or undercompensated. There is no exact formula for valuing a tort case. However, there are many factors that impact on case evaluation. One is the issue of liability, another is the extent of damages and medical opinions about injuries. Finally, when valuing a tort case the attorney must assess his or her ability to present the case to a jury and predict how a jury will receive the case. In short, each case must be evaluated and presented on its own merits, and constantly reviewed in the light of the client's best interest.

A victim who has carefully selected an attorney will be confident that his or her attorney has the experience and skill to properly evaluate the case for settlement purposes and the integrity and commitment to take the case to trial if the client's best interest so requires.

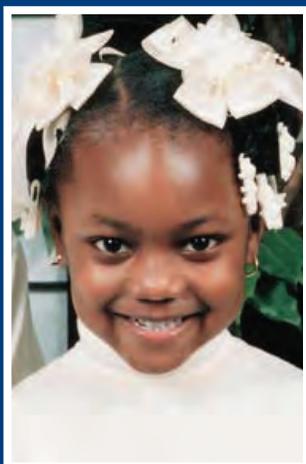
## CONCLUSION

Having a general understanding of Alabama law is very important for motor vehicle accident victims. While many accident claims can be resolved without having to file a lawsuit, it is important that the victim of a motor vehicle accident understand the procedures related to a civil lawsuit. This is because the victim may have to decide whether to accept a settlement offer or reject the offer and proceed with a civil lawsuit. Knowing various theories of recovery and possible defenses recognized in Alabama will also help the victim when making such a decision. Finally, the victim of a motor vehicle accident should have a general familiarity with insurance coverage and have an understanding of fee arrangements that are available from attorneys.

It is the sincere hope of the authors and publisher that this handbook has provided the reader with some of the general information set forth above. However, the reader is again reminded that the law is a dynamic and complex subject. Applying the law to a specific factual situation and predicting the possible results is not an exact science. An experienced attorney knows that many cases can pivot on facts that may seem inconsequential or remote to a layman. Since most attorneys who devote their practice to representation of accident victims do not charge for a consultation, accident victims can easily seek further clarification or explanation of their rights.







THIS PUBLICATION IS DEDICATED  
TO THE MEMORY OF

*Joia White*

(September 14, 1994 - June 20, 1999)

KILLED BY A DRUNK DRIVER

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