

DAMAGES AND CONTINGENCY FEES In Personal Injury and Discrimination Cases



People who have been injured through the fault of someone else often want to be compensated by the party who was at fault for the pain, hassle and inconvenience. However, there are a number of factors, listed below, that any attorney will consider when deciding whether to represent a person in a lawsuit, arbitration, mediation, or even in negotiations. They are especially important if the attorney is to be paid for his or her effort on a contingency basis.

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The goal of the civil justice system is to put injured people back in the same position they held before the injury. If a person's position was not changed, the civil justice system provides no remedy. For example, if someone loses the use of a hand in an accident, he or she could be given a money award ("**damages**") to compensate for this loss. However, if someone is in an accident, but suffers no injuries, that person is still in the same position as before the accident, so no damages would be appropriate. Similarly, if someone is discriminated against at work, but the employer deals with the problem so that there are no serious effects on the employee's work life, the employee will receive no damages. These examples illustrate the rule of "no harm, no foul."

Sometimes injuries are not obvious at the scene of an accident due to excitement or other emotions of those involved. The pain will often show itself as the excitement fades. In other cases, a victim of a physical injury or workplace discrimination who is embarrassed by the injury may downplay the effects. But for a person to be eligible for damages, **injuries must show themselves soon after the incident** to be attributed to the collision, fall or other event.

Time Factors

Acting promptly greatly increases a victim's chance of recovering damages for an injury. State and federal statutes set time limitations to bring a law suit. The limitations for both personal injury and discrimination are usually, though not always, three years. However, it is very important for a person with a claim not to wait that long. Documents and witnesses that can verify the wrongful act can disappear shortly after the incident. In discrimination cases, there may also be requirements that a claim be filed with a government agency within a very short amount of time.

Also, the rules of ethics that govern lawyers require that they conduct an adequate investigation of a case before they file suit. If a person waits until a short time before the statutory time limit expires, it will be difficult, if not impossible, to file a law suit that would allow the claim to continue.

Types of Losses or Damages

Injuries might include, for instance, physical or emotional injury to a person or destruction of an object. Our legal system assigns all of them a monetary value and attempts, by awarding the injured person an amount of money, to restore the injured party to a position as close as possible to where he or she was before the injury. These money amounts are called *compensatory damages* and must be directly related to the injuries caused by the incident.

Compensatory damages are divided into *special damages* and *general damages*. Special damages are those losses that can be easily given a dollar value, such as the cost of a doctor's visit, special equipment, lost wages, and travel expenses incurred to get necessary medical care. General damages are much more difficult to assign a dollar value, as they include pain and suffering, mental anguish, and inconvenience.

Fault and Duty

There are other elements that must be considered in evaluating a claim. A primary consideration is whether the person who causes injury has a **duty** to the injured person not to act in that manner. An example of such a duty is that every automobile driver has a duty to drive carefully and defensively. Every pedestrian, likewise, has a duty to act responsibly in traffic. If an individual darts out from between cars in the middle of a block, directly in front of a moving vehicle, the pedestrian will generally be considered at fault for his or her injuries, not the driver, because it was the pedestrian who breached his duty. The clearer the duty, the better the chances that the claim can be pursued.

Another primary consideration is what factor was the **proximate cause** – the most direct, immediate cause of an injury. So, for instance, if the driver had run the stop sign at the corner, but was not speeding or otherwise driving improperly when the pedestrian ran out from between the cars, then even though both parties breached some duty, it is the pedestrian's breach of duty that is the proximate cause of the accident. The driver is not likely to be considered liable for injuries suffered by the pedestrian.

What are Contingency Fees?

An injured client is unlikely to be able to afford the hourly fees an attorney charges, so attorneys will usually take personal injury cases and sometimes discrimination cases *on a contingency fee* basis. This means that the attorney and client agree in a written contract that the attorney will take a part of any settlement or judgment paid by the opposing party, as payment for attorney

fees. The attorney may also agree to advance the amounts of any court-related costs (filing fees, etc.) and other fees (deposition charges, etc.) Then, if the injured client wins the case, the attorney may take any advanced costs and fees, plus a percentage of any recovery. Note, however, that if the injured client does not win the case, he or she may be responsible to reimburse the attorney for court costs and other non-attorney fees. This contingent fee arrangement shifts much of the risk of the case onto the attorney and for this reason an attorney will carefully evaluate each element necessary to prove a personal injury or discrimination claim.

How Does an Attorney Decide to Take a Case?

An attorney will carefully review the elements of duty and proximate cause that are necessary to prove a claim, whether it is a personal injury case or a discrimination case. If an element is weak, or if the injured party contributed in some way to the injury so that it is difficult to show that the other party was clearly responsible for the cause of the damages, it may be more difficult for an attorney to pursue a claim. However, never assume that your case is not worth pursuing until you have discussed it with an attorney. Very often the law recognizes duties that are not obvious, or perhaps there are other factors that would increase the likelihood of a case to succeed. It is important that you explain completely everything related to your case to an attorney so that he or she can properly evaluate it for you.

The Effect of Damages on the Attorney's Decision

An event that causes fear or emotional stress doesn't necessarily create a claim for damages that an attorney will accept. It must be an emotional injury interferes significantly with one's life for more than a few days or weeks and usually it must require professional assistance from a counselor or a doctor. Similarly, a minor physical injury that requires only minor treatment doesn't usually create a claim for damages that an attorney will accept.

As an example of how an attorney evaluates damages, let's look at an increasingly common scenario: the presence of foreign objects in processed food, such as a piece of glass in a jar of jam. These cases are generally difficult because they require proof of how the foreign object got into the food, in order to identify the at-fault party and the proximate cause.

Aside from that, let's look at damages. If a person finds the foreign object before eating it, there are no injuries other than the lost purchase price of the food. The purchaser should ask the seller or manufacturer for reimbursement, and perhaps notify appropriate regulatory agencies. However, there are probably no grounds for a lawsuit.

If the person does not realize that the foreign object is there until he or she bites it, surprise, fear and anger are typical reactions. However, with no physical injury and only brief emotional pain, there is no possibility of pursuing a successful legal claim. If the injury is only a small cut that is healed within a few days, or even if you are ill and miss a day of work, that is not enough for an attorney to take on the case.

If, on the other hand, there are broken teeth that require extensive dental work or an injured digestive track that requires surgery or months of therapy, then it becomes more likely that an attorney would seriously consider such a case.

Before accepting a case, a lawyer determines that pursuing a claim for injury is likely to produce a recovery of money damages that is greater than the costs of pursuing the suit, including attorney's fees. Especially if the lawyer accepts the case on a contingency fee basis, and even more if the lawyer advances his or her own funds to cover fees and costs, the case must appear able to generate a satisfactory amount of damages. The thousands of dollars it takes to try even a small case must be recoverable before the lawyer will agree to accept the case.

The Effect of Collectibility on the Attorney's Decision

The attorney will also look at the financial status of any parties legally responsible for an injury in considering whether to represent an injured person. If the person at fault has no assets, no insurance, and/or is unemployed, then even if the breach of a duty is clear and that breach proximately caused the injury, the attorney may well not accept the case. The same sort of analysis would apply to a business or other entity responsible for an injury. Also, if the responsible party's assets are not available for recovery (for instance if they are held in a trust) it may not be worthwhile to pursue the claim.

Other Considerations for an Injured Person

Documentation of the injury is very important. In personal injury cases, documents such as police reports, insurance claim forms and medical records are important because they provide reliable, third-party documentation of the injury, the medical care, and the progress toward healing. **Regardless of fault or causation, physically injured individuals should at least seek an initial medical evaluation of their injuries and then follow their doctor's recommendations.**

In employment cases, a person should keep copies of any written performance evaluations. A person who has been fired should get a copy of his or her personnel file as soon as possible. He or she should also keep records of jobs they have applied for since they were fired and any rejections or acceptances they have received.

In both personal injury and employment cases, it is important that injured people take prompt actions to **work toward as full a recovery as possible**. The law presumes that a person who doesn't take such actions is adding to his or her injury, and the court may reduce the amount of any money damages awarded because of a failure to do so.

Conclusion

- ❖ If you have been injured in a substantial way by a person or company,
 - and if there are resources from which to collect damages, such as insurance or personal assets,
 - an attorney might well be interested in your case.

- ❖ If you have been wronged but you were partly at fault for your injury,
 - or the party who injured you had no duty to you (for instance you got injured on private property where the owner had posted a “No Trespassing” sign)
 - or there are little or no damages or only brief emotional distress,
 - a lawyer is unlikely to pursue your claim through the legal system because the economics do not justify it.

What Can I Do If an Attorney Won't Take My Case?

There are possible solutions for cases that attorneys will not accept.

Problems with consumer goods can be reported to the Attorney General’s Consumer Line for possible mediation with the vendor, and also to the local or state health departments.

Small Claims Court accepts cases with value up to \$4000. No attorneys are allowed for either side – you will represent yourself, and the party you sue will represent himself or herself. The King County Bar Association <http://www.kcba.org/> has a booklet on using the Small Claims Court and the Northwest Justice Project has information on its website, www.nwjustice.org.

There are free or low-cost dispute resolution services in many counties; you may call Legal Voice for a referral.

You may also want to read these related memos, available from Legal Voice:

- Employment Discrimination
- Sexual Harassment in the Workplace
- Termination of Employment
- Working with a Lawyer

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