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When does an accident constitute a lawsuit?

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Columnist

Q: A couple of incidents happened during the last year that left me wondering if I made the right "legal" decisions in response to each. One involved an incident in which my 17-year-old daughter was injured when she fell through some faulty steps at a friend's house, and the other was when I found myself suffering from injuries resulting from a minor auto accident.

I did not speak to an attorney following each incident. Did I make a mistake? Do you think I had grounds for a lawsuit? Each of these incidents occurred within the past 18 months.

A: You've certainly had your share of accidents in the family recently. Aside from that, you shouldn't feel too embarrassed about your decisions — a great many people don't think they have an actionable claim at law when something like this happens, and don't consult an attorney. At any rate, before trying to answer your question as to whether you have an actionable lawsuit in either of the incidents you describe, we need to cover a few basics.

First, as to whether you're too late to take action for either of these accidents, the answer is no, you're not. Generally speaking, Massachusetts law provides a three-year statute of limitations on commencing (filing) a lawsuit for personal injuries. The three-year period applies from the date of the accident. Therefore, as of the present, you're not barred from taking action in this matter.

Which brings me to my second point. Anyone can file a lawsuit; whether you win or not is another story. This issue will turn on the facts of the case, the evidence and the governing law in Massachusetts. With the limited facts you've given me, I'd need to know much more before I could assess your chances of a successful lawsuit in either of the above incidents, and I would be glad to speak with you. However, generally speaking, for a plaintiff to receive either a jury award or pretrial settlement, you must have established a dual combination of damages and liability.

That is, you must first prove that you have suffered or incurred some type of compensable damages — economic or non-economic — and you must also prove or establish liability on the part of the defendant. Both must be present in order for a plaintiff to be awarded damages in Massachusetts. In other words, you may be able to establish you've suffered some type of damages, but what if you cannot establish that the defendant is liable, or legally responsible, for your injuries? Suppose you're the party that's found to be more at fault?

Then in that case, as a plaintiff suing for personal injuries, you cannot recover. This illustrates the prevailing legal rule in Massachusetts, known as the doctrine of comparative negligence: Unless a plaintiff can demonstrate that he/she was not more than 50 percent at fault (even if the plaintiff is found to be only 51 percent at fault), then the plaintiff cannot recover. The issue of liability will turn on the facts and the evidence, as decided by a judge or jury.

Alternatively, suppose that as plaintiff you can demonstrate that it was the defendant's negligence that caused the accident, not yours, but you can't establish any compensable damages (you didn't suffer any compensable injuries). Then in that case, you're not likely to recover anything, and there's really no purpose to the suit. So, you can see, to successfully prevail as a plaintiff for personal injuries, you must establish both damages and liability on the part of the defendant you're suing.

There is a third element to a successful lawsuit by a plaintiff, and this is coverage, or recovery. This refers to the financial means to pay the award or settlement, and this most always comes from a policy of liability coverage held by the defendant — whether homeowner's insurance or auto insurance. (Not only would the defendant's liability insurer defend the case on his behalf, they would also pay any jury verdict or settlement up to the liability policy limits.) In the event a defendant had no liability insurance coverage available, then as plaintiff you would have to begin proceedings to attach and liquidate whatever assets you could locate in the defendant's name, in order to pay the judgment or settlement.

To sue in the case of an auto accident, you must first incur damages in the form of medical expenses to treat injuries which exceed $2,000, or suffer some type of permanent physical injury such as a broken bone or permanent scarring. If you have not suffered these or similarly defined physical injuries, and if your level of medical expenses does not reach $2,000, then as a plaintiff you cannot file suit. This mechanism is known as a "tort threshold" and is designed to weed out the smaller cases from the court system. In such "small" cases, the injured parties' insurance company will pay for lost wages and/or medical expenses up to $8,000. If and when medical bills exceed the $2,000 threshold, then you are entitled to file suit and seek damages.

As to how much money or damages you may be awarded, in theory the answer is that they are unlimited. In practice, damages or settlements, depending on the evidence and liability, tend to be more than fair and reasonable. Also, a plaintiff is limited, in practice, to collecting only up to the limits on the liability policy the defendant is carrying. Amounts awarded or agreed upon in excess of any liability policies would have to be reached through a separate attachment and liquidation process. In the vast majority of cases, this is not necessary.

As to attorney's fees, most all attorneys, including myself, accept such cases on a "contingency fee" basis, which means that the attorney will receive a customary and standard fee or one-third (33.3 percent) of any jury verdict or insurance settlement, plus reasonable expenses.

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AT THE BAR