

Hidden Dangers in Litigating the Brain Injury Case

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Advocating for individuals with brain injury can be highly rewarding, both personally and professionally. Some of the cognitive deficits suffered by people with brain injuries are lack of insight, poor judgment, loss of impulse control, rigidity, and an inability to initiate or act on their intentions. Before intensive therapy, it is very common for people with moderate to severe brain injuries to completely deny their deficits and problems. All of these effects of brain injury make these individuals very vulnerable to the legal system and make it difficult or impossible for them to advocate for themselves. At the same time, these deficits make working with such clients a personal and professional challenge for the solicitor. Their volatility and rigidity sometimes make them very difficult to deal with. Their problems with memory and concentration sometimes make them unreliable and their problems with execution make it very difficult for them to follow through on legal advice and direction, regardless of their desire to be compliant. This article reviews the typical brain injury case from its beginnings through the various stages of preparation for trial. Effort has been made to point out “hidden dangers” inherent in brain injury litigation.

While this article is directed specifically to considerations which must be taken into account by legal counsel, individuals with brain injury and their families will gain insight into the legal process and will be able to discern how they may contribute to the litigation.

Initial Interview

At all times when acting for such individuals, the lawyer must be aware of the likelihood that the information being provided will not always be accurate. Individuals with brain injury often tend to minimize and/or deny their problems. The lawyer must therefore take precautions from the earliest stage of the proceedings to get the accurate information from many different sources. If a lawyer knows prior to the initial interview that the prospective client has sustained a brain injury, then they should encourage the person to attend with their spouse, parent or other close relative or friend. Try to isolate the client with brain injury as much as possible from the negative feedback provided by other family members. Be aware that the family member or friend will need to speak to the lawyer alone.

Because of the lack of insight and denial that often results from brain injury, it is difficult to get an accurate list of symptoms. The solicitor may be tempted to suggest symptoms to the person through questioning. This will not be a serious problem for those who have a well-documented and severe brain injury. However, it should be avoided in cases where it is questionable whether the person had a brain injury or not. Those clients who are susceptible to “secondary gain” will be highly suggestible to the kinds of symptoms they would be expected to have in order to maintain a claim. Another important consideration at the initial interview is to determine whether the person has the capacity to retain a lawyer. At the very least, the lawyer should follow the practice of having the retainer contract signed also by a responsible family member. As a professional practicing in this

area, the lawyer must always have in mind the protection of the client. If another adult involved in the case is using the person with brain injury for personal gain, the lawyer must do everything possible to protect the best interests of the client. People who do not have the best interests of the person with a brain injury at heart will usually not remain in a close relationship. It is very important for the lawyer to monitor how the caregiver is doing and access all possible professional support for that person. In cases where the lawyer is in any doubt about the capacity of the client and/or genuineness of the caregiver's involvement, an opinion from medical professionals as to capacity should be obtained, and in appropriate cases, a "guardian" should be appointed by the Court.

Circumstances of the Accident

In most cases where a person sustains a brain injury in a motor vehicle collision, they will have amnesia for the events surrounding the crash. Immediate investigation into the facts and circumstances of the accident is critical. The lawyer must take steps to preserve physical evidence, obtain photographs of the vehicles and the scene of the collision, confirm the names of the eyewitnesses and obtain statements from them while their recollection of the facts of the collision are fresh. A police report should be ordered and the police officer interviewed. Early consideration should be given to whether accident reconstruction by an engineer is necessary.

Documenting Damages

Documenting every aspect of a brain injury case is very important. Because the client may not be a reliable historian, the lawyer must have all aspects of the case, both pre and post-accident, documented well in advance of any examinations either by lawyers or defence doctors. In every case the lawyer should order the ambulance call report and the complete hospital chart and records from all hospital admissions. It is important to note that the loss of consciousness or lack thereof is not sufficient to include or rule out the diagnosis of brain injury. The lawyer should also request the clinical notes and records of the person's main treating physicians for at least five years prior to the accident. Where economic losses are permitted, the lawyer should immediately secure documents confirming the person's educational background for as far back as those records are still maintained. The lawyer should also be aware that school records and employment records are usually destroyed after a certain period of time and this can severely prejudice the client's case. It is important to know whether a person with brain injury has had any previous psychiatric, psychological, or aptitude testing. These records may be available through the school record file. Lawyers should inform themselves immediately as to whether there have been any learning difficulties or behavioural problems in the past. It is critical to document any previous potential brain injury, no matter how minor.

For those clients who are already in the workforce, a complete employment history must be reconstructed. Often, the client will not be able to provide a detailed work history or the work history provided may be embellished or inaccurate. This part of the case must be carefully documented through previous employers and close family members as well as through the assembling of employment records, tax returns, accounting records, and

bank statements. It may be necessary to retain a forensic accountant to assist the lawyer in assembling the above information.

Documenting the Case through Expert Evidence

Brain injury cases are usually very difficult to present at trial. Most people with a brain injury look perfectly normal. There may be no external evidence of disability. Further, to the lay person. The client's deficits are not always immediately discernible and clients with brain injury often over-represent their capacity and ability. They are invariably optimistic about their recovery and ability to return to a higher level of functioning. It is common for lawyers to rely on their own client's statements which consequently lead to serious under-evaluation of the claim. It is very challenging for a lawyer to be able to discern between those cases where the person has made significant progress and where the person is unfortunately being over optimistic. The lawyer's challenge is complicated even more by the fact that the health care system, very often, if not properly directed, lets individuals with brain injury down. There is very little follow-up built into the system and, because of the inability to initiate and follow through, patients are often left untreated. Accordingly, it is very common for people with brain injury to become confused, depressed and feel abandoned.

Rehabilitation Case Manager

The lawyer's job will be significantly eased by an effective and experienced case manager. The case management field has been expanded in recent years, and many of the people who are holding themselves out as case managers in the rehabilitation field have very little experience. The management of a brain injury case is a highly specialized area. The lawyer should be familiar with the people in the industry who are specialists in managing brain injury cases. If the insurer suggests a caseworker that does not have a known reputation for specializing in brain injury cases, the lawyer should meet with that person and satisfy themselves as to their qualifications to manage the client's treatment. If the lawyer is still in doubt about the case manager's competence, then they should consult with a local brain injury association or known experts in the brain injury rehabilitation field or a lawyer who devotes their practice to brain injury cases. Failure to involve a trained and experienced case manager can rob clients of important opportunities and can even exacerbate problems and set back the client's ultimate recovery. If the lawyer is going to handle brain injury cases, they must keep in communication with the case manager, monitor their involvement and conduct periodic case conferences. The client is entitled to feel comfortable with all of the professionals involved in their life. It is important for the lawyer to listen to their client's feedback about the case worker. However, it is common for the people with brain injury to complain about their caseworker and these complaints are not always informed and legitimate. It is important for a solicitor to satisfy themselves as to the caseworker's qualifications and competence and to remain proactive in supporting the caseworker, always encouraging the client to cooperate with them fully.

Experts Required

Each brain injury case must be looked at individually and selection of experts should be based on the particular deficits of the injured person, as well as the expert's personality, location, and the recommendations of the patient's treatment providers. A great disservice may be done to the client if lawyers simply have a static list of experts to whom every client is referred. The lawyer must keep in touch with the medical community and be aware of the special interests of a large number of experts.

Role of the Insurer

In many jurisdictions the role of the insurer is to fund the client's treatment and rehabilitation in accordance with the term of an insurance contract. Generally, insurers do not have the right to run the client's treatment program, decide on who the case manager or treatment providers will be or to involve themselves directly with the client. However, the insurer's cooperation with the lawyer and the client in providing timely and adequate funding for necessary treatment and rehabilitation is critical. The lawyer must ensure that there is thorough and regular reporting to them by the case manager and other professionals. The insurer must also be kept fully informed of the client's treatment and progress. The lawyer should generally keep open communication with the insurer and have periodic conferences with insurance personnel. In some cases, it is even appropriate to have the insurance representative attend a meeting with the lawyer, the treating clinicians and the case manager and sometimes with the client. This is especially important where problems arise or where the lawyer gets the sense that the insurer is beginning to resist the rehabilitation plan.

It is also important that the lawyer start communication with the third party insurer early and maintain a flow of information to them which allows them to understand the seriousness of the client's case. It is always in the interest of the client for third party insurers to have proper reserve established. Failure to allow insurers to understand the nature of the client's case and set proper reserves can often set a very bad tone for the dealings with the insurers and create unnecessary problems throughout the litigation. Even worse, if an adjuster has not appreciated the seriousness of the case and is later embarrassed by having set reserves too low, it can force the case to a trial unnecessarily.

Limits of Insurance

If the lawyer has a case which is clearly catastrophic and would, if quantified on a 100% basis, exceed the amount of insurance available, then they should document all demands for the policy limits to be paid in writing. Insurers have a duty of utmost good faith to their own insureds and are much more motivated to make early settlement of cases where the amount involved approaches the policy limits and where their insureds have personal assets which could be exposed to an eventual judgment. Further, where opportunities to settle within the policy limits have been offered, the insurer can be exposed to claims for punitive damages and/or bad faith, if the claim is not settled.

Pre-Trial Hearing and Alternative Dispute Resolution

Both of these vehicles can be extremely effective in promoting settlement. The key is careful and thorough preparation. A case that is well documented by appropriate and respected experts should be aware of the weaknesses in the case and address those weaknesses. Settlement mediations and other Alternative Dispute Resolution methods are proving to be very effective vehicles for settling these cases. One of the clearest advantages of the mediation process is that a representative from the insurance company with authority to authorize settlements is usually present. Mediation also gives the lawyer an opportunity to have direct access to the insurer's representative and persuade them as to the merits of the case without putting the client through the stress of a trial.

Communication with the Client

People who have sustained brain injury can be very demanding clients in many respects. Because of problems they have with their memory and their ability to concentrate, they often forget information that has been provided to them or focus on a single issue and forget anything else that has been discussed. It is important to keep a "paper trail" flowing to the client. It is helpful to clients if the lawyer simply copies them with much of the correspondence sent to others. This helps the clients to know that work is being performed on the file and what progress is being made. It may also be helpful to the clients to provide them with written reports of any meetings between the lawyer and client to highlight issues that were discussed and decided. Clients can then refer to the correspondence to recall what was covered and therefore avoid unnecessary lengthy telephone conferences. As a general rule, clients with brain injury should not be provided with copies of their medical reports. Treating clinicians prefer to discuss their findings with the client in person and are often reluctant to express a negative prognosis in writing if they think the client will read it.

Examination for Discovery

The attorney cannot prepare individuals with brain injury for a legal examination in the same way other clients are prepared. Individuals with brain injury are usually not able to remember many of the details discussed during preparation. More often than not, they are not even able to provide complete lists of all their problems, without prompting. It may be helpful to start of the Examination of such clients by making a statement off the record advising the opposing counsel that the answers which these clients give may not be reliable because of the nature of the injury. As mentioned earlier, the attorney's time in preparing for legal examinations is well spent if family members are asked to corroborate information provided by the client. It is imperative that the attorney be familiar with medical records so that if the client says anything inconsistent with those records, a correction on the record can be provided.

One of the most common features of brain injury is fatigue. Especially under stressful circumstances, the client will tire very easily. Attorneys should not subject the client to long periods of examination without a break. Additionally, the client's answers are likely to become more unreliable as they become more fatigued. When the attorney sees this

happening, the examination should be adjourned and continue later. If impulse control is a problem for the client, then the attorney must be extremely careful to observe signs of agitation and take a break to avoid complete loss of control. Although the inability to control temper and other impulses is a serious feature of many brain injuries, it remains very difficult for others to understand. Often a person being belligerent and angry during examination causes the defence counsel to dislike clients and to assume that they will make a bad impression as witnesses at trial.

Conclusion

People who have sustained brain injury are extremely vulnerable. They have been injured and they may fall prey to the legal and medical systems. The lawyer has to be experienced enough so as not to allow them to be further victimized by inadequate or unprepared legal representation. These people will face life with the deficits caused by their brain injury on a permanent basis. It is the responsibility of advocates to ensure the clients obtain the maximum treatment, rehabilitation, and financial compensation which the civil justice system provides.

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