Not So Fast…..Don't Accept A Low Policy Limits Settlement Offer for Your Catastrophically Injured Client.

You are sitting at your desk when the phone rings with a new potential case. The individual on the phone informs you that the potential client suffered catastrophic injuries as a result of a recent automobile accident. Unfortunately, you learn that the driver of the vehicle that struck the potential client drove a car from the late 1980's at the time of the accident, and you immediately suspect that there may not be adequate insurance to fully and properly compensate your client for his losses. You know that if adequate insurance coverage can be located, then the client can be fairly compensated for his losses so that he can live as normal a semblance of life as possible in spite of his injuries.

Conversely, if adequate insurance coverage cannot be located, then this client and his family will be victimized a second time by having to suffer the losses that come along with catastrophic injuries without fair and proper economic compensation paid by the negligent party. Therefore, lawyers representing catastrophically injured clients need to be prepared for this call, and need to be ready, willing and able to investigate all possible avenues of recovery. The representation of catastrophically injured clients requires that the attorney be ready to invest a significant amount of time, money, and brain power to locate and identify all avenues of potential recovery. This article explores causes of action and theories of liability that should be considered by practitioners to maximize potential insurance coverage, and to identify potential defendants with sufficient amounts of coverage to fairly compensate the catastrophically injured client.

This article will focus on the following potential theories of liability: (i) Suit against the adverse driver, (ii) Suit against the employer of the adverse driver, (iii) Uninsured Motorist Claims (iv) The Workman's Compensation Claim, (v) Negligent Entrustment Claims, (vi) Product Liability Claims, (vii) Negligent Roadway Maintenance/Negligent Roadway Design Claims, (viii) Medical Negligence Claims, (ix) Dram Shop Liability Claims, (x) Third-Party Bad-Faith Claims, and (xi) Claims Against Insurance Agents. Initially, we will address what you need to do in your preliminary fact-finding investigation.

I. Preliminary Fact Investigation

A complete investigation of the car crash should be completed as quickly as possible. Evidence such as skid-marks on the roadway, property damage to vehicles, and the interior condition of vehicles can disappear shortly after a crash, and it is therefore imperative that the fact investigation be done immediately. If possible, the attorney should visit the site of the accident himself. An investigator can be retained to obtain the basic facts of how the accident occurred, to take witness statements, and to ascertain additional facts that the catastrophically injured client and their family may not be aware of themselves. Things that should be considered in this initial investigation include: (i) How did the accident happen?; (ii) Was the use alcohol or drugs a factor in the crash?; (iii) Where were the drivers coming from, and going to?; (iv) Were any of the parties to the crash working at the time of the crash?; (v) Who owned the vehicles involved in the crash?; (vi) How did the operator of the vehicle that struck the client come into possession of the vehicle?; (vii) What property damage was sustained?; (viii) What was the adverse driver's initial explanation of the accident, and what statements

were made in the immediate aftermath of the crash?[1]; (viii) Did the airbags inflate?; (ix) Were there skid marks?; (x) Were seatbelts used? If so, did they work as they were supposed to?; (xi) What is the repair history of the vehicles involved in the crash? If the repairs were done incorrectly, was that a proximate caue of the collision?; and (xii) Photos should be obtained of the interior and exterior of all vehicles and of the roadway where the crash occurred. Obviously this list is not exhaustive, but it should provide you with some of the more important areas to cover in your initial investigation.

The more facts that can be gathered, the more potential arrows the attorney will have in her quiver to work with when it comes time to consider possible defendants and potential causes of action. While one may think that the initial fact gathering can be done inexpensively and with little effort, if you are handling catastrophic injury cases, you need to be willing to spend a significant amount of time, money and resources on this initial fact investigation so that consideration of appropriate causes of action and/or defendants can be appropriately undertaken. Failure to do so during this initial time period can be the difference between a fair and proper recovery and a small minimum policy limits recovery.

II. The Cause of Action Against The Adverse Driver

The most obvious defendant in any automobile accident case is the adverse driver whose negligence caused the crash. When the injuries to your client are catastrophic, it is important to figure out how much liability-insurance coverage this individual has, and

[1] Maryland Rules of Evidence 5-803(b)(1)(2)(3) provide for admissibility of present sense impressions, excited utterances and statements of then existing mental, emotional and/or physical conditions, including statements relating to intent, plan, motive, design, mental feeling, pain and bodily health. Statements made by the operators in the immediate aftermath of the crash may also provide insight as to whether those involved in the crash were drunk, sick, and/or working.

whether the driver has personal assets that may allow the negligent driver to satisfy a judgment over the policy limits.[2] If the adverse driver has adequate insurance coverage, then it may not be necessary or cost effective to look for other defendants with additional insurance coverage. In catastrophic-injury cases, the reality is that the typical individual automobile-insurance policy will not provide adequate coverage, and alternative causes of action should be considered.

Unfortunately, it can be difficult to determine the amount of coverage prior to a lawsuit being filed. In Maryland, insurance companies take the position that they are not required to disclose coverage amounts prior to a suit being filed, and quite often, they will not tell you exactly how much coverage there is.[3] Once a lawsuit is filed against an insured, the insurance company must disclose the amount of liability coverage. Maryland Rule 2-402 (c) specifically addresses this, and provides that:

> A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

In practice, if liability is clear, and if an experienced insurance adjuster knows that the damages will exceed their insured's policy limits, then they will either make a policy limits settlement offer (in which case you then know how much coverage there is),

[2] There are companies that perform asset checks for a fee. While asset checks can provide some useful information, they seem to have limitations. While they will show real property and automobiles owned by the person, they do not show bank account balances, brokerage account balances, and/or 401-K account balances which may be attachable in an excess verdict case.

[3] In many other states, insurance companies are required to disclose coverage amounts prior to suit being filed. Such pre-suit disclosure many times helps avoid unnecessary litigation. Perhaps the Maryland Legislature should consider enacting a statute that would require insurance companies to disclose coverage amounts prior to suit being filed.

and/or they might tell you how much coverage they have. Another alternative is to use a commercial company to obtain the liability limits.[4]

III. Cause of Action Against Employer of the Adverse Driver

Was the negligent driver working at the time of the accident? If so, A cause of action against the employer of the adverse driver should be considered. Quite often the employer will have a commercial-insurance policy providing liability coverage well in excess of the typical individual automobile policy.

An employer is generally vicariously liable for the tortious conduct of an employee when the employee is acting within the scope of the employment relationship.[5] Unfortunately for automobile practitioners, this general rule has been slightly narrowed with regard to automobiles, and an employer will not be liable for an employee's negligent automobile tort unless the employer consented to the use of the automobile, or the use of the employee's automobile was of such vital importance to the employer's business that control can be reasonably inferred. [6] An employer will not be liable if the car crash occurs while the employee is on his way to or from work.[7]

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[4] One such company is MEA Services, Inc. Their website is www.measervicesinc.com,and their phone number is 800-330-3340. If the identity of the insurer is already known, they will charge about $100-$200 to ascertain the applicable policy limits in effect at the time of the accident.

[5] *Embrey v. Holly*, 293 Md. 128 (1982).

[6] *Henkelmann v. Insurance Co.*, 180 Md. 591, 599, 26 A.2d 418 (1942). In this case the Court of Appeals explained that:

> "[O]n account of the extensive use of the motor vehicle with its accompanying dangers, the courts have realized that a strict application of the doctrine of *respondeat superior* in the modern commercial world would result in great injustice."
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> "It is now held by the great weight of authority that a master will not be held responsible for negligent operation of a servant's automobile, even though engaged at the time in furthering the master's business unless the master expressly or impliedly consents to the use of the automobile, and ... had the right to control the servant in its operation, or else the use of the automobile was of such vital importance in furthering the master's business that his control over it might reasonably be inferred." *Id.* (citations omitted).

The determination of whether employer liability will attach is fact sensitive, and it is therefore important to obtain information regarding where the driver was coming from and/or going to during the initial fact investigation (as well as during discovery). Once suit is filed against an employer, it is crucial to obtain detailed deposition testimony from the employee driver regarding the nature of the employment relationship, and the extent that the employer controlled the employee's use of the vehicle. You can also note a corporate designee deposition on this issue or submit Requests for Admissions. Defendant employers typically file motions for summary judgment on this issue, and the way to defeat such motions is with specific facts showing that the employer directed and controlled the employee in the employee's use of the vehicle, and that the employer benefitted from the employee's use of the vehicle.

It should be noted at this point that catastrophic injury cases can make for strange bed-fellows. Keep in mind that in a catastrophic injury case, defense counsel for the employee driver will want the additional protection of the employer's liability-insurance

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In *Dhanraj v. Potomac Elec. Power Co.* 305 Md. 623, 627-628, 506 A.2d 224, 226 (Md. 1986) the Court further explained that:

> The application of the doctrine of respondeat superior "rests upon the power of control and direction which the superior has over the subordinate, and ... does not arise when the servant is not actually or constructively under the direction and control of the master." In other words, the doctrine may be properly invoked if the master has, "expressly or impliedly, authorized the [servant] to use his personal vehicle *in the execution of his duties,* and the employee is in fact engaged in such endeavors at the time of the accident." Normally, therefore, while driving to and from his job site, an employee is not acting within the scope of his employment. *See* Annot., 52 A.L.R.2d 287, 303 (1957). It is essentially the employee's own responsibility to get to or from work. *See* Restatement (Second) of Agency § 229, comment d (1958). Thus, the general rule is that absent special circumstances, an employer will not be vicariously liable for the negligent conduct of his employee occurring while the employee is traveling to or from work.

[7] *Dhanraj v. Potomac Elec. Power Co.*, 305 Md. 623, 627-628 (Md. 1986).

policy, and, if the facts permit, may be willing to have her employee defendant provide answers that will increase the chances of vicarious liability attaching to the employer.

IV. First Party Claims: Uninsured Motorist Coverage, PIP/Medpay Coverage And Stacking

Most insurance policies issued in Maryland will have at least $2,500 of Personal Injury Protection Coverage (PIP Coverage) and at least $20,000 per person/$40,000 per occurrence in Uninsured Motorist Coverage (UM Coverage).[8] As a general rule, when your client is catastrophically injured, it is important to obtain the applicable insurance policies (including the declarations pages) to see what coverages will be available to your client. This typically includes the insurance policy for the vehicle your client is in at the time of the accident, the insurance policy for any other vehicles your client may own, and the insurance policy for any vehicle owned by any member of your client's household. With catastrophically injured clients, first-party coverages typically will not be sufficient to provide full and adequate compensation. Nevertheless, all avenues of recovery need to be explored and first-party benefits should be obtained whenever possible. It is important to keep in mind that the Maryland Courts construe the Personal Injury Protection Statute and the Uninsured Motorist statute liberally because of their goal of assuring recovery for innocent victims of motor vehicle accidents.[9]

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[8] §19-505 of the Insurance Article of the Maryland Code requires at least $2,500 in Personal Injury Protection Coverage (PIP) in motor vehicle liability insurance policies issued in Maryland unless the PIP coverage is waived. § 19-509 of the Insurance Article requires that Uninsured Motorist Coverage be provided in all policies issued in Maryland in the same amount as liability coverage unless waived. Since the minimum limits of liability coverage in Maryland is $20,000.00 per person/$40,000.00 per occurrence, most Maryland insurance polices have will provide at least $20,000.00 of uninsured motorist benefits.

[9] See *State Farm v. MAIF*, 277 Md. 602, 605, 356 A.2d 560 (1976); and *West Amer. v. Popa*, 108 Md. App. 73, 84-85, 670 A.2d 1021, 1027 (Md. App. 1996) (explaining that the uninsured motorist provisions in the Maryland Code be liberally construed because of their goal of assuring recovery for innocent victims of motor vehicle accidents).

A. Uninsured Motorist Claims

An uninsured motorist claim should be made if the "at-fault" vehicle is uninsured, or if the amount of liability coverage available to your client from the "at-fault" vehicle is less than the amount of uninsured motorist coverage available to your client.[10] An uninsured motorist claim should also be made if the "at-fault" vehicle is unidentifiable (e.g. hit and run situations and phantom vehicle situations). The amount of uninsured motorist benefits available to your client will be reduced by any amount paid to your client under any liability-insurance policy.[11]

B. Personal Injury Protection Claims and Medpay Claims

Personal Injury Protection Coverage provided in Maryland insurance policies pays for lost income and medical expenses without regard to fault, without regard to any collateral source, and it is not subject to subrogation.[12] Practitioners should be aware that the deadline for submitting a PIP application to the insurance company is typically one year from the date of the accident. While the minimum amount of PIP coverage is only $2,500, practitioners will find that some Maryland insurance policies have up to $10,000 in PIP Coverage. In addition to PIP Coverage, some Maryland insurance policies also have Medpay Coverage. Whereas PIP coverage is regulated by the

[10] § 19-509 of the Insurance Article of the Annotated Code of Maryland sets forth the definition of "uninsured motor vehicle" and requires that motor vehicle liability insurance policies contain Uninsured Motorist Coverage in the same amount as liability coverage unless waived.

[11] § 19-509 (g) states that "The limit of liability for an insurer that provides uninsured motorist coverage under this section is the amount of that coverage less the amount paid to the insured that exhausts any applicable liability insurance policies, bonds, and securities on behalf of any person that may be held liable for the bodily injuries or death of the insured."

[12] See § 19-505- § 19-508 of the Insurance Article of the Annotated Code of Maryland.

Insurance Article of the Maryland Code, Medpay Coverage is not. Therefore, the policy language regarding Medpay Coverage will govern such claims.

If the catastrophically injured client has PIP Coverage or Medpay Coverage available to them on an insurance policy issued in a state other than Maryland, then that policy language needs to be read carefully and legal research needs to be done to determine what effect, if any, making the PIP claim may have on any subsequent liability claim.[13]

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[13] Maryland practitioners should be aware that if a PIP claim is made on an insurance policy issued in the District of Columbia, then a civil liability claim cannot be made in the District of Columbia's Courts unless a statutorily imposed injury threshold is met. Victims are required to make a written election between a D.C. PIP Claim and a D.C. liability claim within 60 days of the accident. See D.C. Code § 31-2405 which provides, in relevant part:

> "(a) A victim shall notify the personal injury protection insurer within 60 days of an accident of the victim's election to receive personal injury protection benefits.
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> (b) A victim who elects to receive personal injury protection benefits may maintain a civil action based on liability of another person only if:
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> (1) The injury directly results in substantial permanent scarring or disfigurement, substantial and medically demonstrable permanent impairment which has significantly affected the ability of the victim to perform his or her professional activities or usual and customary daily activities, or a medically demonstrable impairment that prevents the victim from performing all or substantially all of the material acts and duties that constitute his or her usual and customary daily activities for more than 180 continuous days; or
> (2) The medical and rehabilitation expenses of a victim or work loss of a victim exceeds the amount of personal injury protection benefits available.
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> (c) Nothing in subsection (b) of this section shall prevent the survivors of a victim whose death arises out of the maintenance or use of a motor vehicle from maintaining a civil action based on the liability of another person for the loss and noneconomic loss resulting from the victim's death regardless of whether the victim had previous to his or her death elected to receive personal injury protection benefits.
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> (d) The insurer must notify any identifiable victim in writing of the 60-day election period.
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> (e) The 60-day election period may be extended upon the mutual written agreement of the victim and the insurer.
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> (f) If a victim is incapacitated or in some other way unable to make the election, it may be made by the next closest relative, or if there is no relative, an individual taking responsibility for the victim's affairs.
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> (g) If the covered victim fails to make an election within the 60-day period, the mandatory liability insurance coverage applies.

C. *Stacking of Insurance Coverages*

Stacking of insurance coverages is the process by which an insured is covered by more than one insurance policy, or by a policy covering multiple vehicles, and, therefore, attempts to "stack" multiple coverages in order to ensure adequate compensation for a victim's injuries.

Unfortunately for our catastrophically-injured clients, stacking of insurance coverages for policies issued in Maryland is not permitted. [14] Section 19-513 (b) of the Insurance Article of the Maryland Code explicitly states that "…a person may not recover benefits…from more than one motor-vehicle liability-insurance policy or insurer on a duplicative or supplemental basis." However, our neighboring jurisdictions including Virginia, West Virginia and Pennsylvania, do allow for some form of stacking of uninsured/underinsured motorist coverages. When representing the catastrophically injured client, it is therefore crucial to consider whether the client has uninsured/underinsured motorist coverage available to him under insurance policies issued in a State other than Maryland that may be stacked.[15]

V. The Workman's Compensation Claim

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[14] See Insurance Article, § 19-513 (b), *Rafferty v. Allstate*, 303 Md. 63, 492 A.2d 290 (Md. 1985) (holding that recovery of uninsured motorist benefits in excess of the statutory minimums from more than one insurer is statutorily prohibited); *Howell* v. *Harleysville Mut. Ins. Co*., 305 Md. 435, 505 A.2d 109 (Md. 1986) (holding that commercial fleet policy insuring several vehicles for which separate premiums were paid did not permit stacking or aggregating of uninsured motorist coverage).

[15] **Virginia**: See *Cunningham v. Insurance Co. of North America*, 213 Va. 72, 189 S.E.2d 832 (1972) (holding that the uninsured motorist coverage in a multi-vehicle policy was increased by the number of vehicles insured, and that uninsured motorist coverage in such cases could be stacked unless the plain and unambiguous language of the policy prevented it); **West Virginia:** See *State Automobile Mutual Insurance Co. v. Youler*, 183 W.Va. 556, 565, 396 SE 2nd 737, 746 (1990) (recognizing the permissibility of stacking of uninsured and underinsured motorist coverages in West Virginia, and holding that antistacking language contained in the applicable insurance policy was void as against West Virginia's public policy of full indemnification); **Pennsylvania:** See 75 PA C.S.A. §1738 "Stacking of Uninsured and Underinsured Benefits and Option to Waive."

If the catastrophically injured client was working at the time of the crash, then a timely workman's compensation claim should be made.[16] Practitioners should keep in mind that the deadlines for filing workman's compensation claims are much shorter than the three-year statute of limitations applicable to filing a negligence lawsuit in a third-party liability case. The deadline for notifying an employer of an accidental injury is 10 days after the accidental injury, and 30 days after an accidental death.[17] The deadline for filing with the Workman's Compensation Commission is two years from the date of the accident. Workman's Compensation benefits are particularly important to the catastrophically injured claimant because if the liability insurance is inadequate, at least the catastrophically injured client's lifetime medical expenses will be taken care of through the workman's compensation claim. Some practitioners are hesitant to make a workman's compensation claim when they will be making a third-party claim because the workman's compensation insurance carrier will assert a lien on any third-party recovery, and if there is inadequate insurance coverage, this lien can become an obstacle to settlement. When a client has catastrophic injuries, however, it is crucial that all avenues of potential recovery be explored and preserved, and whenever possible, a workman's compensation claim should be made.

VI. Negligent Entrustment[18]

[16] If the catastrophically injured claimant is entitled to Maryland PIP benefits then the PIP Benefits should be applied for and obtained prior to the filing of the workman's compensation claim. MD Code, Insurance, § 19-513 (e) provides that PIP benefits shall be reduced to the extent that the recipient has recovered benefits under the worker's compensation laws.

[17] Lab. & Emp. 9-704 (b). It should be noted that failure to give the required notice bars a claim unless the Commission excuses the failure on the ground that notice could not have been given or that the employer-insurer was not prejudiced by the lack of notice. See § 9-704(d), § 9-705(b) and § 9-706 (a).

[18] Practical examples of the use of a "negligent entrustment" cause of action are as follows:

A cause of action for negligent entrustment can increase coverage because it adds an additional defendant, and it may trigger additional insurance policies. The Maryland Pattern Jury Instruction for Negligent Entrustment provides as follows:

> A person is liable for negligent entrustment who, directly or through a third person, supplies an item of personal property for the use of another, who, the person knows or has reason to know, is likely, because of youth, inexperience, or otherwise, to use it in a manner involving an unreasonable risk of harm to himself or herself or to others.

MPJI-CV 18:5.[19]

In Maryland, a negligent entrustment claim will usually not trigger coverage under most homeowner's-insurance policies because of the exclusion in such policies for torts relating to the use of motor vehicles (including negligent entrustment claims).[20] That being said, however, practitioners should read the policy language of any applicable

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(i) If the parent of an unlicensed fifteen year old child gives the child the keys to the family car, and the fifteen year old child gets drunk and negligently crashes into your client's vehicle causing catastrophic injuries, then suit can be filed against the fifteen year old child for "negligence," and against the parent for "negligent entrustment."

(ii) Two friends drive to a bar together in Friend A's vehicle. Friend A and Friend B have dinner and polish off two bottles of wine. Friend A knows that Friend B has a bad driving record. At the end of the evening, Friend A (the vehicle owner) gives his keys to Friend B and asks Friend B to drive him home. On the way to Friend A's house, Friend B crashes the vehicle into your client. Your client can sue Friend B for "negligence" and Friend A for "negligent entrustment."

(iii) Your client is catastrophically injured in an accident with a tractor trailer. The tractor trailer operator has a poor driving record and has been involved in numerous prior accidents while driving the tractor trailer. Your client can sue the tractor trailer driver for "negligence," and the Safety Manager of the tractor trailer company for "negligent entrustment" for authorizing the tractor trailer driver with the poor driving record to operate his tractor trailer on the operating authority of the tractor trailer company.

[19] MPJI-CV 18:5 (2002) citing *Broadwater v. Dorsey*, 344 Md. 548, 688 A.2d 436 (1997).

[20] *Pedersen v. Republic Insurance Co.*, 72 Md. App. 661, 532 A. 2d 183 (Md. App. 1987). However, Maryland practitioners should be aware that the appellate courts in New Jersey have found that a similar exclusion in a homeowners insurance policies did not apply. Therefore, if the negligent entrustment of the vehicle occurred in New Jersey, it is quite possible that coverage can be obtained from the homeowner's insurance policy. See *McDonald v. Home Insurance Co.*, 97 N.J. Super. 501, 235 A.2d 480 (NJ 1967). For a summary of the law on this issue in various jurisdictions see 6 ALR 4th 555 "Construction and Effect of Provision Excluding Liability For Automobile-Related Injuries Or Damage From Coverage Of Homeowner's or Personal Liability Policy." David B. Harrison, J.D.

homeowner's-insurance policy or general-liability insurance policy carefully to make sure that the exclusion related to automobiles is specifically included in the policy. Even if there is not insurance coverage, if the negligent entrustor has sufficient assets to satisfy a judgment and/or assets to contribute to a global settlement, then the negligent entrustment cause of action should be considered.

VII. Product Failure

Practitioners should be aware that even though product liability cases against automobile manufacturers are expensive and difficult to successfully prosecute, Maryland law on product liability is relatively favorable to claimants. Maryland recognizes the doctrine of "strict liability" and has adopted the "crashworthiness doctrine."[21] Since most individual automobile-insurance policies do not provide adequate coverage for catastrophic injuries, a product liability case may be the only avenue to obtain full compensation for your catastrophically-injured client. Therefore, in catastrophic injury cases involving automobiles, at the outset of the representation, practitioners should take steps to preserve crucial evidence so that an expert can determine whether or not a product liability cause of action should be considered. This may include securing the vehicles involved in the accident, and/or sending a letter to the custodian of any evidence that may need to be inspected and/or preserved.[22]

A. Strict Liability

In addition to traditional negligence claims against the automobile manufacturer and automobile seller, Maryland recognizes the doctrine of Strict Liability. This is

[22] See *Miller v. Montgomery County*, 64 Md. App. 202, 494 A.2d 761 (Md. App. 1985) for a discussion of the appropriate remedies for spoliation of evidence.

important because to establish a *prima facie* case of strict liability, there is no need to prove any particular act of negligence on the part of the automobile manufacturer. Instead, the focus is on the product itself (the automobile) and if the product was "unreasonably dangerous" and "defective" at the time it left the seller, then the basic elements of strict liability have been established.[23] Furthermore, the defense of "contributory negligence" does not apply to strict liability claims.[24] The Maryland Pattern Jury Instruction for Strict Liability provides as follows:

> The manufacturer or seller of any product in a defective condition that is unreasonably dangerous to the user or the user's property is responsible for physical harm resulting from the defect, provided: (1) The product was in a defective condition at the time it left the possession or control of the seller; (2) The product was unreasonably dangerous; (3) The defect was the cause of the injuries or property damage; and (4) The product was expected to and did reach the user without substantial change in its condition. In an action for strict liability in tort based upon product defect, the plaintiff need not prove any specific act of negligence as the focus is not on the conduct of the manufacturer or seller, but upon the product itself.

MPJI 26:11 Strict Liability For Defective And Unreasonably Dangerous Products-Elements of Liability (2002).

B. Crashworthiness Doctrine

In crash-worthiness cases (sometimes called second collision cases), plaintiffs are not alleging that a defect in the design of the automobile caused the accident; rather, the claim is that after the accident occurred, a design defect caused increased injuries to the occupant when he or she collided with the interior of the vehicle. Manufacturers of

[23] In *Phipps v. General Motor Corp.*, 278 Md. 337. 363 A.2d 955 (Md. 1976) the Maryland Court of Appeals adopted the concept of strict liability as set forth in the Restatement (Second) of Torts § 402 A.

[24] In *Ellsworth v. Sherne Lingerie, Inc.*, the Maryland Court of Appeals explained that "contributory negligence is not a defense in an action of strict liability in tort. Conduct which operates to defeat recovery may in fact be negligent, but confusion will be avoided if it is remembered that a plaintiff is barred only because such conduct constitutes misuse or assumption of risk, and not because it constitutes contributory negligence." 303 Md. 581, 598, 495 A.2d 348, 356 (Md. 1985).

automobiles are required to use reasonable care in the design of a vehicle in order to avoid subjecting a user (driver or passenger) to an unreasonable risk of injury in a collision.[25] The Maryland Pattern Jury Instruction for the Crashworthiness Doctrine provides as follows:

> "A manufacturer is responsible for a defect in the design or construction which the manufacturer could have reasonably forseen would increase injuries sustained in the accident, and which, in fact, caused or increased the injuries sustained in the accident."

MPJI 26:19 Duty of Manufacturer-Enhanced Injuries (2006).

C. *Gourdine v. Crews*: A Recent Example of a Plaintiff's Attorney's Effort to Obtain Coverage

The recent case of *Gourdine v. Crews* provides an example of a Plaintiff's attorney doing everything reasonably possible to use product liability law to locate adequate coverage in an automobile death case.[26] On February 22, 2002 Ms. Crews was the operator of a motor vehicle that struck a vehicle driven by Isaac Gourdine. The force of the impact caused a fatal head injury to Mr. Gourdine. At the time of the crash, Ms. Crews had taken a combination of insulin prescription medications. The insulin medications were manufactured and distributed by Eli Lilly. The plaintiff's attorney claimed that the crash occurred because Ms. Crews experienced low blood sugar (hypoglycemia) due to her ingestion of the prescription medications manufactured by Eli Lilly. The decedent's attorney contended that the prescription medications taken by Ms. Crews caused increased rates of hypoglycemia during certain times of the day, and that Eli Lilly knowingly failed to warn about this risk. A lawsuit was brought against Eli

[25] *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 206-07, 321 A.2d 737 (1974).

[26] *Gourdine v. Crews*, 177 Md. App. 471, 935 A.2d 1146 (Md. App. 2007); cert. granted 403 Md. 612, 943 A.2d 1244 (Md. 2008).

Lilly. The trial court granted defendant Eli Lilly's Motion for Summary Judgment. The Plaintiff's attorney appealed. The Maryland Court of Special Appeals affirmed the grant of summary judgment because the injuries sustained by the decedent were not reasonably forseeable. The Court of Special Appeals explained:

> Appellants correctly state that "liability for injuries which are foreseeable resulting from a defective product extends to bystanders who are put in peril by the defect." Even assuming, *arguendo,* that the warnings rendered about the drugs were defective, the injuries sustained by Gourdine were not reasonably foreseeable. It cannot be said that Lilly should have reasonably foreseen that Crews, with her history of hypoglycemia, would ignore her doctor's orders to discontinue her morning insulin, drive a car, suffer a hypoglycemic episode, lose control of her car, strike Gourdine's car, push it into the back of an illegally parked tractor-trailer, and fatally injure Gourdine. Indeed, to impose a duty on Lilly in these circumstances "would create an indeterminate class of potential plaintiffs."

Gourdine v. Crews 177 Md.App. 471, 479, 935 A.2d 1146, 1151 (Md.App.,2007) (citations omitted).

The Maryland Court of Appeals granted Certiorari, however at the time that this Article went to press, no decision had been rendered.

VIII. Negligent Maintenance of Roadway and Negligent Roadway Design

A cause of action can be maintained against those responsible for negligent roadway design and negligent maintenance of the roadway. Such causes of action will usually be against a governmental entity, and therefore, recovery will be limited by either the Local Government Tort Claims Act,[27] or the Maryland Tort Claims Act.[28]

[27] MD Code, Courts and Judicial Proceedings, § 5-303 "…the liability of a local government may not exceed $200,000 per an individual claim, and $500,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions…"

[28] MD Code, State Government, § 12-104 "The liability of the State and its units may not exceed $200,000 to a single claimant for injuries arising from a single incident or occurrence."

Negligence suits against governmental entities for negligent maintenance and control of the roadway are not barred by the doctrine of sovereign immunity, but you need to make sure that you timely and appropriately comply with any and all notice requirements to the correct entities.[29]

On occasion, the responsible governmental entity will have contracted with a private party such as a construction company, roadway safety consultant and/or other subcontractor for the design of the roadway and/or maintenance of the roadway. Any such private entity that negligently contributed to the cause of the crash should be included as a Defendant in a catastrophic-injury case. It is often difficult to determine whether a private subcontractor is involved prior to filing suit against the governmental entity. Therefore, it is important to file suit well in advance of the statute of limitations so that additional defendants can be added if necessary.

Proving a negligent roadway design/negligent roadway maintenance case usually requires expert testimony. If the case involves traffic-control devices, roadway signs, warnings, roadway markings, or traffic signals, the expert should rely upon *The Manual on Uniform Traffic Control Devices For Streets and Highways* ("MUTCD") which sets forth a national standard for all traffic-control devices installed on any street or

[29] See *Montgomery County v. Voorhees*, 86 Md. App. 294, 586 A.2d 769 (Md. App. 1991), *Godwin v. County Commissioners, 256 Md 326. at 335, 260 A.2d 295* (Md. 1970); *See also, Tadjer v. Montgomery County*, 300 Md. 539, 548, 479 A.2d 1321 (1984) ("The duty to maintain streets and highways in a reasonably safe condition is a major exception to the immunity from suit in Maryland of counties and municipalities."); *Cox v. Anne Arundel County*, 181 Md. 428, 431, 31 A.2d 179 (1943) (when maintaining public highways, a municipality is acting in its corporate capacity, and is liable for suit for its negligence); *City of Baltimore v. Seidel*, 44 Md. App. 465, 476, 409 A.2d 747, *cert. denied*, 287 Md. 750 (1980) (holding that the placing of warning signs on public highways is a proprietary or corporate function and, consequently, the City was not immune from suit). See also 45 A.L.R. 3d 875 Liability of Governmental Entity Or Public Officer For Personal Injury Or Damages Arising Out of Vehicular Accident Due to Negligent or Defective Design of a Highway.

highway.[30] The standards set forth in the MUTCD apply to both governmental entities and private entities such as construction companies and sub-contractors.

IX. Medical Negligence Claim For Subsequent Medical Treatment

If your client's original injuries from the crash are made worse by improper medical treatment, then a medical-negligence claim should be considered. [31] As a general rule, insurance policies covering doctors and hospitals for medical negligence are larger than the typical individual-automobile policy. However, the negligent medical provider will only be responsible for the aggravation of the injuries from the original automobile accident caused by the medical error. In practice, suit should be brought against both the original tortfeasor who caused the automobile accident, and against the negligent medical provider(s). If a settlement or judgment is obtained against only the motorist tortfeasor, and not against the physician tortfeasor, then the claim against the physician could be mistakenly extinguished.[32] Therefore, care should be taken in entering into a partial settlement with only the original negligent motorist tortfeasor. A general release, executed in the settlement of a damage claim against the operator of a motor vehicle whose negligence caused an injury, does not discharge, as a matter of law,

[30] The Manual on Uniform Traffic Control Devices For Streets and Highways, 2003 Edition has been approved by the Federal Highway Administrator as the National Standard in accordance with 23 USC 109(d), 114 (a), 217, 315, and 402(a), 23 CFR 655 and 49 CFR 1.48(b)(8), 1.48(b)(33), and 1.48 (c)(2).

[31] See *Morgan v. Cohen*, 309 Md. 304, 310-311, 523 A.2d 1003, 1006 (Md.,1987) (recognizing that "[w]hen a physician negligently treats the injuries, he also becomes liable to the plaintiff, but only for the additional harm caused by his negligence; and that the negligent treatment is a subsequent tort for which the original tortfeasor is jointly liable.); Restatement (Second) of Torts § 433A comment c (1964); W. Prosser & W. Keeton, *The Law of Torts* § 52, at 352 (5th ed. 1984).

[32] *Underwood-Gary v. Matthews*, 366 Md. 660, 785 A.2d 660 (Md. 2001) (holding that a plaintiff's claim against a subsequent treating physician was barred by a satisfied judgment against the original tortfeasor/motorist and explaining that a plaintiff is entitled to but one compensation for his or her loss, and full satisfaction of a plaintiff's claim prevents it from being further pursued).

a physician who subsequently treats the injury, but rather, the release of the physician depends upon the intent of the parties.[33] To avoid confusion, the release should clearly and specifically indicate that the cause of action against the medical provider is not being released and is therefore preserved.[34]

X. Tavern Liability/Dram Shop Liability

Across the United States approximately 17,000 people are killed yearly in accidents caused by intoxicated drivers, and many more suffer serious injuries. Alcohol related fatalities make up approximately 41 percent of the total traffic fatalities each year.[35] Nevertheless, Maryland is one of only three states in which there is no dram shop liability. This means that in Maryland, there is no cause of action against bar owners, restaurants or homeowners for negligently providing alcohol to individuals who later get behind the wheel and cause injuries to others.[36]

As practitioners, we need to be aware that all of our neighboring jurisdictions have dram shop liability, and if the at-fault driver has inadequate insurance coverage, consideration should be given to whether the at-fault driver became intoxicated at an

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[33] *Morgan v. Cohen*, 309 Md. 304, 523 A.2d 1003 (Md. 1987); See also 19 MD-ENC RELEASE § 7.

[34] Remember that if you file suit against a negligent health care provider in Maryland, any such suit must be initiated in the Health Claims Alternative Dispute Office of Maryland ("HCA"), and the Courts & Judicial Proceedings sections followed. Once properly waiving out of HCA, you can file suit in Circuit Court and then move to consolidate the malpractice complaint with the automobile complaint.

[35] These statistics were obtained from the Maryland Department of Transportation State Highway Administration Website at www.sha.state.md.us/safety/alcohol_driving_statistics.asp; and from the Mothers Against Drunk Driving's Website at www.madd.org/Drunk-Driving/Drunk-Driving/Statistics.aspx.

[36] See *Veytsman v. New York Palace, Inc.*, 170 Md. App. 104, 122, FN 11 906 A.2d 1028, 1038 (Md. App. 2006) (explaining that only Maryland, Nebraska and Nevada decline to impose dram shop liability) ; *Wright v. Sue & Charles*, 131 Md. App. 466, 749 A.2d 241 (Md. App. 2000) (declining to follow the number of jurisdictions that have departed from common law and imposed civil liability on sellers of alcoholic beverages for damages caused by patrons; and stating that dram shop liability in Maryland will require legislative action).

establishment located in a state other than Maryland. If so, a choice of law analysis of the state where the person became intoxicated should be done, and consideration should be given to filing suit against the entity that negligently served the intoxicating beverage in that entity's home state. Unfortunately, if suit is filed in Maryland and the crash occurred in Maryland, then Maryland law will most likely apply and there will be no dram shop liability.[37]

The case of *Zhou v. Jennifer Mall Restaurant, Inc.* is instructive.[38] Mr. Zhou and his wife were seriously injured in a car accident that occurred in Montgomery County, Maryland. Their vehicle was struck by a vehicle driven by a gentleman returning from a restaurant located in Washington, D.C. Employees of the restaurant unlawfully served alcohol to the Defendant driver after he became intoxicated, and after his intoxication was apparent. In his impaired condition the defendant driver drove into Maryland and caused an accident. Suit was filed against the restaurant in the Superior Court for the District of Columbia. The District of Columbia uses a "governmental-interests analysis" to determine which jurisdiction's law should apply. The District of Columbia Court of Appeals held that the District's law applied "when a cause of action is cognizable under District of Columbia tort law on the basis of a violation within the District of Columbia of a District of Columbia statute or regulation, even though the injury occurs nearby in Maryland where a similar statute has been interpreted by Maryland's highest court as not supporting civil liability." Not only did Mr. Zhou obtain the benefit of the District's

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[37] See *Erie Ins. Exchange v. Heffernan*, 399 Md. 598, 620, 925 A.2d 636, 648 - 649 (Md. 2007) (explaining that where the events giving rise to a tort action occur in more than one State, we apply the law of the State where the injury-the last event required to constitute the tort occurred).

[38] 534 A.2d 1268 (D.C. 1987).

acceptance of dram shop liability, but he and his wife also benefitted because non-economic damages are uncapped in Washington, D.C., and violation of a statute in the District of Columbia is negligence *per se*.[39]

Although Maryland does not recognize dram shop liability, when representing a catastrophically-injured client, one should consider whether suit can be filed in a different jurisdiction that recognizes dram shop liability. Our Legislature should consider joining the 47 other states that recognize that those who are negligent in supplying alcohol to minors and others who should not be driving should share in the financial responsibility for damages caused by their negligent operation of a motor vehicle.

XI. Third Party Bad Faith Claims

Liability insurers have a duty to attempt to settle claims within their insured's policy limits.[40] When the client has catastrophic injuries, and there is inadequate insurance coverage, inadequate assets to satisfy a judgment, and when there are no other theories of liability to trigger additional insurance policies and/or additional defendants, then a written demand for the defendant tortfeasor's policy limits should be made to the liability-insurance carrier.[41] The demand package should include enough information so that the insurance carrier can exercise its judgment, and either offer the insured's policy limits, or refuse to offer the policy limits. If the insurance carrier refuses to offer its insured's policy limits, and if a judgment is obtained in excess of the insured's policy

[39] By contrast, Maryland has a statutory cap on non-economic damages and violation of a statute is merely evidence of negligence.

[40] *Sweeten, Adm'r. v. Nat'l. Mutual*, 233 Md. 52, 194 A.2d 817 (1963), *Fireman's Fund v. Continental Ins. Co.*, 308 Md. 315, 318, 519 A.2d 202, 204 (1987), *State Farm v. White*, 248 Md. 324, 236 A.2d 269 (1967).

[41] Make sure your client is fully aware of this and that they are in agreement with making the policy limit demand.

limits, then the insured tortfeasor may have a viable cause of action against the insurance carrier for its bad-faith refusal to settle within policy limits. If an excess judgment against the insured is obtained, then the insurer will be liable to its insured unless its refusal to settle within policy limits "consisted of an informed judgment based on honesty and diligence."[42] The determination of whether an insurance company's refusal to settle for policy limits is essentially a question for the jury, and there are no hard and fast rules as to whether a particular course of conduct by the insurance company will alleviate its bad-faith liability. In a Maryland third-party bad-faith claim, the jury will be instructed as follows:

> In evaluating the company's decision, factors to be considered include the severity of the plaintiff's injuries giving rise to the likelihood of a verdict greatly in excess of policy limits; lack of proper and adequate investigation of the circumstances surrounding the accident; lack of skillful evaluation of the plaintiff's disability; failure of the company to inform the insured of a compromise offer within or near the policy limits,; pressure by the company on the insured to make a contribution towards a compromise settlement within policy limits, as an inducement to settle by the company; and actions which demonstrate a greater concern for the company's monetary interest than the financial-risk attendant to the insured's predicament.

MPJI 14:10 Duty to Settle-Bad Faith.

If the liability-insurance carrier refuses to settle for policy limits, practitioners should strongly consider taking the case to trial and attempting to obtain an excess verdict against the insured. Even if there is inadequate insurance coverage, and even if the defendant has no assets to satisfy the judgment, the defendant/insured can assign its bad-

[42] *State Farm v. White*, 248 Md. 324 at 333, 236 A.2d 269 (Md. 1967).

faith claim to your client, and your client can attempt to collect the excess judgment from the insurance company that acted in bad faith.[43]

XII. Claim Against Insurance Agent

Insurance brokers owe a duty to their customers to exercise reasonable care and skill performing their duties, and if they fail to do so, they are liable based on negligence and breach of contract.[44] If coverage is inadequate, and the injured client purchased his automobile insurance through an agent or broker, then a cause of action against the agent/broker for negligently failing to obtain adequate uninsured motorist coverage should be considered.[45] Did the agent/broker explain what uninsured motorist coverage is? What do the documents in the insurance agent/broker's file indicate regarding the risks that your client asked the broker to insure against? Did the insurance agent/broker act reasonably in insuring against those particular risks? A tortfeasor may have a claim against his/her insurance agent and/or insurance broker for failing to obtain adequate liability insurance. If a large judgment is obtained against a tortfeasor, consideration should be given to having the tortfeasor assign to your client any claim he/she may have against the insurance agent for negligence.

XIII. Conclusion

The representation of those with catastrophic injuries from automobile collisions is a major responsibility in terms of experience, time, money, and resources. Practitioners need to approach these cases with creativity and diligence. Those who take

[43] *Medical Mut. Liability Ins. Soc. of Maryland v. Evans*, 330 Md. 1, at 29, 622 A.2d 103, at 116 - 117 (Md. 1993) (holding that assignment of bad faith cause of action to injured party is permitted).

[44] *Bogley v. Middleton Tavern*, 288 Md. 645, 650, 421 A.2d 571, 573 (1980).

[45] See *Popham v. State Farm*, 333 Md. 136, 156 634 A.2d 28, 38 (1993) (recognizing a cause of action against insurance agent for failing to offer adequate uninsured motorist coverage).

on such cases need to be aware of the various theories of liability and causes of action that should be considered in order to obtain fair and proper compensation for the catastrophically injured client. Furthermore, you also need to be willing to "think outside the box" in order to maximize insurance coverage. Doing so allows you to best represent a client who has been victimized because of the carelessness of another, and seek justice for that individual and her family.