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BE INFORMED

UNDERSTANDING YOUR LAWSUIT

Be Informed

--- Understanding Your Lawsuit

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Introduction

Most people rarely need a lawyer. But, sometimes a family member is injured so severely – or has died – that huge financial burdens result. People in these circumstances quickly find that the corporation or insurance company responsible for paying for the consequences of careless behavior rarely is interested in providing answers or adequate compensation. In those times, there is little choice but to seek justice in a court of law. The purpose of this book is to answer some of the basic questions you might have when you find yourself in a situation where a lawsuit may be necessary.

Chapter 1

What is negligence?

Lawsuits for severe injury or wrongful death are most often based on the concept of negligence that causes harm. The term "negligence" simply means the failure to use the amount of care that a reasonably careful person would use under the same or similar circumstances. The various states may have slight differences in how the term is defined. But, the concept is universal. There are also related concepts of responsibility when the bad-actor knew of a high level of danger and acted anyway, or even when the bad-actor intended to do harm. For these situations, there are usually enhanced forms of punishment in the form of additional money damages that are recoverable such as exemplary or punitive damages. But as a general rule, the majority of injury or death cases are based on the concept of negligence causing harm.

Though it might seem obvious what a reasonably careful person would do under a given set of circumstances, your lawyer will frequently go to various sources for evidence of what that conduct should be. These sources might include the state driver's handbook for an automobile collision, the Federal Motor Carrier Safety Standards for rules and regulations about what a trucker should do, and the medical literature or regulatory board rules and regulations for what a hospital, nurse, or doctor should do in a given situation. So, for example, a medication that gets injected into the body might be restricted to injection into a vein only – or restricted into a large muscle only. When a patient in a hospital gets injected improperly, the relevant medical literature and training materials might be used to prove how a reasonably careful person would have injected the drug.

Chapter 2

What does "causation" mean and why is it important?

The law limits the filing of lawsuits to only those situations in which the bad-actor has caused significant damages. This is the concept of "causation," and it is an essential element of any negligence lawsuit, meaning that it must be proven to win the case. When one does something really dangerous, or almost hurts somebody else, but there is no harm, a negligence lawsuit is not appropriate. For example, many times a call comes into the office where a loved one received an injection of the wrong drug in a hospital. But, the injection was harmless. The caller is upset, and rightfully so. But, no harm has resulted. This is not a situation that can be addressed by a lawsuit. A complaint letter to the hospital might be fruitful. Or, a formal complaint with the state regulatory board might be considered; but, not a lawsuit. On the other hand, when an 18-wheeler runs a red-light and severely hurts passengers in another vehicle, the law allows compensation through a lawsuit for the harm caused by running the light.

In complex litigation such as a birth injury case, the insurance companies and hospital corporations spend a great deal of time and money focusing on the causation element of proof in such a case. They may spend many thousands of dollars and hire specific experts to say that the bad conduct did not cause the harm that resulted in the lawsuit. The plaintiff must therefore spend a comparable amount of time and money refuting those claims. This is a battle that takes place in every case. No matter how clear the causation is to a perfectly normal person, you can rest assured that the insurance lawyers will attempt to disprove the obvious.

Chapter 3

What kinds of damages are necessary in order to file a lawsuit?

The types of damages that are recoverable when one is injured or killed by the wrongful conduct of another include such things as medical expenses and lost earnings, but also include disfigurement, physical pain and emotional torment, and funeral/burial expenses. One of the things that must be done early on in a lawsuit is to gather the materials necessary to calculate the economic losses associated with the injury or death, as well as evidence of the incalculable injuries to the jury.

One complaint heard with some frequency by lawyers who do severe injury and death cases is from folks who say, "no lawyer will take my case because they can't make a lot of money from it." When you find yourself using these words, then please take a moment to take a step back and look at the situation from all sides. From the caller's side, something bad has happened and the caller is upset. From the attorney's side, he or she takes into consideration what is necessary to bring a lawsuit and compare that to what benefit is realistic for the caller. A simple case such as an intersection collision may take $25,000 or more in expense money to fund – which the lawyer would typically pay up front. These expenses will include such things as filing fees, expert witness fees, and expenses for depositions, travel, and exhibits. In cases involving medical malpractice, a defective product, automobile or drug, the case expenses may end up between $200,000 and $500,000. In a typical contingent fee agreement, the lawyer will have to pay those expenses even if the case is lost. If the case cannot realistically leave the caller with a meaningful amount of money after the fees and expenses are paid then the case should not be brought. This is the thought process behind the attorney's decision not to accept a case when the damages aren't sufficient. It does no one any good to spend two or more years in

expensive litigation and then be left without a meaningful amount of money when the smoke clears. In the end, it is that simple. As this decision is a subjective one based on the attorney's experience, getting second or third opinions on this from other attorneys is wise.

Another question involves caps placed on damages in some states including Texas. In medical malpractice cases it is commonplace for there to be arbitrary limits placed on the damages that are recoverable in court. In Texas, for example, the damages limit for all non-economic damages taken together is $250,000. Non-economic damages are the type of damages that don't come with an easy way to value them like lost wages or medical expenses. Non-economic damages are damages for disfigurement or severe pain and emotional torment in the case of a severe burn, for example. The limits placed on these kinds of damages are something the jury is not told about. This is unfortunate, because when the jury is kept in the dark about such important matters injustices can result. Juries, for example, might think they are helping someone by awarding a lot of money for these kinds of damages without knowing that the money will never be paid because of damages caps. In these kinds of cases, the attorney may ask for such damages to be found in the "amount of $250,000" and then emphasize a finding of more significant damages in other categories of damages. This may be one clue that there are damages caps in place that the jury will not be informed about by the judge.

One further question that is important is the role of medical providers and other lienholders that may have an interest in the case. This is also something jurors are not told about. So, for example, when a person is injured severely and has incurred a large amount of medical bills that were paid by his health insurance company, the health insurer has a right to get paid back for those expenses. Because jurors are not told about this sometimes a jury may not enter a finding for past medical bills thinking that "well, they were paid by insurance so we

won't award money for that." This works an injustice because they will have to be paid back nonetheless.

These are just a few of the many issues that the attorney will be working on during the development of the case. And, they are some of the many issues that an attorney needs to focus on to determine whether it is feasible to pursue a case.

Chapter 4

What must be done before a lawsuit is filed?

When an initial decision has been made by the law firm that the potential case is one that should be brought, the first steps generally taken are to investigate the incident to verify the events that have been reported to the firm. This might include obtaining police reports, investigation reports of government agencies, medical records, autopsy reports, scene photos, an in-person inspection of the scene, and interview of witnesses. Once a complete picture of the event has emerged, the law firm may hire one or more consulting expert witnesses to review the information and educate the attorney on the appropriate standards of conduct or other issues that relate to proving negligence and causation of damages. In some cases, such as a birth injury case, the law firm may consult with many medical specialists in order to show the relevant standards of conduct and causation issues. For example, in such a case it would be common for the attorney to hire an obstetrician, a neonatologist, a pediatric neurologist, a pediatric neuro-radiologist, a placental pathologist, a labor and delivery nurse, and a physical medicine and rehabilitation specialist – all prior to making the final decision about filing suit. In a simple case involving an intersection collision resulting in severe injuries, the investigation can be accomplished in a short time. In complex cases such as medical malpractice or a defective product, the case investigation can take weeks or months because a large volume of records and other materials are required to be reviewed by consulting experts in order to obtain the answers necessary to file a lawsuit. In some jurisdictions, such as Texas and Oklahoma, medical malpractice cases must be supported with expert testimony with written reports prior to filing of the suit. Working with the schedules of various experts during the investigation period also accounts for some of the investigation time that is consumed prior to filing of the case.

When the investigation is completed, and a decision has been made that filing suit is the correct way to proceed, the lawsuit papers are prepared. These papers always include a document that actually starts the lawsuit, called either a “petition” or a “complaint” depending on the place the lawsuit is filed. This document explains why the lawsuit has been filed, what was done wrong, and what harm has resulted, as well as the damages that are being sought. Depending on the jurisdiction, this document will either state these things generally, or it will be very specific – according to what the local rules require. In addition, there are other documents that are prepared and often filed at the same time as the petition or complaint. These documents are referred to generally as “discovery” documents, and include written requests for information, admission of certain facts, and documents that are relevant to the claim.

Chapter 5

How is a lawsuit started?

A lawsuit is started by the filing of the petition or complaint mentioned above with the clerk of the court. The clerk prepares a document called a citation that will be delivered to the people or corporation being sued along with a copy of the petition or complaint and the discovery documents, if any. A defendant is allowed a certain amount of time to file a response, which is in the form a document that is called an "answer." The discovery documents have a deadline for filing responsive answers and producing requested documents, as well. Once the lawsuit is started by filing the petition, and the defendants have filed their answers the lawsuit has begun.

Chapter 6

What can I expect after the lawsuit is filed?

After the lawsuit is filed by the plaintiff, and the answer(s) are filed by the defense, the discovery period begins. Frequently, a schedule for the exchange of information is put into place by court order or by agreement of the parties. During the first phase, written information and documents are exchanged. Frequently, hearings are conducted with the court to determine the scope of the information required to be exchanged and to resolve disputes of the parties over related matters. One subject of inquiry is the insurance coverage that applies to the incident. Responsible persons and corporations protect the folks they do business with by purchasing insurance coverage to pay for harm they might cause. And, the lawyers exchange this sort of information as well. If there is no basis to expect that a recovery can be made for the injured then the case won't proceed because that won't do anyone any good. If a case is tried, one can be sure that there is insurance coverage that applies – even though jurors are rarely told this information. Once the information exchange is underway, sworn testimony of the parties and important witnesses are conducted by the lawyers. This is typically in the form of a deposition, which is when a witness meets with the lawyers and a court reporter at an agreed location and the witness's testimony is taken under oath. The attorneys question the witness about what he or she saw, heard, or knows about facts that are relevant to the dispute. The number of witness depositions that are taken depends on the size and complexity of the case. Some cases have only 2-3 depositions while more complex cases may have dozens of witness depositions. After the bulk of the information has been exchanged and all of the important witnesses have been deposed, the lawyers will take the sworn testimony of any expert witnesses they have retained to explain what happened and why, and to explain the

relevant standards of conduct that were violated and where those standards come from. For example, in a birth injury case, an obstetrician or maternal-fetal medicine specialist may be retained to explain to the jury what the signs/symptoms/findings displayed by mommy or baby mean to a physician and what the physician should have done about them. The witness may explain the medical literature that supports his or her opinions and show the jury how the violations of those standards of conduct harmed the mother or baby.

Once the information exchange is complete and the witnesses and consultants have been deposed, the case is ready for trial. Universally, at this point in time the defense will ask the court to throw the case out claiming that it is not meritorious by filing a document called a "Motion for Summary Judgment." The judge will rule on this motion after the opposing side has responded to it. If the case is in trial, one can be assured that the judge has already determined that the case has merit and has made a decision to allow it to be decided by the jury. In fact, during the trial, immediately after the plaintiff has rested his case, the jury will be taken to the jury room – or given a lunch or evening break – and the defense lawyers will make what are called "Motions for Directed Verdict" which is their time to re-urge the motions to dismiss the case claiming it is frivolous. If the jury is allowed to hear the defense's side of the case and deliberate to a verdict you can be assured that the judge has ruled at least twice that the lawsuit is meritorious not frivolous.

Prior to trial, however, it has become commonplace in many jurisdictions for the parties to meet for a mediation or settlement conference before the case is tried in order to attempt an out of court resolution of the case. If that fails, a trial is conducted and a jury decision results.

Chapter 7

How are lawsuits resolved?

A lawsuit will be resolved in one of a number of ways. These include a voluntary settlement agreement at some point during the case. This may happen pre-trial, during trial, or during the appeal process if one is initiated. A favorable jury verdict, when it has become final, can be executed upon according to legal process. However, this is rare because usually a voluntary settlement agreement is reached in these situations. Sometimes, the case is resolved in favor of the defendants with a jury verdict. Frivolous cases are routinely dismissed by the judge long before trial starts, as described below.

Frequently, after the exchange of information and documents, and after the key witnesses have testified, the case will resolve by voluntary settlement agreement. Most of the time, when the case investigation shows the case is meritorious, and the lawyer works the case up effectively, the case will ultimately settle. Sometimes, meritorious cases have to be tried because the defendant refuses the advice of his attorney or insurance adjustor and insists on a jury verdict – thinking that the jury will side with him or her no matter the evidence. As mentioned above, when a significant case is tried one can assume that there is adequate insurance coverage to pay the verdict. The court, the parties and the lawyers don't want to spend a lot of time or money on an expensive lengthy trial when there is no expectation that the verdict will be paid. Unfortunately, jurors suffer under the misunderstanding that a verdict against the defendant will damage his career, or will come from the defendant's pocket, or that it will damage his lifestyle because they are rarely told about the insurance coverage that will pay the judgment. Even though the defendant will not have to write a check for the judgment, the insurance coverage is very important because the insurance company has a lot to say about

how the defendant runs its future business. This is so because the carrier will typically refuse to continue to insure the company if it refuses to correct the problems that caused the injury in the first place.

Chapter 8

What Does the Verdict Mean?

In cases that are not settled by mutual agreement, a jury verdict results from trial. Jurors are not informed about what happens with the verdict and what it means. Many jurors think that the plaintiff receives the amount of money that is entered on the verdict form. This is not so. When the jury verdict is entered and approved by the court, the judge will use that verdict form to craft what is called a "judgment." The judgment is a document the court puts together after applying the law to the answers in the verdict form. So, for example, in Texas if the jury awards $1,000,000 for disfigurement in a case where the patient suffered horrible burns to her face and throat from a fire in the operating room from improper anesthetic technique, the judge will put into the judgment $250,000 for that portion of the damages because that is what the law requires. Likewise, if the jury finds that the patient was 10% at fault then the judgment will reflect a 10% reduction of the award in the judgment. If the patient has incurred a large amount of past medical bills but the jury doesn't award that to the plaintiff because the jury believes the bills have already been paid by insurance, the judgment may take that amount money away from the money that was awarded and give it to the insurance company that paid the bills if that company has protected its right to that money. Sometimes, in the case of Medicare for example, the money has to be deducted without the payor doing anything. But, the insurance company is not required to refund the health insurance premiums that the patient paid to have the coverage in the first place. And, the insurance company did not have to do any of the work or pay any of the expense in bringing the case to trial. While it is a win-win for the insurance company it frequently works an injustice to the plaintiff. For these reasons, it is important for the jurors to carefully consider the way that the attorney is asking

them to fill out the verdict form because he or she will know how the law is going to be applied to the answers on the form - and will be trying to guide the jury, as much as he or she is allowed, to arrive at a verdict that will represent a fair outcome for the plaintiff when all is said and done.

I hope that you find the information in this booklet helpful to your understanding about how the legal process works in a case involving a severe injury or death. Should you have any questions, comments, or concerns related to this booklet, please feel free to contact me at jim@girardslaw.com.

- Jim Girards, February 2013

Jim Girards is a lawyer who is Board-Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization. He has been practicing law since 1989 and has over 23 years' experience trying complex lawsuits involving medical malpractice, birth injuries, heart damage, severe burns, brain and spinal cord injuries, and wrongful death. He has been voted a Texas "Superlawyer" every year for the last 9 years. He is a graduate of Gerry Spence's Trial Lawyer's College in Dubois, WY. He received the 4th Largest Medical Malpractice Verdict in the State of Texas in 2011, according to a study done by Texas Lawyer Magazine. He has been voted one of Dallas' Best Attorneys by "D" Magazine. In 2011, he was chosen as one of the Top Lawyers in the Country by Newsweek Magazine. He is Past-President of the Dallas Trial Lawyers Association, a member of the Board of Directors of the Texas Trial Lawyers Association, and is a member of the Board of Governors of the American Association for Justice. He is licensed in Texas, Oklahoma, and Arkansas. He is an instrument-rated private pilot, with ratings for single- and multi-engine aircraft. He lives in Dallas TX.