

PERSONAL INJURY

Financing a Personal Injury Case

By Charles Gluckstein

At any given time, most personal injury law firms have thousands of dollars tied up in litigation costs. It might be said that these law firms are providing their clients with cost-free, non-interest-bearing loans. In addition, the firm may have incurred many thousands of dollars worth of unbilled time that may or may not be collected until after the conclusion of the lawsuit. Even if the lawyers are eventually repaid, they may still take a loss, having forfeited the opportunity to put that money to other more productive use in the interim.

In most personal injury litigation cases, a lawyer agrees to risk his or her own time and expense in prosecuting the case. In exchange, the client agrees to pay the lawyer a percentage of the total amount of any recovery in his or her claim, whether by settlement, jury verdict or some alternative dispute resolution procedure. Personal injury litigation is one of the few areas of the law that includes access to justice for litigants with limited ability to pay. The "contingent" aspect of the fee means that if there is no recovery, there is no lawyer's fee.

While contingency fees have recently been regulated in Ontario under Bill 213, the *Justice Statute Law Amendment Act, 2002* will further regulate the requirements of these agreements. Therefore, before accepting a personal injury case, all risks in the potential lawsuit must be considered.

1. Taking on a Case: The initial client interview should provide the principal lawyer with necessary information to assess the risks involved (liability, damages and causation). It is important, from an economical point of view, to make a decision early on as to the quality of the case and the type of client that you are willing to accept. For example, clients who have retained and hired two or more lawyers before contacting you may be difficult to satisfy and costly as there will be previous solicitor accounts to satisfy.

After the interview, it is important to set out in writing to the client what will be done on his or her behalf and to explain the various stages of the litigation process. The fee arrangement and the retainer should also be set out in detail to avoid any misunderstanding later.

In assessing a potential case be weary of a matter that has a large potential damages aspect but a questionable liability issue. Alternatively, do not be quick to turn away a case which may only attract small damages if there are no liability problems.

Ultimately, in motor vehicle

cases one has to factor in threshold defenses and deductibility considerations to determine if there is any value in proceeding with a small damages case. Under *Bill 198* (for accidents after October 1, 2003) accident victims rights are severely curtailed with a \$30,000.00 deductible and difficult verbal threshold to overcome. Many of your potential clients will need to be counseled that they will be unable to receive compensation under *Bill 198*.

2. Budgeting the Case: Having made the decision to take on a case, it is essential to determine where the key evidence in your case lies. Hiring the appropriate expert early on will be important not only to strengthen the evidence in your case but to demonstrate to the defendant that you are willing to invest in your client.

In cases where liability is an issue and damages are large be sure to consider the following experts: private investigator, photographer, accident reconstructionist, and biomechanical engineer.

Medical and other experts will also be required to prove your client's damages. In a brain injury or spinal cord matter you may want to consider the following experts: neurosurgeon, neurologist, physiatrist, neuropsychologist/psychologist, psychiatrist, physiotherapist, occupational therapist, behaviour therapist, cognitive therapist, vocational therapist, speech-language pathologist, educational therapist, social worker, case manager.

Finally, in order to properly present any claims for special damages such as economic loss or loss of competitive advantage and future care costs be sure to involve an accountant, actuary and/or

economist.

It is not necessary to retain numerous experts in every matter as many times it may in some cases be "overkill". Alternatively, cases which proceed without any expert evidence are often viewed as ill prepared or of little value by the defence due to the fact that the plaintiff's counsel has been unwilling to invest in building the case.

The financial reality is that in personal injury cases, defendants will offer adequate settlement offers in cases where the plaintiff's counsel has presented expert evidence to prove their theory of their case because the defendant recognizes the risks for an adverse decision at trial. Ultimately, counsel for plaintiffs will recoup their expenses in addition to higher settlements if they have invested in their cases.

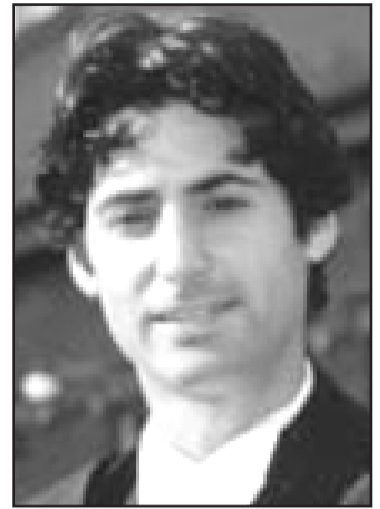
3. Settlement or Trial of the Matter for Settlement Negotiations/Mediation: In jurisdictions with mandatory mediation programs, many personal injury cases now have a tool to bring cases to conclusion earlier at a lower cost. When used correctly, and often after Examinations for Discovery, a mandatory mediation can often resolve the dispute. Although early mediations rarely resolve complex files involving catastrophic claims, they are useful in dealing with relatively straightforward liability cases with minor to moderate injuries, or fatal accident cases.

4. Costs Involved in Litigation: As a practical matter and in order to sustain a healthy practice it is often wise to have a balance of relatively small uncontroversial matters blended with complex cases. Once a matter is destined for a trial the plaintiff's lawyer requires a "war chest" of monies to present

their case. Keep in mind your client is most likely in a worse financial position than previously and unlikely to cover any of the costs up front. By settling out small cases on a regular basis, the firm or sole practitioner can then build up a "cash flow" for a select number of cases that will require substantial investment.

Even in a straightforward chronic pain case which proceeds through to judgment, you might expect to incur the following costs:

- pleadings and filing fees, motion records etc. \$2,000;
- costs of examinations for discovery and mediation \$2,000;
- production of documents \$2,000;
- investigation, will statements and interviewing witnesses \$15,000;
- photocopying, courier and postage \$3,000;
- medical and expert reports costs \$15,000;
- expert fees for a 10-day trial \$15,000;
- total amount of time spent by law firm, including lawyers, law



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clerks, etc. \$50,000.

The costs increase as the matter becomes more complex: In cases that include costs of care, such as brain injury or spinal cord cases, with trials lasting five weeks or more, the costs could be as high as \$500,000.

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