MINOR CONSIDERATIONS, MAJOR CONCERNS

In representing children in personal injury cases, it all starts with their involvement and interests

By CHRISTOPHER GULY

ONE OF THE most challenging tasks for personal injury lawyers is representing child plaintiffs.

"Children aren't generally responsible for their own acts and can't be assigned contributory negligence, and often accidents occur when children are under their parents' supervision and care," says Darcy Merkur, a partner with Thomson, Rogers in Toronto who practises almost exclusively in plaintiffs' personal injury litigation.

For instance, in cases where parents are likely to become defendants because they too sustained injuries or are implicated in failing to properly supervise their child, counsel has to look to another relative to serve as litigation guardian and provide instruction.

But depending on the age of the injured child, personal injury lawyers must also involve the minor in any deliberations, says Patrick Brown, who has practised critical injury law for more than three decades and is a principal partner at McLeish Orlando in Toronto.

"It's imprudent to ignore the child and just follow the advice of a parent or litigation guardian. To have the child's interest, you have to listen to the child, while reviewing the process with the parents or guardian, and have them fill out the necessary paperwork." He recalls meeting a child who had been severely burned at a cooking class for toddlers — just to understand who she was. "I dealt solely with the parents because I didn't want to give the little girl any added burden and enhance her injury."

Generally, 12 to 14 years old is considered the starting range at which lawyers can examine a child. However, Brown, who estimates one in four of his injury cases involve children, points out that the assessment is normally based on the individual child and whether or not he or she can provide evidence that is credible and reliable. A British Columbia Supreme Court interlocutory ruling earlier this year broadened the criteria used to determine when a minor could be examined for discovery. In *Dann-Mills (Litigation guardian of) v. Tessier* [2015] B.C.J. No. 465, the court held that mental competence shouldn't be the sole factor to determine whether a child could be compelled to attend an examination for discovery, and should also include "the child's age, ability to understand the truth, ability to express himself/herself, attention span, and the prospect of undue anxiety on the part of the child or potential harm to the child."

Veteran personal injury lawyer Barbara Legate typically seeks instructions from parents, yet notes that not all understand the fiduciary obligations they have for their child who sustains an injury.

"I've had situations where I didn't think the parents were acting in their child's best interests but in their own best interests. 'How much am I going to get?' is not a question I like to hear, though I recognize they may have incurred a lot of debt to care for their child and have not been compensated. What I would rather hear is: 'What will be enough to care for my child?' "

A lot of work is involved, explains Legate, whose practice is mainly devoted to representing clients who suffered catastrophic injuries. Affidavits are required from the litigation guardian and the lawyer, the latter stating the merits of the claim to the court. Counsel also has to justify a contingency-fee agreement, which is the norm since few families can afford to pay for disbursements that can total hundreds of thousands of dollars for expert reports. A factum is then prepared that outlines causation, damages and liability issues along with a justification for the settlement amount sought for court approval. In Ontario,

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When things go south

The most common claim against a personal injury lawyer representing injured child plaintiffs involves improper communication, according to Ian Hu, counsel with claims prevention and the practicePRO program at the Lawyers' Professional Indemnity Co. (LAWPRO).

For instance, counsel believes $1 million is the right amount for settlement, but follows through with the litigation guardian's desire to settle for $300,000. When the minor reaches adulthood, he or she might feel the litigation guardian settled for much less than he or she ought to have and will hire another personal injury lawyer to sue the original lawyer for the remaining $700,000 for failing to act in the minor's best interests, explains Hu, a former plaintiff injury lawyer.

Inadequate investigation is another major problem, he says.

"If a lawyer closes a brain-injury case thinking there won't be any future problems, and a few years later the child's condition worsens and the plaintiff goes to another lawyer, original counsel could be in trouble for failing to conduct a thorough expert investigation and assessment of the original injuries in a timely manner."

a judge may ask the Office of the Children's Lawyer to review the settlement to ensure it adequately represents the injured child's interests. A child plaintiff, 16 years of age or older, must also consent to the settlement.

However, assessing damages alone is no easy feat.

"Infant litigants pose unique challenges to counsel — especially in the case of catastrophic trauma, such as brain injuries or paralysis — because the plaintiff lawyer must evaluate and assess the nature, duration and extent of the client's losses, not just until the child attains the age of majority but also for the balance of his or her life," explains Vancouver personal injury lawyer John Rice, a partner with Jarvis McGee Rice.

Brown says that quantifying damages for child plaintiffs is difficult because of the absence of a road map of their past to determine their future.

If the child is older, school records and psychological assessments could help predict the child's career trajectory. If the child is a toddler, the forecast is based on genetics: the parents' education and careers or jobs, and if applicable, siblings' academic performance.

Brown is familiar with the latter scenario. He represented a young girl who had lost a leg and sustained a brain injury in a car accident.

"She came from a dysfunctional family — and was under the care of her grandmother," Brown recalls. "The defence looked at her parents and siblings and determined that few of them did much with their lives and took the position that the apple doesn't fall from the tree. But her teachers said she was an exceptional young lady and did better in school than her siblings, and we argued she was a diamond in the rough."

The case went to trial and the court awarded the girl over

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> Darcy Merkur, Thomson, Rogers

$4.5 million in damages.

Determining what an injured minor will need in the future sometimes involves "more art than science" and "crystal-ball gazing" in attempting to forecast what the child could do in life and need, depending on the extent of the injuries sustained, says Rice.

"In catastrophic cases, a battery of expert medical opinion is required to get a sense of the reasonable range for lifetime outcomes," he explains. In cases of severe brain or spine trauma, the experts involved range from neurologists and neurosurgeons to orthopedic surgeons, physical medicine and rehabilitation specialists, and psychiatrists or psychologists.

Statistics, along with medical literature and studies, can also serve as a guide for the future, says Rice.

"Triers of fact need to be armed with evidence to make future damage awards predicated on the best available demographic data, medical evidence and, crucially important, fact-specific evidence to the child, his or her injuries and family."

Merkur says that it normally takes between seven to 10 years to resolve a lawsuit involving a child plaintiff — or about twice as long as that for an adult plaintiff — to allow for more time to assess whether the minor's condition has improved or deteriorated.

However, Rice believes that where possible to obtain a reasonable range of lifetime outcomes for a child plaintiff, lawyers should consider prosecuting cases to trial or settlement earlier since many families struggle with staggering medical expenses for severely injured children.

"Short of early settlement or judgment, paying for what can help now and forever is impossible for most of our clients until he or she recovers damages," he says. "It can also be more persuasive to advocate for brain-injured children — who usually fall further behind than their peers — than a brain-injured delinquent teenager who, although wrongly, is less sympathetic than a younger victim."

Whatever the age of the injured child, future care reports are usually prepared after discovery and before mediation, which can occur three or four years following an accident, Merkur explains.

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Sometimes, counsel doesn't have to focus too much on future scenarios.

Merkur recently settled a case involving a child who sustained a serious brain injury after being struck by a car. The defendant driver's insurance policy only provided a maximum coverage of $1 million, all of which the minor plaintiff received. "We didn't need to get into a debate as to future income loss," says Merkur.

Counsel normally has to project not only the cost of future care, but income loss too. The child's school records and IQ are considered along with similar criteria for his or her siblings, if applicable, and the parents' educational background, jobs and salaries. Counsel then estimates what the minor plaintiff could have earned had the injury not occurred.

Legate assembles a team of experts to help litigation guardians arrive at the appropriate amount of damages sought and have a long-term care plan in place before a settlement is reached. A case manager will review with them government-funded benefits and facilities available to them, along with attendant care such as special beds, lifts or wheelchairs.

Another lawyer will be retained to file an application on their behalf under the *Children's Law Reform Act* to enable them to become guardians of their child's property and develop a plan for the management of settlement money, which a structure broker has placed with an insurance company.

As Merkur explains, a structured settlement is only available to anyone involved in a personal injury claim that pays a tax-free, interest-generating annuity every month to a parent or guardian, according to a management and care plan approved and monitored by the court. Once in place, the structure cannot be changed and the monies cannot be used for any other purpose unless approved by way of an amended management plan.

An injured child plaintiff, without degenerative cognitive impairment, would receive the monies directly once reaching the age of 18, according to Brown.