

How to Know if You Have a Case?

Think of the Three-Legged Stool

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Injuries and losses happen all the time. Every day, bad things happen to good people. Sometimes, it is simply an unfortunate fact of life; as the saying goes, “into every life, a little rain must fall.”

Sometimes, however, these things happen because of the negligence, recklessness, or fraud of others. In cases like these, there can and should be a remedy under the law.

So, how can you tell the difference? If you suffer from an injury, a financial loss, or an act of fraud, how do you know whether you have a case worth pursuing?

Nothing can substitute for the advice and counsel of a knowledgeable attorney. Cases often involve complex issues that require experienced legal analysis. For this reason, the remainder of this article is simply an informative tool that you can use to understand why some cases we take, and others we don't. It is not meant to substitute for legal advice, or to encourage you to make a final judgment on your own case!

The easiest way to answer the question above is to visualize a common three-legged stool. As we all know, that stool needs to have three good legs in order to stand up. If any one of those legs is weak, or missing altogether, the stool wobbles and falls. The seat of the stool is your case, and it rests on three legs: (1) liability; (2) damages caused by that liability; and, (3) a source for recovery.

(1) Liability

The first question that must be asked is whether someone else is liable, i.e., is someone at fault for what happened to you?

In most cases, this is easy to determine. For example, if another driver rear-ends you and causes you injury, he is liable. If he turns into a cross-walk while pedestrians have the right of way, and hits someone, he is liable. If an employee is using a piece of machinery, and because of poor maintenance it malfunctions, or because of lack of proper safety equipment the employee is badly hurt, the employer is liable.

If there is no liability, then no matter how strong the other two legs are, the stool falls over and there is no case. For example, suppose a driver in front of you suddenly comes to a stop, and you swerve to miss him, causing your car to go into a ditch and roll over. No matter how severely you are injured and no matter how much insurance the other driver has, there is no case because he is not liable to you. It was not his fault that you couldn't stop in time; your basic driver's education

course teaches you to leave enough distance between yourself and the car ahead so that you can stop if it does.¹

There are other more complicated cases where one might think liability exists, but the law says differently. For example, I've gotten many calls where potential clients have inquired whether they have a case when they underwent surgery at a hospital, and then developed serious infection post-surgery, requiring additional hospital stay, extensive medical treatment, and substantial pain and suffering. Many people believe that if they develop an infection while in the hospital, the hospital is liable for medical malpractice. However, this is very rarely the case.

It is a well-known risk of being in a hospital environment that no matter how careful the hospital staff may be, many bacteria exist there, and infections may develop, particularly after surgery. In fact, the "informed consent" form, which you sign as a patient prior to undergoing a procedure, discloses to you all known risks of the procedure, and the risk of infection is almost always at the top of that list.

(2) Damages Caused by the Liability

Once liability is established, the question then becomes, were there damages caused by that liability?

Again, in many cases, this is fairly easy to determine. For example, if another driver runs a red light and hits your car broadside, causing you fractured ribs, then you have clearly suffered damages as a result of the liable act. Or if a truck's fuel tank explodes due to an igniting spark from the battery box (which can occur in a

defectively designed fuel tank system on commercial trucks), causing a major fire and second or third degree burns to the driver, he has clearly suffered damages as a result of the defective design.

If there are no damages, then it does not matter how strong the other two legs are; again, the stool will fall over and so will the case. Some people have been able to walk away from major accidents miraculously unharmed. In such situations, there is no case because no matter how clear a driver's liability is, if the other driver suffers no injuries, then there are no damages to pursue.

Again, there are cases where this analysis is more complicated. One case comes to mind where a client underwent a surgical procedure and had a chest drainage tube put in. After the surgery and recovery were done, she was discharged from the hospital — with the tube still in her chest! The hospital staff had forgotten to take it out. A day or so later, while taking a shower, she discovered it still in her chest, and had to return to the hospital to have it removed. A very unsightly scar developed on her chest afterwards.

Although there was clearly liability (the hospital staff negligently discharged her without removing the tube), and the ugly, permanent scar seemed like clear damage to her, there was simply no way to prove that the act of leaving the tube in was what caused the damage. In other words, it may well have been that she would have developed the scar anyway, even if the chest tube had been removed before she was discharged. There was no one who could testify with medical certainty as to the

cause of the scar. For this reason, there was no case to pursue, because it was unclear at best that the damage was actually caused by the liable act.

(3) Source for Recovery

If both liability and damages caused by the liability have been determined, the third and last leg to be established is the presence of a recovery source. Will you have the ability to collect your damages from somewhere?

Sometimes that question is easily answered “yes.” In the case of the driver who ran a red light and caused you to suffer fractured ribs, if he has auto insurance, then there is a source from which to recover your damages. Or, if he has little or no insurance, but you have uninsured/underinsured motorist coverage, you will still have a recovery source for your damages. A grocery store or restaurant, in which you slip and fall and suffer a back or hip injury because of a poorly maintained floor, will have a general liability policy or else will be self-insured and therefore have adequate money to compensate your damages.

If there is no recovery source, then unfortunately, no matter how clear the liability is, and no matter how severe the damages are, there will be no case to pursue because there is no potential recovery. Again, the absence of one leg causes the stool to fall over. Suppose that, in the case of the driver who ran the red light, he has no liability insurance, and you have no uninsured/underinsured motorist coverage. Now there is simply no source for recovery of your damages, and no ability to pursue a case on your behalf.²

This problem arises in other contexts as well. Suppose that your employer carries worker's compensation coverage, and you suffer a serious injury due to the employer failing to maintain a safe workplace. Liability is present, and damages caused by that liability are present also. However, by law, when you work for an employer covered by worker's compensation insurance, then you forfeit your right to sue the employer or recover any pain and suffering damages for on-the-job injuries caused by the employer's negligence.³

The worker's compensation insurance carrier should pay for your medical expenses as well as the major percentage of your lost wages for time missed from work. If the carrier denies you benefits that you should be getting, a worker's compensation attorney can help you appeal and get those benefits. However, there can be no case pursued against the employer for your pain and suffering; the employer simply is not a recovery source for those damages in a worker's compensation case.

As the above examples illustrate, sometimes the issues of liability, damages, and recovery are clear, and sometimes they are not. If you have suffered an injury or loss, do not delay — consult an experienced attorney as soon as possible in order to get the most competent advice on whether you have a case, and how your attorney can best help you pursue it.