



## LAW: THE PAEDIATRIC PERSPECTIVE

More than one million Canadian and American children sustain traumatic brain injuries (TBI) each year. Many of these injuries occur in traumatic events—e.g., motor vehicle, pedestrian, bicycling, falls or sports—which may become the subject of personal injury claims or litigation. For this reason, it is important for the parents or guardians of these children to become aware of how the civil justice system works and how this system may be of value. (For the remainder of this article I shall refer to the adults who are looking after the interests of the injured child as parents, while readers recognize that sometimes the responsible person may actually be a court-appointed guardian.) This article explores the legal aspects of paediatric brain injury. First, we shall look at the typical elements of a personal injury (“tort”) case. Second, we shall review the personal qualities which parents seek in attorneys who represent children with brain injury. Finally, we shall consider the notion of “structured settlements”—a legal device often used to ensure long-term financial protection for the injured child.

### ELEMENTS OF A CASE

The typical personal injury (PI) case involves three primary elements:

- *Liability* on the part of another (defendant)
- *Injury* to the child (plaintiff)
- *Ability to recover damages*

Trial lawyers often refer to these elements as the “three-legged stool.” As we shall see, each of these items must be present in a particular case if the child with brain injury is to be successful in recovering monetary damages for compensation. Absence of one or more of these elements in a case causes the “stool” to collapse and likely will result in the child obtaining little or no compensatory damages. Let’s now look at each of these items individually.

### LIABILITY

In every personal injury case, it is necessary for another person or entity (defendant) to be liable or legally responsible for causing the injury in question. Since most brain injuries occur in traumatic events, the typical basis of legal responsibility is the *negligent* conduct of the defendant. (Occasionally, however, liability may be based upon some other legal theory, e.g., *product liability* when a defective product is responsible for causing the injury.)

Negligence occurs when a defendant fails to exercise that degree of care which is expected of ordinarily prudent persons. For example, in a motor vehicle collision, if a defendant motorist runs a stop sign and strikes a vehicle occupied by the plaintiff, those circumstances would constitute negligence as a matter of law.

## INJURY

If the defendant's negligence produces (or as we lawyers say "proximately causes") the child's brain injury, the second element of our paradigm is satisfied. The value of a personal injury case is directly related to the severity of the child's injury. More severe injuries generally produce greater amounts of compensation. But, brain injury, whether it be a so-called "mild" injury or what the medical literature refers to as a "moderate" or "severe" injury, is always a serious condition. Even subtle brain dysfunction can have devastating effects upon children and their families. For this reason, once a brain disorder of any type is diagnosed, lawyers generally accept the proposition that the *injury* portion of the case is present.

## ABILITY TO RECOVER DAMAGES

When *liability* and *injury* are present, review of the case turns to identifying resources to pay money damages (compensation) to the plaintiff. Often a defendant's ability to pay compensation is determined by the amount (limits) of liability insurance that the defendant purchased before the time of the accident. Sometimes, a plaintiff's ability to recover damages may also involve the personal assets of the defendant or perhaps, in road collision cases, uninsured motorist (UM) insurance benefits provided in policies owned by the plaintiff or his or her family. Regardless of the type of available resources, in brain injury cases those resources must be substantial, if litigation is to be successful. When all three elements of a case are present, then the parent of the child with acquired brain injury may reasonably expect to be able to retain the services of a lawyer to represent the child's legal interests. However, if even *one* element is missing, the chances of finding competent counsel are diminished significantly. This is so because attorneys who specialize in personal injury cases generally accept employment only in cases where substantial amounts of compensatory damages may be awarded and *collected*. Without a probability of obtaining adequate compensation, most attorneys will decline an opportunity to become involved in a case. When liability may be proved easily, when brain injury is readily apparent and when substantial insurance coverage is available, the case probably will be resolved under terms favourable to the plaintiff child.

## QUALITIES OF LAWYERS

To pursue personal injury claims or lawsuits, parents require the legal services of knowledgeable attorneys. Parents should retain these lawyers as soon after the traumatic incident as practicable. Since evidence from the injury may disappear immediately after the event, time is of the essence when seeking legal counsel. Like other neurological injury experts, competent lawyers may be difficult to identify. As the Ontario Brain Injury Association (OBIA) points out in the introduction to its publication

*Acquired Brain Injury: Directory of Services:*

*One of the chronic problems facing people with brain injuries and their families is the difficulty of obtaining services in a timely and understandable fashion.*

This problem may be particularly acute when families seek information regarding lawyers because there are relatively few attorneys who have had substantial experience handling brain injury cases. Fortunately, a new type

of attorney is stepping forward to represent clients with brain injury and their families. Called *neurolawyers*, these attorneys specialize in such cases. *Neurolaw* is an emerging subspecialty of trial practice which addresses the medico-legal aspects of both traumatic brain injury (TBI) and spinal cord injury (SCI). This area of legal expertise will be discussed in detail by the author in a subsequent issue of this magazine.\* At present, it suffices to say that parents now have access to a new group of legal experts to represent their children in brain disorder cases.

The previously mentioned OBIA *Directory* contains a section devoted to “Legal Services” which presents biographical information pertaining to lawyers who represent clients with brain injury. Similarly, in the United States, the National Head Injury Foundation’s [now called the Brain Injury Association] *Directory of Head Injury Rehabilitation Services* provides such information as well. However, prior to retaining any attorney, parents should first satisfy themselves that the prospective attorney possesses the personal qualities necessary for successful prosecution of the legal case. Concerned parents must first determine whether or not the consulted attorney understands the nuances of paediatric brain injury. Traumatic brain injury disrupts children *cognitively, socially* and *physically* in a number of important ways.

## COGNITIVE DISORDERS

Cognitive disorders involve: Communication/language, memory (especially for learning new information), perception, attention/concentration, judgment/planning/decision making, thinking/reasoning and the ability to change (the so-called “flexibility” factor). Cognitive function is particularly significant within the school setting, since it is there that brain disorders may become most apparent to parents and teachers alike.

## SOCIAL DISORDERS

Social and behavioural disorders involve: self-esteem, self-control, awareness of self/others, awareness of: social rules/roles, interest and social involvement, sexuality, appearance and grooming, family relationships and age-appropriate behaviour. Such disorders are common in children with acquired brain injury.

## PHYSICAL DISORDERS

Physical (or so-called “sensorimotor”) disorders involve: vision and hearing, speed and coordination of movement, balance/ equilibrium, strength, motor nerve function, speech, eye-hand coordination and spatial orientation. These disorders may have a dramatic effect upon the way children meet the challenges of the physical world.

Simply stated, brain injury in a child affects all neuropsychological systems and potentially creates complex deficits in learning, motor and personality development. For this reason, it is imperative that parents of children with brain injury retain the services of lawyers who recognize and appreciate the full panoply of considerations attendant to neurological injury.

Prior to meeting with a prospective attorney, parents may first desire to make a telephone inquiry in order to learn about that attorney’s background in representing children with brain injury. During this telephone conference, parents should consider asking one or more of the following questions:

1. Have you successfully represented clients with brain injury?
2. How much of your practice is devoted to such cases?
3. Are you a member of any advocacy groups concerned with TBI?
4. Are you a member of any professional trial lawyer organizations?

5. Do you work often with neuropsychologists, physiatrists, rehabilitation specialists and life care planners?
6. Do you carry a policy of legal malpractice insurance?

Bona fide neurolawyers will not be reluctant, offended or embarrassed to answer these questions.

Once an attorney has been “qualified” using this screening procedure, parents should arrange to meet the prospective attorney during a personal consultation. During that meeting the attorney should be further scrutinized. At that time, parents should seek answers to these important questions:

1. Does the attorney appear to understand the complexities of paediatric brain injury?
2. Does the attorney demonstrate *confidence* in his or her ability to represent persons with TBI?
3. Does the attorney appear to possess the appropriate demeanour and personal commitment to work with clients with TBI and their families?
4. Does the attorney have in the office models, medical illustrations and library materials pertaining to brain injury?
5. Is the attorney honest in his or her appraisal of both the strengths and potential weaknesses of the particular case?

If the answer to all of these questions is a resounding “YES,” parents should strongly consider retaining that lawyer.

Even with the very best attorney representing the child’s interests, however, parents should recognize that neuro litigation is complex. There may be many peaks and valleys as the case proceeds toward resolution. Examination of specific litigation issues is beyond the scope of this present article, but some of those will be addressed in the forthcoming article on neurolaw. Now, we shall turn our attention to the question of “structured settlements.”

## STRUCTURED SETTLEMENTS

The goal of all brain injury litigation is the securing of compensation necessary to: (1) fund programs of care, treatment and rehabilitation, (2) compensate for pain and suffering attendant to the injury and (3) replace or supplement past and future lost income. To accomplish this goal, many parents elect to use a legal device known as the *structured settlement* when the opportunity to resolve a case arises.

While parents can accept a settlement in a single “lump sum” payment, that sort of resolution is not generally believed to be appropriate in cases involving children. Single sum payments require parents to manage settlement proceeds carefully for their children and may not afford guaranteed long-term benefits. On the other hand, “structured settlements” provide for *periodic payment* of the settlement money which ensures a steady stream of financial resources over a long period of time.

To employ this legal tool, parents must work closely with the child’s attorney to design a plan appropriate for the factual circumstances presented by a particular case. Typically, settlement offers are evaluated on a *present cash value basis*. If the present value of the offered settlement constitutes fair compensation for the child’s injuries, it should be accepted. The accepted amount is then allocated to: (1) “up-front cash,” paid on the date of settlement and (2) money set aside to fund an annuity—usually purchased from an insurance company which specializes in these devices—which pays out proceeds on a periodic, commonly monthly, basis. “Up-front cash” is used to pay attorneys’ fees and the expenses of the litigation and to reimburse parents, children and health care providers for

past losses and charges. It is not uncommon for this initial payment to be equal to approximately one-half to two-thirds of the present value of the entire settlement amount. Obtaining this portion at the outset allows parents to eliminate past debts flowing from the injury and the litigation. The remainder of the funds is allocated to the *future* needs of the child through the purchase of an annuity. Money produced using this process may be employed to provide for future contingencies as they arise.

A recent case handled by the author illustrates the concept of structured settlements. That case, which involved a *mild* brain injury, was settled for a present value of (U.S.) \$650,000. "Up-front cash" totalled \$400,000, with the client receiving a net sum of approximately \$175,000 on the date of settlement. A total of \$250,000 was used to purchase an annuity which will provide the client with approximately \$1,500 guaranteed each month for the rest of his life. If the client dies prematurely, then the monthly payments will be made for a total of ten years (guaranteed). Those monthly payments ensure that the injured client will have a constant flow of income to replace future lost earnings and to fund a program of out-patient cognitive therapy for the rest of his life. They also provide the client's family with at least some measure of financial security, if the client dies within the first ten years following settlement.

Of course, the terms of the settlement described above are presented here solely for purposes of illustrating how a structured settlement works. The amount of a just and adequate settlement in other instances turns upon the facts of each individual case, using the evaluation techniques ("three-legged stool") mentioned in the first part of this article. Specific terms, amounts of "up-front cash," sums paid on a periodic basis and the period for which those payments are guaranteed are subject to negotiation during the settlement process. Parents must consult with the attorney to work out terms to meet the specific needs of their own child.

### **Conclusion**

Parents confront many demanding issues when addressing the legal interests of their children who have acquired traumatic brain injury. Simply gaining basic understanding of the civil justice systems can be taxing. Obtaining the services of competent legal counsel may be a time-consuming activity. Working out the details of settlement in a personal injury case requires attention to many important details. Proceeding diligently, parents can guarantee long-term benefits to their injured children using the civil justice system in meritorious cases.

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