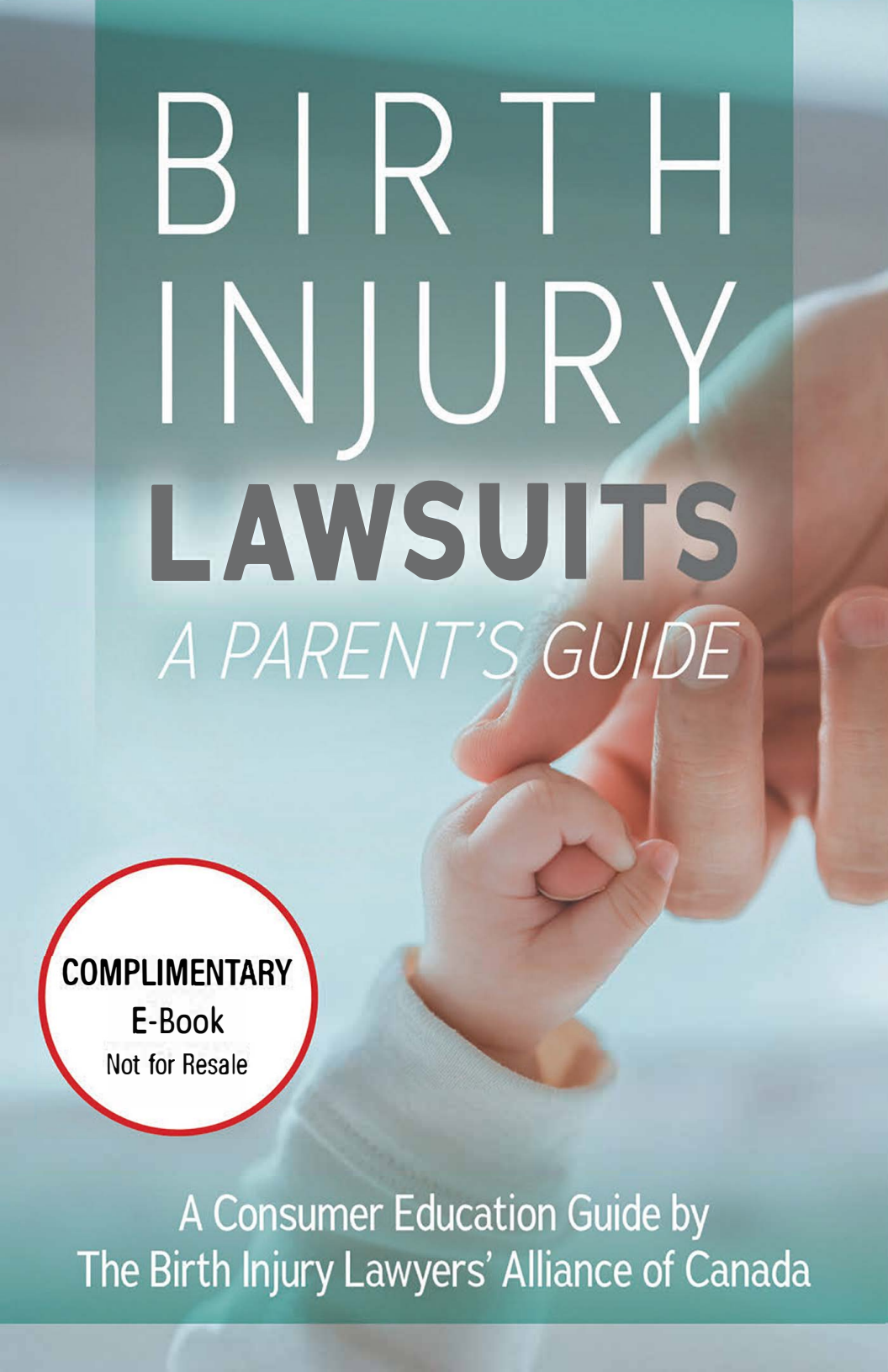
BIRTH INJURY LAWSUITS

A PARENT'S GUIDE



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A Consumer Education Guide by
The Birth Injury Lawyers' Alliance of Canada

BIRTH INJURY **LAWSUITS**

A PARENT'S GUIDE

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This Guide Book is intended as general advice only. You should always consult with a lawyer for specific legal advice concerning your case.

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FORWARD – A LETTER TO PARENTS

PART 1 – A PARENT'S EXPERIENCE

by Brenda Agnew

I remember the moment I decided to pursue a medical malpractice lawsuit for my son. The pain, upset, and confusion I felt when I discovered that my child's cerebral palsy may have been prevented was indescribable. The first two years of his life were spent searching for answers and diagnosis, and when we found out that he had a condition known as kernicterus, which occurs as a result of untreated jaundice, I knew deep down that I had to find a way to determine what had happened and try and ensure this did not happen to another family. The reasons that families choose to pursue legal recourse for medical negligence varies. For some it is financial; for others, it may be a need to hold someone accountable or to try and change the system that let them down.

As a parent, I never imagined that I would find myself in this situation. The world of medical malpractice law and the entire legal process seemed foreign and daunting. I was navigating my son's medical diagnosis and focused looking for healthcare supports and funding resources. I knew nothing about pursing a lawsuit, but I was determined to do everything in my power to advocate for my son and my family. I wanted to hold the responsible parties accountable for their negligence and ensure that my child and our family received the compensation deserved. We have a lifetime of extraordinary costs ahead of us, including therapies, equipment, home modifications,

caregiving support, accessible transportation, and much more. We wanted to ensure that we could provide what our son needed to live a full life, for him to be as functional as possible and to ensure that there was funding available to care for him long after we are unable to do so.

Deciding to finally start the process wasn't easy. I was plagued by questions and fears about what this would all look like and if I was being too harsh in my approach to the situation. Would our care be compromised at the hospital that we were going to sue while we were still receiving care there? Would other physicians know about our lawsuit? Would people think we were being greedy and only in it for the money? Were we going to get someone fired for a mistake that they made, even if unintentional? I can say with certainty that we were not in this for the money and the people who know and love my family knew that. I can also confirm that the care we continued to require at the hospital was not compromised. I learned that confidentiality is part of the lawsuit and that most of our care providers had no knowledge of what we were doing. It was also important for me to keep front of mind the reasons we were wanting to go ahead with a lawsuit and what a resolution would mean to our family and that helped to push all of the anxiety and worry aside. I also now know that healthcare providers do not get fired as a result of medical malpractice lawsuits.

A huge part of the process and ultimately the most important part began with finding the right lawyer—someone who not only understood the complexities of medical malpractice and had the experience to bring these cases, but also empathized with the unique challenges I faced as a parent of a child with cerebral palsy. The relationship between a client and a lawyer needs to be a positive, supportive, and collaborative one, and it will last for years. It is important to find someone who you trust, can work with, and feel confident in their ability to advocate on your behalf.

Throughout the journey, I encountered numerous obstacles. There can be a significant emotional toll proceeding with a lawsuit and reliving events. There are times during this process when the story needs to be told, which can be emotionally taxing. This process is not an easy one and it takes years. The road isn't smooth, and often feels like there is a lot of "hurry up and wait". There were so many instances when I wanted nothing more than to give up, to retreat from the battle and focus solely on caring for my child, but each time I felt like surrendering, I reminded myself of the importance of my mission—to seek justice and compensation for what had transpired and to hopefully prevent future tragedies from happening to other families.

As the months turned into years, my determination never wavered. I attended every meeting, took all the phone calls, read the medical reports, and worked closely with my legal team. The support of my friends, family, and fellow parents of children with special needs was invaluable. I personally preferred to be involved in every part of the legal process. I have learned that other families may not be as hands-on because they find it too overwhelming. The right lawyer will consider and work with your preference in this regard. For me, I felt a sense of purpose in being as involved as possible, and I had a legal team who embraced that and worked with me.

Finally, after what felt like an eternity, we came to the day of resolution. For the first time since we made the decision to bring forward a lawsuit, I felt that the weight had been lifted. I felt validated for doing what we did and it alleviated all of the long held fears I had as we went through the process. Although no amount of money could ever truly make up for the pain and suffering we had endured, this victory represented a sense of closure for our family. As I look back at the entire process, I have no regrets and would make the same decision for my family, knowing everything I do today.

The medical malpractice lawsuit tested my patience, strength and resilience, but I was comforted by the knowledge that I had done

everything in my power to advocate for my child. The path ahead would still be challenging, but together, we would continue to face life's obstacles with courage, determination, and a sense of peace knowing we had the financial means to help make the best decisions we could.

PART 2 – ANSWERING THE PARENTS' MOST COMMON CONCERNS

by Jan Marin

I used to wonder why more people didn't reach out for the commitment-free initial consultation to learn about their rights to bring a lawsuit. Over the years, I have learned that there are some very common reasons why parents hesitate to make the initial call. The reasons generally fall into the following categories:

- I can't afford a lawyer.
- I don't have the time or energy.
- It has been too long.
- I don't know exactly what happened to my child or what caused the injury.
- The doctors saved my child's life.
- I'm worried my child's healthcare will be impacted if I start a lawsuit.
- What if I did something that contributed to my child's injury?

I have discussed each of these concerns with many of my clients over the years, and I will take a moment to address each concern here.

When considering hiring a lawyer, many families don't pick up the phone because they feel that they cannot afford legal fees. Legal costs can be significant. Fortunately, most lawyers practicing in this area offer contingency fee agreements, which means that legal fees

are paid as a percentage of the amount the client receives. All of the lawyer members of the Birth Injury Lawyers Alliance (BILA) work with contingency fee agreements.

Many parents, and particularly those caring for children with special needs, feel completely tapped out. They don't think they have the energy to take on another project or have another demand upon their time. Simply making the initial call to a lawyer can feel overwhelming. While making the first call is a step that the parent needs to take, the time commitment from parents throughout the process varies considerably based in large measure on the parents' own preferences. Most steps are undertaken by the lawyers behind the scenes.

With regard to timing, when children are injured they generally have until two years after they reach the age of majority to initiate a lawsuit, although the laws in each province may vary. We certainly don't recommend parents wait too long because there may be issues with obtaining the complete medical records. In birth injury cases, we require both mom and baby's records. Most hospitals have a policy of retaining adult records for ten years. I would certainly encourage parents to reach out well before the ten year mark. That being said, I have obtained complete records past ten years and would encourage all parents seeking answers to reach out—we can then determine whether records are available and complete.

Parents often do not fully understand how their child was injured. In some cases, this is one of the reasons they are consulting a lawyer. Most parents want to know exactly what happened to their child. In other cases, this lack of knowledge makes parents hesitate: "I don't even know what happened. Why would a lawyer consider my case?" We encourage any parent whose child has been injured at or around the time of birth to consult with a BILA lawyer. Most of our clients don't know exactly what happened or why their child was injured. Part of the lawyer's job is to figure out what happened. In fact, the first stage of the process is information gathering and

an investigation. We will listen to your story, order the relevant medical records, and closely examine them to determine what happened. In many cases we can offer the parents a preliminary opinion simply from our review of the records. If we believe that your child's injury may have been caused by negligence, we will have the records reviewed by medical experts.

Following a traumatic birth experience, many parents feel like their child's life was saved by the healthcare team. That may be true. If that is the case, we will tell you. Alternatively, there may have been opportunities for the healthcare team to have intervened before your child got into trouble, which may have avoided the injury all together and avoided the need for the physician to rescue your baby.

Another common feeling I hear from parents is, "I knew something was wrong," "I should have spoken up," or "I should have asked more questions." Variations of these concerns come up with many of the families I speak with. Many parents hold onto feelings of guilt that they could or should have done more for their baby. They worry that bringing a lawsuit might confirm these thoughts. Let me be clear: you did not cause your child's injury. It is the job of the healthcare providers to let parents know when there is a concern. It is their responsibility to inform parents so that you, as the patient, are able to make informed decisions.

Another common concern is the potential that bringing a lawsuit against a hospital or healthcare provider may impact your families' ongoing or future healthcare. As Brenda discussed above, it is not uncommon for our clients to require ongoing care at the very hospital that is named in the lawsuit. None of my clients have felt that their care has been impacted when attending the same hospital. That being said, when you sue a doctor, you'll likely not be treated by that individual again. In most cases, there are other doctors who can provide you and your family with care. Many clients also express worries that if they attend the hospital that all the nurses and doctors will know that there is an ongoing lawsuit. However, there will not

be any flag on the records, and you can expect to receive quality care regardless of bringing a lawsuit.

The vast majority of people have never been involved in a lawsuit, and the thought of starting this process is daunting. You will not be alone in the process. BILA lawyers understand the anxieties, fears, and uncertainties parents feel before and during the process. The potential upsides to a successful lawsuit usually sways parents toward requesting the initial investigation. The upside includes having the resources to provide the very best care for your child, which is what every parent ultimately desires.

INTRODUCTION & OVERVIEW OF THE MEDICAL MALPRACTICE PROCESS

INTRODUCTION: WHAT IS THE BIRTH INJURY LAWYERS ALLIANCE?

by Richard Halpern

You and your partner are starting a family and eagerly anticipate your new arrival. It is a time filled with anticipation, excitement, and some anxiety—but you are ready for it. You seek out skilled and experienced healthcare providers to make sure that everything goes according to plan. You read up on what to expect, and you listen to your healthcare professional's advice.

The exciting day arrives, and all seems to be going well, but then something terrible happens. Things aren't quite right with your baby. There is chaos. You can't get answers to your questions. You're confused. Crushed. Frustrated. Possibly even angry. This is not the happiest time of your life.

You just want to know what happened to your baby and why. The Birth Injury Lawyers Alliance helps to answer these questions and more.

If your child has been injured during the course of labour and delivery and you have concerns with the medical treatment that was provided, it is important that you contact a BILA lawyer as soon as possible. The lawyer will be able to provide you with some preliminary information as to the process of investigating any potential claim and will advise you on the applicable limitation period. There is legislation in each province that limits the amount of time you have within which to issue a claim against the medical practitioners involved.

The Birth Injury Lawyers Alliance (BILA) was formed in 2016 by a group of lawyers from across Canada with considerable experience in birth injury cases to promote the effective representation of children and families affected by avoidable injuries occurring at or around the time of birth. The founding members of BILA practice law in every province and territory in Canada, with the exception of Quebec.

The Birth Injury Lawyers Alliance is a not-for-profit corporation. Its goals are to educate and collaborate to ensure that children suffering from birth trauma get capable and informed lawyers. BILA seeks to facilitate access to justice for these children.

BILA lawyers have largely dedicated their professional lives to representing children and families just like yours who suffer avoidable birth injuries. We recognize that these are complex, heart-wrenching, and challenging cases. When your child has suffered an injury from birth trauma, you and your family will feel vulnerable and emotional.

This book is written by BILA lawyers to help you understand your rights and your child's rights when injury is caused by medical

negligence. In it, we'll walk you through the process from retaining a BILA lawyer right up until post-trial (should your case go to trial), outlining what to expect, so you remain informed and aware.

> **Note:** *If your child has just experienced a birth injury, and you don't know where to turn, we are here for you. Everyone deals with stress differently. Some will want to read every bit of information they can find, while others may not be able to process a lot. This guide can be helpful, but we realize it might be too overwhelming for you right now to read an entire book, which is why you'll find a condensed step-by-step action guide at the end of this book (right before the Resource" section). This checklist will tell you what you need to know now, and you can return to the guide at a later time for additional information when you feel ready.*

In this book, we will cover the essential things you need to know and consider if you think your child may have been injured by poor medical care at and around birth.

To help you find the information you need when you need it, this book is divided into three main sections.

- Part One gives an overview of what a medical malpractice claim is, the types of injuries that can lead to a claim, and more information on BILA.
- Part Two guides you through the malpractice litigation process, from filing the initial claim to the trial process.
- Part Three discusses what happens after the trial is over and alternative means of action you can pursue. We have also provided a useful Resource section at the end of this book, where you can find information on coping with loss and dealing with a child's disability, as well as a list of BILA lawyers across Canada.

BILA lawyers share access to legal and medical resources to ensure that you and your family receive the highest quality representation and the most current information needed to effectively prosecute your case. Regular communication and contact between the members of BILA is intended to maintain competency in acting for you. No matter who your particular BILA lawyer is, you can benefit from the collective knowledge and experience of all the members of BILA. There is a considerable benefit to having access to this impressive depth and breadth of experience. We'll elaborate further on the many benefits that a BILA lawyer can offer you throughout the book, but here are a few:

- From time to time, BILA holds educational meetings or seminars for lawyers, health professionals, and families affected by birth trauma.
- BILA lawyers make themselves available to present at educational meetings organized by other legal groups, healthcare providers, and organizations involved in promoting the interests of affected children.
- BILA members also write regularly on topics of interest to families affected by birth injuries, lawyers, and healthcare professionals. Helpful information on a variety of topics is regularly posted to the BILA website (**bila.ca**).
- We are easily accessible by phone or email to discuss enquiries from families and lawyers about the potential merit of any claim.

On a logistical note, BILA lawyers maintain our separate and distinct legal practices in the provinces in which we reside and practice. We are not partners and are not associated in any other way than that described above. When you are represented by a BILA lawyer, your solicitor–client relationship is with that BILA lawyer and the law firm in which he or she practices. You will not be represented by any other BILA lawyer. When you retain a BILA lawyer, any fee

arrangement is with that particular lawyer and his or her law firm. No other BILA lawyer outside that particular firm will participate directly in your case or receive any remuneration.

BILA lawyers understand what parents of injured children go through. We know you worry about your child's future. The costs of looking after a child with disabilities can be substantial. If your child's injuries were caused by a healthcare provider's negligence, BILA lawyers believe that the financial burden should be paid by that negligent healthcare provider. This guide will help you understand the process of easing that financial burden through a medical malpractice claim.

CHAPTER 1 WHAT IS A MEDICAL MALPRACTICE CLAIM?

by Jan Marin

After an uneventful pregnancy, Laura arrives at the hospital at 39 weeks' gestation. She is told that she will be given oxytocin to induce labour. Over the course of several hours, the nurses continue to increase oxytocin despite rapid and prolonged contractions. The fetal heart monitor continuously alerts that the baby's heart rate is dropping following contractions. Despite feeling concern, Laura is told that everything is fine. Suddenly, the baby's heart rate drops below 100 bpm and does not return to baseline. Contractions continue. An

hour later, the doctors finally recommend a cesarean section, which they say will save Laura's baby. Following delivery, the baby requires resuscitative measures, and shortly after birth, he suffers a seizure. Laura and her husband are told that sometimes these things happen, and that the injury may have been present prior to labour and delivery. Brain imaging reveals hypoxic ischemic encephalopathy (HIE) and Laura is advised that her baby may have cerebral palsy.

This story describes a probable case of mismanaged labour, an example of medical malpractice. Medical malpractice occurs when healthcare providers fail to meet the required standard of care. In other words, when they do not provide care consistent with what a reasonable healthcare provider of the same training and experience would have provided. A medical malpractice claim is a lawsuit, seeking damages because of the injuries caused by the substandard care.

Medical malpractice can arise in any interaction that a patient has with the healthcare system, and, unfortunately, there are times when preventable injuries occur. Although some poor health outcomes are unavoidable, there are thousands of Canadians who are either injured or die because of a preventable medical error each year.

A poor outcome does not mean that medical care is substandard. There are times when patients will have bad outcomes even when receiving excellent medical care. Some poor outcomes, however, are caused by negligent medical care. In these situations, patients may be entitled to bring a medical malpractice claim. If you, your child, or a family member have experienced injuries because of medical negligence, you may have the right to bring a medical malpractice claim, and should consult with an experienced lawyer, like the members of the Birth Injury Lawyer's Alliance (BILA).

Medical malpractice lawsuits are brought by patients or their family members against the involved medical and healthcare

professionals, as well as the institutions where they work. This can include doctors, nurses, and therapists, as well as hospitals, private clinics, or agencies, to name a few. The goal of bringing a civil lawsuit for medical negligence is to provide patients and their family members with financial compensation for the injuries and impairments they have suffered.

It is the responsibility of the injured patient or their family, with the assistance of an experienced lawyer, to prove that the injuries suffered were caused by substandard care. It is the lawyer's job to gather the evidence and expert opinions required to prove the case.

TYPES OF MEDICAL MALPRACTICE CASES

Medical malpractice injuries can range from minor to catastrophic. It is important to remember that some injuries or complications are unavoidable. A medical malpractice case will only be viable when medical negligence can be proven to have caused an injury.

Some common types of medical malpractice cases include the following:

- Birth Injury: The area of expertise of BILA lawyers, these claims arise following injuries to mothers and/or babies from the events before, during, or after labour. Birth injury cases are the focus of this book and are discussed in detail in the chapters that follow.
- Surgical and Anesthesia Errors: These cases arise from injuries caused by the surgical team before, during, or after a surgical procedure. Some common surgical errors include operating on the wrong body part, leaving an instrument or sponge inside the body, or inadvertently causing injury to a nearby structure. Anesthesia errors can include the mismanagement of medications, airways, or hemodynamics (blood pressure, heart rate, oxygenation, etc.).

- Medication Error: This type of claim involves the inappropriate use of medication, whether that involves the wrong dose of a medication or the administration of the wrong medication.
- Misdiagnosis or Delayed Diagnosis: This involves the failure of a medical professional to diagnose a patient's condition correctly and promptly, and to treat the condition in a timely manner.
- Interpretation Error: These types of cases involve the negligent interpretation of medical investigations, including medical imaging such as X-rays, CT or MRI scans, pathology slides, or laboratory results.
- Referral Error: These cases involve a failure by a medical professional (often a family doctor or an emergency room physician) to refer the patient to an appropriate specialist in a timely manner, to ensure appropriate management of their condition.
- Informed Consent: The failure of a medical professional to advise of the material risks of a proposed treatment or the failure to provide treatment options. Doctors are obligated to have detailed and meaningful discussions with patients about their treatment options, and the risks and benefits that these options carry with them.

Patients may find that they have been the subject of more than one type of medical error. For example, in the context of a birth injury case, there may be a misinterpretation of prenatal ultrasounds (an interpretation error), a failure to refer the mother to a specialist for a high-risk pregnancy (a referral error), the misuse of a medication to increase the intensity and frequency of uterine contractions (a medication error), and a delay to diagnose a serious condition requiring emergent caesarean section or resuscitative measures (a delayed diagnosis).

BILA lawyers are first and foremost medical malpractice lawyers, but with a particular focus and specialized expertise in handling birth trauma cases and the unique medical and legal issues that arise in these cases.

COMMON ELEMENTS OF A MEDICAL MALPRACTICE CLAIM

Regardless of the type of claim, all medical malpractice cases require the following legal elements:

1. Breach of the standard of care.
2. Causation, or a link between the breach and the harm suffered.
3. Damages.

To be successful in a medical malpractice case, you will need to be able to prove all three elements. Your BILA lawyer will work with you to ensure that each of these elements are advanced successfully. A fuller discussion of each can be found below.

THE STANDARD OF CARE

When it comes to proving a medical malpractice case, it is not enough to show that the patient suffered an injury or an unexpectedly poor outcome. You must be able to show that the actions of the medical professional(s), and/or institution(s), fell below the acceptable standards of care.

The test for determining whether a medical professional has breached the standard of care is objective. It is defined by what a reasonable and prudent healthcare practitioner with similar qualifications would have done in the same circumstances.

The applicable standard of care will vary on a case-by-case basis and will depend on several different factors. Most importantly, the standard of care will vary depending on the type of medical

professional being sued. The standard of care will depend on the medical professional's area of practice, level of qualifications and specialty training, as well as experience. It may also depend on the location where the incident occurred, and the resources that were available at the particular location. For example, professionals at teaching institutions in large urban centers (with greater access to resources) may be held to a higher standard than those located in remote or rural locations. The test is what a similarly situated and trained medical professional would be reasonably expected to know and do in the circumstances.

CAUSATION

After proving that there has been a breach of the standard of care, it is essential that you establish causation. Causation involves proving a link between the substandard care and the harm. Even in situations where there has been an established breach of the standard of care, many medical malpractice cases are lost on the issue of causation. Causation is often complex and challenging to prove. For example, in some cases involving newborn injury, the injury may result from poor care, unavoidable genetic cause, or a combination of both.

Causation can be particularly challenging in the context of a birth injury case. Given the complex medical issues involved in these types of cases, there are often competing theories about the mechanism and timing of the injuries suffered to the baby.

The test for causation is called the "but for" test. To be successful, you must be able to demonstrate that the baby would not have suffered the injury "but for" the breach of the standard of care. This must be proven on a balance of probabilities, meaning that it must be more likely than not (more than 50%) that the injury would have been avoided had proper care been provided.

It is routinely argued by the defendants in birth injury cases that there are other explanations for the injury to the baby. For example,

it may be argued that the injury occurred early in pregnancy or was caused by a genetic condition or metabolic abnormality, making the injury unavoidable.

Timing of the injury is essential to prove causation. It is necessary to prove that the injury occurred after the negligent care. Only in this way can you prove that the injury would have been avoided with care that met applicable standards. BILA lawyers understand the importance of this and will involve experts capable of identifying the timing of injury, usually neuroradiologists and neonatologists.

Although establishing causation in birth injury cases can be challenging, BILA lawyers have extensive experience in navigating these challenges. They, along with their network of experts, have the expertise required to succeed in these challenging cases.

DAMAGES

The final element which must be proven in a birth trauma case is the extent of damages suffered by the child. The amount of financial compensation that you and your family may be entitled to depends on the extent of the injuries suffered and the future needs of your family. Damages are more fully discussed in Chapter 7.

Given that medical malpractice cases are vigorously defended, damages are an important consideration when determining whether to commence a medical malpractice claim. Chapter 5 of this book more fully explores the considerations that are taken into account by BILA lawyers when assessing whether a claim is worth pursuing.

THE ROLE OF EXPERTS IN PROVING YOUR MEDICAL MALPRACTICE CASE

Where the case does not settle, it will be up to a judge or jury to decide whether the medical professional(s) and/or institution(s) breached the standard of care, and whether the substandard care

caused the patient's injuries. To make this decision, the courts rely on the evidence of expert witnesses who will provide their opinions on the issues of standard of care, causation, and damages. Only properly qualified medical experts are permitted to provide opinion evidence.

The selection of medical experts is one of the most important decisions made by your lawyer throughout the course of litigation. A variety of different experts may be consulted, depending on the particulars of the case. The following factors will be considered when selecting an expert:

- Qualifications: It is essential that the expert selected has the necessary background, expertise, and training to provide their opinion.
- Objectivity: Medical experts are required to be unbiased, objective, honest, and fair. Their role is to assist the court in understanding the complex medical issues in the case.
- Ability to Testify at Trial: It is important to have an expert who is able to effectively and efficiently communicate their opinion, both by way of written report and orally at trial.

Selecting the best expert is essential as these cases often result in a "battle of the experts" and the judge or jury must decide which expert opinion is preferred.

Medical malpractice claims are complex and challenging. This is particularly true of birth injury claims. Your success will depend on the merits of your case, the skill and experience of your lawyer, and the quality and persuasiveness experts retained. Having the best possible team beside you and your family will improve your chances of success when advancing a medical malpractice claim.

BIRTH INJURIES: TYPES & CAUSES

CHAPTER 2 WHAT KIND OF INJURIES CAN LEAD TO A CLAIM?

by Joe Miller K.C.

Immediately after delivery, Mary's baby looks pale and does not cry. Mary is not allowed to hold her newborn right away and watches as they put a tube down the baby's throat before whisking him away. Some hours later, while Mary is trying to breastfeed her baby, he turns pale again and tenses up. The doctors tell her the baby had a seizure. Later, Mary is told that the seizure could have been caused by poor oxygenation of the baby's brain some time before birth that might have caused permanent injury to brain tissue.

In the majority of cases that lead to a medical malpractice claim, the baby suffers a brain injury. The brain injury can result from a disruption of blood flow to the baby's brain, a stroke, or a hemorrhage (bleeding), and it can occur before labour, during labour and delivery, or in the period following birth (neonatal period).

This chapter will review these types of brain injury claims, as well as other types of obstetrical/neonatal claims, including injuries to spinal column nerves arising from shoulder dystocia and injuries arising from treatable genetic conditions.

BRAIN INJURIES

Oxygen deprivation during labour and delivery

Hypoxic ischemic encephalopathy (HIE) simply means brain sickness from inadequate oxygenation to the brain. The fetus receives its necessary oxygen and nutrients from the mother through the umbilical cord. If this delivery mechanism is compromised, the baby may suffer an irreversible neurological injury.

Contractions during labour may result in a reduction of blood flow through the umbilical cord, causing a reduction in the delivery of oxygen and nutrients to the fetus. When a contraction ends, the blood supply through the umbilical cord usually returns to normal. In the vast majority of situations, the fetus can tolerate the momentary reduction in blood supply and recovers during the resting phase in between contractions. In some cases, however, the repeated reduction in the supply of oxygen and nutrients during contractions will exceed the reserves of the fetus and, if this pattern continues, can result in neurological injury. Babies that are growth restricted, or are preterm, have lower reserves and are less able to tolerate the reduction in blood supply. If labour is induced or augmented with oxytocin, this can cause longer, more frequent contractions, reducing the time between contractions and limiting the baby's ability to recover.

In the case of twins, a transfer of blood between twins (referred to as twin-to-twin transfusion) can occur, which reduces the ability of one or both twins to tolerate the stress of labour.

One of the responses of the fetus to the decrease of blood flow is a change in the fetal heart rate and its pattern. Electronic fetal monitoring (discussed more in Chapter 3) is used to detect any changes in the fetal heart rate or pattern that suggests that the fetus is not tolerating labour and to allow for intervention prior to neurological injury occurring. It is the responsibility of both nurses and doctors to respond to any evidence of impaired fetal oxygenation suggested on the fetal heart tracing. By doing so, injury to the baby can, in some circumstances, be avoided or mitigated.

Some situations cause the fetal blood supply to decrease suddenly and significantly: uterine rupture during an attempt at a vaginal birth after cesarean, cord prolapse, placental abruption, and shoulder dystocia. This profound decrease in the blood flow will result in a significant decrease in the fetal heart rate—a sign that the baby needs to be delivered immediately.

Periventricular leukomalacia

This brain injury occurs in some premature babies. The more premature the baby, the higher the risk of this injury occurring. In medical terms, this is an injury to the white matter of the brain around the ventricles. The premature baby does not have a fully developed system for the supply of blood to all parts of the brain. In addition, the premature baby has not fully developed its autoregulation system, which is the body's mechanism to regulate blood pressure throughout one's body to maintain adequate blood flow and, therefore, oxygenation, to the brain. This makes a premature baby vulnerable to changes in blood pressure, which compromises the blood flow to parts of the brain and can result in irreversible neurological injury.

Intraventricular hemorrhage

Similar to periventricular leukomalacia, this condition can also affect premature babies. The immature blood vessels and the lack of a developed autoregulation system puts a premature brain at risk of hemorrhage with any significant changes in blood pressure or neonatal infections.

In utero stroke

Strokes can result from a blockage of blood flow or a bleed in the brain. Strokes commonly affect one side of the baby's brain, whereas a brain injury due to oxygen deprivation usually affects both sides. The critical issue when stroke causes a brain injury is to determine the cause of the stroke, which, in some cases, can be linked to episodes of lack of oxygen during labour.

Trauma due to vacuum or forceps

While the risk is small, injuries such as retinal hemorrhage and hematomas can result from the use of vacuums and forceps. As a general rule, it is not recommended to use both forceps and vacuum to deliver a baby, and the obstetrician must be prepared to proceed to cesarean section if the baby cannot be delivered using either forceps or vacuum.

Hypoglycemia

Brain cells require both oxygen and nutrients, including glucose, to live. Some babies are born at risk of having a glucose imbalance. A small fetus, sometimes referred to as being intrauterine growth restricted (IUGR), and large fetuses, sometimes referred to as macrosomic or large for gestational age (LGA), are at significant risk of having a glucose imbalance. Further risks include maternal diabetes

and gestational diabetes. In utero, the fetus receives its glucose from its mother. The concern with neonatal hypoglycemia arises after birth when the newborn baby is required to regulate their own blood sugars. If this ability is compromised, the failure of the newborn to effectively be able to provide the necessary glucose may result in death of brain cells, resulting in an irreversible neurological injury.

Kernicterus

Kernicterus is a type of brain injury that can result when a newborn has severe jaundice. Left untreated, a substance in the blood called bilirubin accumulates and spreads into the brain tissue resulting in permanent brain damage. There are risk factors associated with the development of kernicterus, including premature birth, problems with breastfeeding, and the development of jaundice in the first twenty-four hours after birth. Once diagnosed, most jaundice is easily treated with regular feeding and light therapy.

Infection

A newborn baby, particularly a small or preterm baby, is at risk of suffering a neurological injury if they catch certain infections. The mother may be carrying Group B strep bacteria, which can be passed on to the baby as the baby is delivered. As well, infection can occur during labour, affecting the placenta (chorioamnionitis) or the umbilical cord (vasculitis or funisitis). These conditions may have an impact on the health of the newborn.

Phenylketonuria (P.K.U.)

In Canada, babies are tested for a number of genetic conditions. Many of these conditions, including phenylketonuria (P.K.U.), are easily treatable. But if left untreated (perhaps due to mislaid test results), irreversible brain damage can occur.

NON-BRAIN INJURIES

By John McKiggan K.C.

Brachial plexus injury and Erb's palsy

A brachial plexus injury is an injury to the nerves in the neck of the baby caused by attending to shoulder dystocia, an obstetrical emergency. When a baby is at a position where their umbilical cord is pinched closed, due to where the baby is in the birth canal, the obstetrician must deliver the baby within minutes of the shoulder dystocia occurring or else risk the possibility of neurological injury due to the interruption of the blood flow through the umbilical cord to the baby.

A brachial plexus injury can occur when the obstetrician applies downward traction on the fetal head in an attempt to dislodge the shoulder. This downward traction can stretch the nerves in the baby's neck and, in extreme examples, can result in avulsion of the nerve, meaning that the nerves are pulled away from the cervical spine. Brachial plexus injuries are often temporary but, in some unfortunate situations, they can be permanent. This injury to the brachial plexus nerves will have a direct effect on the functioning of the arm on the side where the nerve injury occurred.

There are three different types of brachial plexus injuries that are dependent on the amount of force applied to your baby's shoulder:

- **Neuropraxia:** This type is injury is caused when scar tissue builds up around a nerve after it has been pulled, stretched, or torn. The scar tissue interferes with the ability of the nerve to transmit nerve signals. Surgery can remove the scar tissue and restore nerve function.
- **Rupture:** This happens when the brachial plexus nerve is torn. In order to correct a ruptured nerve, a surgeon will have to do a nerve graft, which links the gap created by the torn nerve.

- **Avulsion:** This is the most serious form of brachial plexus injury and is known as Erb's palsy. An avulsion injury happens when the root of the nerve is completely torn away from the spinal cord. This type of injury typically requires a complete nerve graft in order to create a new nerve path.

Some Erb's palsy injuries may heal on their own; some may require surgery to repair. Some children can be left with significant life-long disabilities. Erb's palsy can cause weakness and disability in the shoulder, arm, and hand. Many Erb's palsy injuries can cause permanent paralysis of the arm and shoulder.

Some of the risk factors that can lead to shoulder dystocia and Erb's palsy include:

- A prior delivery where the baby had shoulder dystocia.
- Use of drugs like Pitocin or Syntocin to speed up labour.
- Moms who have diabetes.
- Larger babies (greater than 8.4 lbs.)
- Moms who have a small pelvic opening (cephalopelvic disproportion).
- Long labour.
- Breech (feet first) position.
- Baby's head turned the wrong way during delivery.

If patients present with these risk factors, doctors may deliver a baby early and/or perform a scheduled C-section. Should no risk factors present and should dystocia occur, there are a number of techniques or maneuvers a doctor can use to safely deliver the baby. But, as described above, there is also the possibility of an injury occurring during the process.

Other conditions

In some rare situations, a fetus can be subjected to medications taken by its mother at a critical time in fetal development, which can result in birth defects. The treatment of newborn complications, if not done properly, can lead to a claim.

During labour and delivery, healthcare practitioners rely on their expertise and certain medical tools to alert them of a problem. The next chapter gives more information on an important monitoring tool: the clectronic Fetal Monitor (EFM).

CHAPTER 3 ELECTRONIC FETAL MONITORING: WHY IS IT IMPORTANT TO THE SAFETY OF YOUR BABY?

by John McKiggan K.C.

Near the end of Joan's labour, her contractions come fast and furious. She hears the constant beep of the baby's heartbeat on the monitor. Early in the labour, the beeping of the baby's heart rate seemed consistent and regular, but now, each time Joan experiences a painful contraction, she hears the baby's heartbeat slow and then speed up after her contraction is over. The nurses seem to be paying extra attention to this and

even call for the doctor, but no one tells Joan or her partner why they are suddenly more attentive. Just before delivery, the baby's heartbeat slows but doesn't speed up again. When the baby is born, she isn't breathing.

As noted earlier in this book, hypoxic-ischemic encephalopathy (HIE) is a condition of newborn brain sickness that can be caused by impaired oxygenation of a baby during labour and delivery. Unfortunately, this can lead to brain injury and profound physical and cognitive disabilities, including cerebral palsy (which involves motor dysfunction and cognitive challenges) and neuro-developmental problems (that might cause learning disabilities and behavioural issues).

HIE is caused by an impairment of oxygenation to the brain related to issues with the placenta and/or issues with the umbilical cord. The fetus is supplied with oxygenated blood through the uterus to the placenta and through the umbilical cord; the umbilical cord is attached to the placenta. Any condition that impairs the flow of blood to the placenta (for example, uterine contractions) or to the umbilical cord (like compression of the cord) has the potential to impair oxygenation to the fetus.

A healthy and well-grown fetus has considerable capacity to tolerate intermittent interruptions in oxygenation, particularly if any episodes of impaired oxygenation are separated by adequate rest and recovery. This capacity to tolerate the normal stresses of labour is often referred to as fetal reserve. Fetal reserve is not, however, unlimited. If episodes of impaired oxygenation are allowed to go on too long, or are too severe, fetal reserve can be depleted and, eventually, exhausted. Some babies may come into labour with less fetal reserve, particularly babies who might have been growth restricted (small babies) during pregnancy.

During labour and delivery, a baby's well-being is assessed by nurses and doctors by monitoring its heart rate. There are features of the fetal heart rate, when interpreted properly, that can suggest a possible problem with fetal oxygenation. The most important tool that doctors and nurses use to measure a baby's oxygenation during labour and delivery is the electronic fetal heart monitor (EFM).

WHAT DOES THE EFM DO?

The electronic fetal monitor provides a continuous tracing of both the fetal heart rate (FHR) and uterine contractions. The nurses and obstetricians use this tracing to see if the pattern reflects a fetus that is well-oxygenated or a fetus that may be under a degree of stress due to impaired oxygenation.

In the case of any atypical patterns, a change to the approach to managing the labour may be required in order to protect the health of the baby. The FHR patterns must be interpreted in the context of the uterine activity, as well as the stage and progress of labour.

The data on the EFM is a crucial factor in determining whether the injury occurred during labour and delivery and whether the standard of care required some other approach. BILA lawyers have spent a considerable amount of time studying the issues concerned with FHR patterns and the impact the EFM data has on proving liability.

HOW DOES THE EFM WORK?

The EFM monitor has two devices that detect pressure called transducers. The transducers are placed on the mother's abdomen and held in place with straps. From time to time, it may be necessary for the nurses to adjust the transducers in order to achieve an adequate signal to produce a clear and continuous heart rate tracing on the recording strip.

The EFM has a screen or monitor that shows the fetal heart rate. The EFM also produces a printed strip of paper that is covered in grids showing time segments and heart rate. Data from the EFM monitor is plotted on the strips and looks like two wavy or spiky lines. A properly trained professional can tell a great deal about the well-being of a fetus during labour by looking at these lines. The top line represents the fetal heart rate. The line spikes up or dips down to reflect changes in the fetus' heart rate. The bottom line shows the mother's uterine contractions. The line peaks when she is having a contraction.

EFM monitors also produce sounds that are related to the fetal heart rate. An alarm sounds when the fetal heart rate is too fast or too slow.

UNDERSTANDING EFM DATA

It is important that the nurses and physicians caring for the mother and fetus are properly trained in the use and interpretation of EFM data. There are a number of different factors that the EFM monitor will record that are critical to evaluating the baby's health and well-being.

Contractions

One of the transducers measures the pressure produced during a contraction. The EFM will detect the duration of the contraction (how long it lasts) and the frequency of the contractions. A normal pattern for contractions is every two to three minutes and not more often. The nurses or doctors monitoring the labour will assess the intensity of the contractions by feeling the mother's belly. They are also required to ensure that the uterus relaxes between contractions.

When contractions come more frequently than every two minutes, it is called tachysystole. The risk of tachysystole increases

when physicians use certain drugs (e.g., oxytocin) to try to induce or augment labour. Contractions that last for a duration longer than 90 seconds are called hypertonic or tetanic contractions.

The problem with contractions that occur too frequently or that last too long is that they can contribute to impaired oxygenation of the baby. These uterine contraction patterns extend the time of stress on the fetus, increasing the risk of diminishing fetal reserve. Concerning fetal responses to these kinds of uterine contractions may be seen as changes in the pattern of the fetal heart rate.

Fetal Heart Rate (FHR) Patterns

The Society of Obstetricians and Gynecologists of Canada has established guidelines defining the important data collected by the EFM. Unfortunately, some of these guidelines fail to provide adequate guidance on how to respond to some fetal heart rate (FHR) patterns in the context of all the clinical circumstances. BILA lawyers are familiar with the current guidelines and have an understanding of the shortcomings.

Baseline: The baseline is the average of how fast the fetus' heart beats over a period of 10 minutes (beats/minute). The normal baseline for a healthy fetus is between 110 and 160 beats per minute.

- If the heart rate goes above 160 beats per minute for extended periods of time (more than 10 minutes), this is a condition known as tachycardia. Tachycardia may be a sign of fetal distress.
- When the heart rate drops below 110 beats per minute, this is called bradycardia. Bradycardia is a sign of fetal distress, and it usually means the fetus is not getting enough oxygen.

Variability: Variability refers to the oscillation of the FHR above the baseline and below the baseline. A healthy fetus' heart rate usually fluctuates over time, so it is normal and reassuring to see variation in the heart rate.

- If the oscillation in the heart rate is greater than 25 beats per minute, the variability is classified as marked.
- Variability that ranges between 6 and 25 beats per minute is classified as moderate.
- Variation of less than 5 beats per minute is classified as minimal.
- When the heart rate is traced essentially as a flat line, the variability is classified as absent.

A healthy fetus will normally produce a heart rate with moderate variability. If FHR variability is minimal, it can be due to a number of factors. Sometimes medication administered to the mother can reduce variability. Fetal sleep can be a cause as well. Finally, minimal variability can be caused by impaired fetal oxygenation and, therefore, is cause for concern. Absent variability and marked variability are both non-reassuring.

The obstetrical care providers need to consider all the clinical circumstances and medical evidence to determine whether reduced variability is something that is normal and not of any concern or whether the reduced variability is a non-reassuring sign of potential fetal distress.

Accelerations: Sometimes the EFM monitor will show abrupt spikes in the heart rate. An abrupt increase in the heart rate of more than 15 beats per minute is referred to as an acceleration. Accelerations are often normal and a reassuring sign that the baby is doing well. Having said that, accelerations occurring in the context of other atypical or abnormal FHR patterns cannot be considered reassuring.

Decelerations: A dip in the heart rate below the baseline is referred to as a deceleration. There are different kinds of decelerations, each with slightly different significance for assessing fetal well-being. In addition to the various patterns and timing of decelerations, the depth and duration of a deceleration is clinically significant. Decelerations of longer duration and deeper depth are more concerning.

- **Early decelerations** are a gradual decrease in the fetal heart rate that typically mirrors the mother's contractions. This type of decrease in FHR is thought to be caused by head compression from a contraction. While many obstetrical texts and journal articles consider early decelerations to be normal and benign, there is more recent literature suggesting that no deceleration is entirely benign. As well, there is reason to believe that head compression has the potential to be harmful to the fetus when excessive or prolonged.
- **Variable decelerations** are an abrupt drop in the fetal heart rate of more than 15 beats per minute lasting anywhere from fifteen seconds to two minutes. Variable decelerations are commonly seen during labour and are thought to be caused by umbilical cord compression. Variable decelerations are categorized as either uncomplicated or complicated.
    - Uncomplicated variable decelerations show an initial spike (acceleration) then a dip (deceleration), followed by another spike (acceleration) before the heart rate returns to the normal baseline. Uncomplicated variable decelerations that occur repetitively may be a sign of fetal intolerance to labour and intermittent decreased fetal oxygenation. The frequency, depth, and duration of these decelerations are important for determining the degree of distress being experienced by the fetus.
    - Complicated variable decelerations may have loss of variability in the deceleration, may be a deceleration in two phases, or may be a deceleration that takes a long time to return to the baseline. Complicated variable decelerations are concerning and can be a sign of fetal distress.
- **Late decelerations** is when the bottom of the deceleration occurs after the peak (or tip) of the contraction tracing. Late decelerations are generally accepted by medical professionals

to reflect some degree of hypoxia (oxygen deprivation) in the fetus.

- **Prolonged decelerations** are decelerations that last for more than two minutes. These decelerations are concerning and require immediate clinical action from the obstetrical team.

EFM classification

When a nurse or doctor looks at the EFM strip, they have to consider all of the circumstances and all of the data on the monitor in order to classify the tracing.

It used to be that EFM strips were categorized as either reassuring (the information on the monitor showed that the baby was doing well) or non-reassuring (the information on the monitor suggests the baby may not be doing well). Unfortunately, this easy-to-understand classification system has been abandoned by the medical profession. In recent years, the Society of Obstetricians and Gynecologists of Canada created new guidelines to categorize EFM strips as normal, atypical, or abnormal.

- **Normal** EFM strips are considered to represent a well-oxygenated fetus and are generally what was once referred to as a reassuring tracing. In other words, the baby is likely to be happy and healthy.
- **Abnormal** tracings contain data that strongly suggest that there are problems with fetal oxygenation and that the baby may be at risk of injury. Abnormal tracings usually require immediate action either to try to address the cause of the abnormal tracing or to expedite delivery of the baby by C-section or operative vaginal delivery (e.g., forceps, vacuum).
- **Atypical:** Unfortunately, most EFM tracings fall into the atypical category. This category of tracing is poorly defined and consists of a FHR pattern that is neither normal nor abnormal. These types of tracings suggest that there may or

may not be a problem with fetal well-being and expedited delivery may or may not be required. The appropriate response to an atypical tracing depends on a consideration of the entire clinical context in which it occurs and is usually the subject of much debate in birth injury malpractice claims.

EXPERT EVIDENCE

One of the first things that your birth injury malpractice lawyer will do is hire an obstetrical expert to assess the fetal heart monitor tracings. That expert will be asked to determine whether there was any evidence of fetal distress and whether the obstetrical team responded appropriately to the available data.

Experienced birth injury malpractice lawyers have some degree of skill in understanding and interpreting EFM tracings to determine whether there are potential grounds for concern and whether it is appropriate for further investigation by hiring a medical expert.

THE MEDICAL MALPRACTICE PROCESS FOR BIRTH INJURIES

CHAPTER 4 WHY HIRE A BILA LAWYER?

by Paul McGivern K.C., Susanne Raab and Lindsay McGivern

Pauline Smith, age thirty, has enjoyed a healthy pregnancy before going into spontaneous labour at full term (forty weeks). Everything seems normal at first, but then the labour drags on for many painful hours. Toward the end of the labour, there seems to be some concern for the fetal heart rate, but no one discusses that with Pauline or her husband, Todd. Immediately after the birth, the baby isn't breathing

and is whisked away. Pauline and Todd are told that their daughter may later have cerebral palsy and this sometimes happens for unknown reasons. They have questions and want to investigate the reason for their baby's injury, so they hire a BILA lawyer.

There's no shortage of lawyers to be found, so you might wonder why you should hire a BILA lawyer. The answer is simple: to level the playing field.

In the field of birth injury, the playing field is far from level. Physicians in Canada are represented by an organization called the Canadian Medical Protective Association (CMPA), a highly sophisticated and well-funded organization. Its mission statement (found on their website: CMPA-acpm.ca) includes "protecting the professional integrity of physicians," and they defend these physicians vigorously.

A quick glance at the CMPA's most recent annual report[1] reveals some frightening statistics. In 2023, of all of the medical malpractice cases that went to trial, the plaintiff (injured person) lost and received no compensation in 72% of the cases. Of the cases that were resolved out of court, 66% resulted in a dismissal or discontinuance, again with no compensation to the plaintiff. It is worth pointing out that previous years have seen similar or even more dismal outcomes for injured plaintiffs.

Importantly, these statistics *do not* reflect the experience of BILA lawyers. BILA lawyers will handle your case in a way that improves the odds of success. We have a track record of success in representing victims of medical malpractice, particularly children with birth injuries.

There can be no doubt that the CMPA is a formidable foe, with many advantages in its favour. BILA lawyers, however, are committed

1 https://www.cmpa-acpm.ca/en/about/annual-report

to creating a level playing field. We do so through our experience, hard work, and collaboration. We share knowledge, resources, and information. We develop strategies and work together to advance the law in the areas where we perceive unfairness to children living with cerebral palsy and other birth trauma injuries. We have dedicated our professional careers to learning the highly specialized law and medicine involved in birth injury cases and building a network of medical experts prepared to give the type of objective, unbiased opinions necessary to succeed with these cases.

While BILA lawyers have a lot of experience in handling birth trauma cases like yours, the collaboration between BILA lawyers across Canada provides access to the depth of experience that may not be available elsewhere.

When you are looking for the most capable and experienced lawyer to handle your child's case, there are some important questions you should ask any lawyer you are considering retaining:

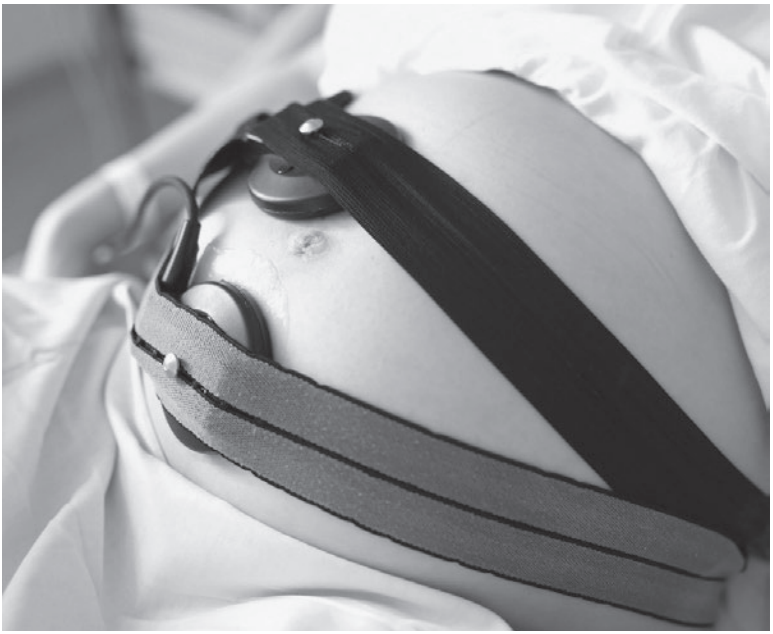
- How many birth trauma cases have you handled? (BILA lawyers, collectively, have handled hundreds of these cases.)
- What do you do to keep up to date with the latest developments in obstetrics, neuroradiology, and neonatology? (BILA lawyers attend and speak at conferences on these issues regularly. BILA lawyers also maintain an extensive library on these subjects.)
- Have you taken a birth trauma case to trial? (BILA lawyers have successfully taken many of these cases to trial.)
- How are you going to access the experienced medical experts needed to prove my case? (BILA lawyers regularly deal with outstanding experts in all the important medical fields.)
- Can you read and interpret what is in the hospital records and the fetal heart rate tracing? (BILA lawyers have spent thousands of hours learning to read and interpret medical records and fetal heart tracings.)

Your case is important. Don't be afraid to ask any questions you wish and expect direct answers.

While BILA lawyers represent a wide range of medical malpractice victims, they have a particular interest in birth injury claims. All BILA lawyers have extensive, hands-on experience with birth injury litigation.

CHAPTER 5 IS MY CHILD'S BIRTH WORTH INVESTIGATING?

by Jan Marin



Amy and Tyler have realized that their son Carter is not reaching expected milestones. The pediatrician has offered a potential diagnosis of cerebral palsy (CP). After researching the CP diagnosis, Amy has seen that the cause can be a lack of oxygen to the baby during birth. Despite a normal pregnancy, Amy has concerns about the care she received during

her labour and delivery. Carter's parents are left wondering whether something avoidable may have happened at the time of Carter's birth.

If you have concerns about the medical care you or your child received during the labour and delivery process, you should contact a BILA lawyer. The BILA lawyer will be able to tell you whether the potential claim is worth investigating. Each lawyer's process might vary slightly but the following steps are generally involved in the initial assessment of your case:

1. An initial interview.
2. Obtaining the necessary medical records.
3. Careful review of the medical records by the legal team.
4. Retaining medical experts, as necessary.
5. An assessment of the damages.
6. Providing you with advice on whether to proceed with a claim, or not.

THE INITIAL INTERVIEW

The first step of the investigation process is a discussion with the BILA lawyer and their team. It is during this initial meeting that we will discuss the events surrounding your child's birth. You will be asked about the pregnancy, the labour, and the delivery. We will ask you about your recollections of the care you received and the healthcare providers who were involved in the labour and delivery. We will also want to know if your child was resuscitated immediately following the birth, if they went to the special care nursery, if your baby was cooled, if your baby suffered from seizures, and their subsequent health. In advance of our meeting, it can be helpful for you to put together a detailed chronology of your recollection of the events.

It is important that you provide as much detail as possible to help your BILA lawyer evaluate your potential case.

The lawyer will want to know which medical and healthcare providers have been involved in caring for your child since birth. It can be helpful for you to come to the initial meeting prepared with a list of your child's current treatment team, as well as those who had been previously involved.

It is during this initial interview that your BILA lawyer will also provide you with important information regarding the process involved in pursuing a birth injury claim, and we will explain the process involved in determining whether your case has merit. You will also have the opportunity to ask your BILA lawyer any questions about the process and your rights.

At the conclusion of the initial meeting, your BILA lawyer may provide you with a retainer agreement so that we may proceed with an investigation.

OBTAINING MEDICAL RECORDS

As part of the initial investigation, your BILA lawyer will require copies of the relevant medical records. You may be able to obtain copies of these directly from the healthcare professionals or institutions involved by requesting them yourself. Your BILA lawyer may ask you to sign authorization forms to allow their office to request copies of those records on your behalf.

Although every case will be different, your BILA lawyer will be looking to obtain copies of the medical records relating to:

- The prenatal (antenatal) care of the mother.
- The labour and delivery records, including fetal heart tracings.
- The newborn and childhood records (including any brain imaging).

One of the reasons it is important to speak with a lawyer as soon as you can is to ensure the availability of the medical records. While

children's records are supposed to be retained at least until they reach eighteen years of age, the mother's records are often not retained for as long. Many healthcare institutions keep records for at least ten years. In some cases, parents contact us well after the child reaches ten years of age, with the risk that records may no longer be available. Whether we can investigate these more mature cases will depend on the availability of records.

RETAINING MEDICAL EXPERTS

For you to be successful in a birth injury claim, you must be able to prove all of the following elements:

1. The medical professional(s) owed you and your child a duty of care, and that the applicable standard of care was not met.
2. Your child or family have suffered an injury and damages.
3. The substandard care is the legal cause of the injury and damages.

Because of their experience, your BILA lawyer will be able to identify and analyze the medical-legal issues involved in your potential case. In some cases, we can evaluate the strengths and weaknesses without consultation with an expert. In other cases, your BILA lawyer will need to consult with medical experts to determine if the claim is viable, particularly on the issues of standard of care and causation.

BILA lawyers have access to many qualified experts. We will provide copies of the relevant medical records to the experts for their review, along with a letter summarizing the facts and issues in the case. The experience of BILA lawyers is incredibly valuable when reviewing expert opinions. We will ensure the experts fully consider all the medical and legal issues involved in each case.

Standard of care experts

When looking to retain a standard of care expert, it is important to obtain an opinion from a medical professional who has either the same or similar qualifications to the individuals who were involved in the care in question. When it comes to a birth injury case, the standard of care expert is usually an obstetrician, though there are cases where retaining a nurse, family doctor, or midwife may be more appropriate.

Following their review of the records, the medical expert will meet with your BILA lawyer to discuss their opinion regarding the appropriate standard of care, and whether the standard was met in your case. In some circumstances, the expert may provide a written report; though this depends on many factors, including the nature of the opinion and the stage of the case.

Causation experts

As outlined in Chapter 1, proving the cause of your child's injuries can be a very complex issue. Your BILA lawyer will require experts who are qualified and up to date on the current medical literature to provide an opinion regarding the nature and timing of the injury, as well as the cause. To be successful, you must prove, on a balance of probabilities (more than 50% chance), that the substandard care was the cause of the injury.

In birth injury cases, a causation analysis may include one or all of the following specialties: obstetrics, neonatology, pediatric neurology, neuroradiology, placental pathology, and genetics.

As discussed in Chapter 1, the timing of your child's injury is a key component of the causation analysis. Obtaining a supportive opinion on the timing of the injury requires careful analysis of the medical records and of the medical literature by the expert. The expert must be able to say that the injury occurred following the substandard care, so that it can be proven that the injury would have been avoided.

PRELIMINARY ASSESSMENT OF DAMAGES

As part of the initial evaluation of your case, your BILA lawyer will consider the potential damages in your child's case. This may involve gathering further information regarding your child's prognosis and future needs, as well as any relevant income loss information for one or both parents. The consideration of damages is an important factor to assist in the determination of whether it is worthwhile for you and your family to pursue the case. Once the initial investigation is complete and the legal case has been started, a fulsome workup of the damages, involving multiple experts, will take place.

MEETING WITH YOUR BILA LAWYER TO DISCUSS WHETHER TO PURSUE YOUR CLAIM

Once your BILA lawyer has completed the initial investigation, they will arrange a time to meet with you and your family to discuss the merits of your case. Your BILA lawyer will provide you with a summary of the investigation to date, including the opinions received from any medical experts who have been consulted, and will advise you, based on experience, whether you should proceed with a lawsuit.

There may be situations when the BILA lawyer you initially consult with will refer your case to another BILA lawyer. This may be done due to the availability of a particular lawyer or law firm to assist with the case, the location where the injury occurred, or the particular expertise of another BILA member.

If your BILA lawyer recommends that you proceed with a lawsuit, there will be a detailed discussion about the issues involved in your case as well as the legal process and what you can expect. You will also discuss the fee arrangements. BILA lawyers offer the option of proceeding on a contingency fee agreement. Instead of paying your BILA lawyer for their time throughout the litigation process, your lawyer will receive a percentage of recovery should your matter

successfully resolve by either negotiation or at trial. Further detail regarding the legal fees charged by BILA lawyers can be found in Chapter 10.

TYPES OF CASES ACCEPTED BY BILA LAWYERS

Brain injury caused by delayed delivery

The most common case BILA lawyers encounter is when the obstetrical team fails to intervene to relieve impaired fetal oxygenation (hypoxic stress) that later leads to neurological injury. Failing to relieve the source of hypoxic stress or to promptly deliver the baby in this context can lead to ischemia (decreased perfusion of oxygenated blood to the brain).

As discussed in Chapter 2, hypoxic-ischemic encephalopathy (HIE) is the type of brain sickness that results from inadequate perfusion of oxygenated blood to the brain in the term baby. Babies with HIE often go on to develop permanent conditions such as cerebral palsy (CP), as well as developmental and cognitive issues. Although CP can arise from other causes, many cases of CP are caused by poor fetal oxygenation during labour and delivery.

Throughout the course of labour, the obstetrical team is responsible for monitoring both maternal and fetal well-being. One of the methods used to assess fetal well-being is electronic fetal monitoring (EFM), which is more fully described in Chapter 3. EFM can detect changes in the fetal heart rate, which provides the medical team with important information regarding how well the fetus is tolerating the contractions during labour (by showing if the fetus is adequately oxygenated). An adequately oxygenated fetus can cope with the stresses of labour and delivery without injury. A healthy term fetus is quite resilient and can withstand the occasional interruptions in oxygenation that naturally occurs during labour. This resilience is not, however, unlimited. Where hypoxic stress is too severe or too

prolonged the capacity of the fetus to withstand the stress can be overwhelmed, leading to a risk for neurological injury. It is essential that the obstetrical team properly monitor the EFM tracing for signs of hypoxic stress. A failure to intervene in the face of concerning signs on the EFM tracings can result in poor outcomes for the baby, sometimes resulting in a brain injury such as HIE.

BILA lawyers have experience with these cases.

Failure to progress

A labour that lasts too long may expose the baby to the risk of injury. From the time of what is called the "active phase" of the first stage of labour, usually deemed to begin at about 4 cm of cervical dilatation and end at 10 cm of cervical dilatation, there is an expectation that the labour will progress at a reasonable rate. This rate is usually defined based on progress measured by cervical dilatation and descent of the fetus in the birth canal. A labour that proceeds at a slower than normal rate, called a protracted labour, or a labour that stalls, called an arrest of labour, may indicate some mechanical problem obstructing delivery. This mechanical problem may be that the uterine contractions are not strong enough, may be caused by the fetus being unable to pass through the birth canal, or may be because the maternal pelvis is too small compared to the size of the fetal head (in a vertex, or head, presentation).

The obstetrical team should be monitoring all aspects of labour to ensure that it is progressing appropriately. The obstetrical team is required to monitor the progress of labour and to intervene in a timely manner. Interventions can include increasing the frequency or strength of contractions with medications, considering an operative vaginal delivery with the use of either forceps or vacuum, or delivering the baby by cesarean section.

BILA lawyers have experience with cases involving a failure to progress.

Improper use of oxytocin

Oxytocin (also known as Pitocin or Syntocinon) is a medication that is used to initiate or increase the intensity and frequency of contractions. Contractions cause cervical dilatation and descent of the baby into the birth canal. Issues can arise when oxytocin is prescribed where it is not necessary or is contraindicated. For example, if a mother is already experiencing frequent strong contractions, administration of oxytocin can result in excessive uterine active, called "hyperstimulation." As well, oxytocin should not be administered unless the fetal heart rate pattern is normal. Administration of oxytocin can increase the stress to the baby and increase the risk of injury.

In cases where oxytocin is warranted, the obstetrical team must closely monitor the EFM tracing, must provide 1:1 nursing care, and, when necessary, reduce or discontinue oxytocin in order to prevent injury.

BILA lawyers have experience with cases involving the improper use of oxytocin.

Shoulder dystocia

There are situations where a baby's shoulder can become trapped behind the mother's pelvis during labour, preventing delivery of the child. This is known as shoulder dystocia. Pulling or tugging on the baby (known as traction) in an attempt to free the shoulder can cause damage to the nerves in the baby's neck, resulting in a brachial plexus injury. Brachial plexus injuries can result in a permanent neurological condition known as Erb's palsy, which may present as paralysis in the affected arm.

In extreme situations, shoulder dystocia may result in a delayed delivery of the child, and as described above, can cause brain injury if the baby is trapped for too long.

Given the serious consequences that may arise from shoulder dystocia, the obstetrical team is required to respond quickly. There are specific steps and physical maneuvers that need to be performed to free the shoulder from the pelvic bone. These including the McRoberts maneuver (where the mother's thighs are brought up to her abdomen), Wood's corkscrew maneuver (where the obstetrician manually rotates the baby's arm to free it), and by pressing down on the mother's lower abdomen. The failure to react promptly can result in serious injury to the baby, which can give rise to a successful birth injury case.

BILA lawyers have experience with shoulder dystocia cases.

Negligent antenatal care

In addition to injuries which occur during the labour and delivery, negligent antenatal (or prenatal) care can also result in serious injury to mother or baby. This can include inadequate screening or counselling for genetic abnormalities. It can also include the failure to appropriately manage medical conditions such as high blood pressure or diabetes.

Proper antenatal care requires the use of monitoring techniques and screening tests to address the health of mother and baby on a regular basis. This includes fetal surveillance through blood tests, ultrasounds and EFM, and can also include genetic testing or amniocentesis. It includes monitoring of the mother's health during her pregnancy. For example, monitoring maternal blood pressure is essential to detect preeclampsia (a hypertensive disorder of pregnancy), which can result in injury to both the mother and the fetus. Maternal glucose levels should be monitored to screen for gestational diabetes, which can result in a baby that is too large for safe vaginal delivery, or other serious risks. Often, early intervention and treatment of these conditions during the antenatal phase can prevent birth injuries.

BILA lawyers have experience with cases involving negligent antenatal care.

Negligent care after birth

There are situations where a baby suffers an injury after delivery due to substandard neonatal care. Depending on the condition of the baby at birth, resuscitation measures may be required. A newborn may require ongoing care in a neonatal intensive care unit (NICU) or may require transfer to a pediatric hospital. The baby may require specific imaging (such as ultrasound, CT, or MRI brain imaging), and a baby that has suffered a brain injury may require cooling treatments. Failure to appropriately treat the newborn's condition shortly after birth can result in either the development of an injury, or may fail to properly minimize the harm suffered by the baby.

Other examples of negligence care post-birth are a failure to monitor baby glucose levels or feeding. When a baby does not receive adequate nutrition, glucose levels can drop. This drop in glucose can result in brain injury. Another example is newborn jaundice. Jaundice is easily monitored and treated. A failure or monitor or treat jaundice can result in a brain injury called kernicterus.

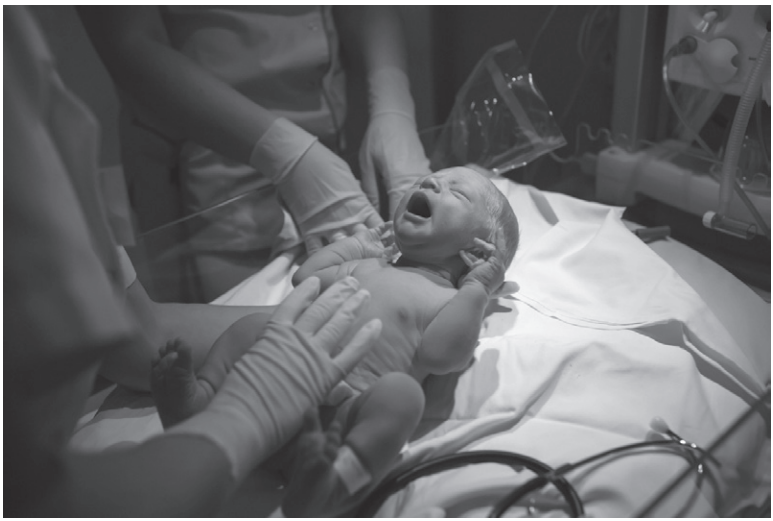
BILA lawyers have experience will all types of cases involving negligent care post birth.

CONCLUSION

As you can see, there are many different types of cases involving the time before, during, and after the birth of babies. If you have concerns about the care you or your child received during any of these periods, a BILA lawyer can provide you with advice. If your child has been diagnosed with a significant condition including cerebral palsy, Erb's palsy, kernicterus, or a serious developmental condition, you can reach out to a BILA lawyer for advice.

CHAPTER 6 HOW DO I FIND OUT WHAT HAPPENED TO MY BABY?

by Joe Miller K.C.



The doctor who delivers Jennifer's baby at the community hospital is one Jennifer has never met before. After delivery, the baby has difficulty breathing and is whisked off to a larger hospital with a neonatal intensive care unit. Jennifer never receives an explanation from the doctor who delivered her baby about why her baby was born in such a depressed condition. She doesn't even remember the doctor's name.

You may not know exactly what caused your baby's injuries. You may suspect that something went wrong, but no one has explained what happened. Or you may only know that your child has disabilities with no explanation of a cause. Even where there has been some disclosure by the doctors about what happened to your baby, many parents still have many unanswered questions. They often face a stone wall when asking for answers from healthcare providers, either because they do not know the answer or they are afraid of the consequences of providing the answer.

Your BILA lawyer can help get these questions answered. Sometimes, parents will not know the precise questions to ask; fortunately, BILA lawyers know which questions to ask and who to ask.

The first step to finding out what happened to your baby is to obtain the medical records. Healthcare professionals have a duty to record what happens during the care of a patient. You have a right to obtain your medical records and those of your child. If you have hired a lawyer to investigate a potential case, that lawyer can do that for you. All you will need to do is sign authorization forms allowing them to do so on your behalf.

There are many different kinds of medical records that provide valuable information about what happened to you and/or your baby. The clinical notes and records from your prenatal doctor show the health of you and your baby before labour and delivery. The mother's chart from the hospital gives information about how well the baby tolerated labour while in the womb and whether there were any complications during the labour and delivery process. The baby's chart from the hospital shows any complications the baby had after they were born. Importantly, experienced birth injury lawyers always obtain copies of the actual imaging (MRIs, CT scans, and ultrasounds) taken during pregnancy and the newborn period, including images of the newborn's brain after birth. These are crucial test results that need to be reviewed to assess your case.

Once your lawyer receives your medical records, they will review them, a task that can be difficult unless you have experience with these type of records. It is easy to miss something important if you are not used to working with medical records—abbreviations and acronyms are commonly used in medical records, so most people do not understand what is written. The heart rate of your baby in utero is often tracked electronically, and these records are vitally important to determine what happened but are meaningless to someone who has never looked at electronic heart rate tracings before. A BILA lawyer knows what to look for in the records, is familiar with fetal heart tracings, and is particularly knowledgeable about the significance of certain entries in those records.

To determine what happened to your baby, birth injury lawyers aim to answer two main questions:

1. Was somebody negligent?
2. Did that negligence cause an injury to the baby?

Your BILA lawyer will carefully review all the relevant medical records to identify the issues of importance and the questions to be asked of the medical experts. Answering these questions will involve feedback from experts (e.g., obstetricians, neurologists, neuroradiologists). Those experts look at the antenatal records, labour and delivery records, and imaging to form an opinion on what happened. The opinions of these experts must be coordinated and agree in order to make the necessary connection between the substandard care and the harm.

Understandably, the main issue of concern for most parents is to get a clear explanation for what happened to their baby. Once that issue is resolved you can decide whether you can, and wish to, hold a healthcare professional accountable.

CHAPTER 7 HOW IS MY CHILD'S COMPENSATION CALCULATED?

by Paul McGivern K.C., Susanne Raab and Lindsay McGivern

Rachel and Jason filed a medical malpractice claim against their doctor for injuries their daughter sustained when the oxytocin Rachel was given during labour caused their baby to be deprived of oxygen for too long. Their daughter, now two, has cerebral palsy and requires significant daily medical help. In addition, Rachel and Jason will soon have to renovate their home to make it wheelchair accessible for their daughter.

Rachel and Jason have spent two years caring for the daughter round-the-clock. The financial stress and anxieties they have about their daughter's quality of life have left them physically and mentally exhausted. They long to take a family vacation.

After a three-week trial that relied heavily on expert testimony and reviewing electronic fetal monitoring records, Rachel and Jason are awarded a settlement that will cover the care, support, therapy, medication, and equipment their daughter will require over her lifetime, the necessary home renovations, as well as additional compensation to reflect other losses, including compensation for Rachel and Jason for all the additional care their daughter requires.

Like most parents, you might be motivated to pursue a medical malpractice lawsuit following a birth injury to obtain the financial resources necessary to provide for your child. Children with cerebral palsy, for example, have significant, lifelong needs and the public system is wholly inadequate in providing the level of care and support required. You might be struggling with limited public resources, supports and services, and often, there is no choice in the process. You're exhausted, having to advocate at every turn to obtain the most basic services for your child. You worry about who will provide for your child when you are no longer able.

While financial compensation does not solve all of these challenges, your ability to choose and fund the best support and services available for your child can make all the difference in your child's life. It provides opportunities for growth and development, lightens the load, and reduces the financial, physical, and emotional stress associated with providing for a disabled child. While no amount of money can ever heal your injured child, having the financial resources to pay for the proper care, therapy, and rehabilitation of your child can help provide you with some peace of mind about your child's future.

The purpose of a lawsuit is to obtain that funding. When the injury has been caused by negligence, financial compensation will often also give you your lives back. In addition to providing for your child's care needs, proper funding also allows for sufficient outside support so you can go back to work (if you wish to do so), volunteer outside the home, have a social life, and regain your relationship with your spouse (if applicable).

In this chapter, we will review the main categories of compensation that may be available for a child living with cerebral palsy in a successful medical malpractice matter. Of course, as no two children with cerebral palsy are alike, no two cases are alike. The amount of compensation any given child is entitled to receive will depend on that child's unique needs, abilities, and circumstances.

Please be aware that this is not an exhaustive list. Rather, it is intended to provide a general overview of the most significant areas of compensation. Differences also exist between the various provinces and territories across the country.

COST OF FUTURE CARE

This is the most important category of compensation. It is meant to provide you and your child with the money needed to put your injured child in the position they would have been in had they not sustained their injury. In other words, it is supposed to provide sufficient funds to pay for the care needs of your child throughout their lifetime.

Parents of children living with cerebral palsy know all too well that these children have extraordinary care needs and a great deal of care and support is required in order to give them the opportunity to meet their full potential. The financial, physical, and emotional burdens of caring for children with birth injuries can be overwhelming. Caring for these children often requires around-the-clock vigilance, with no respite for the family. Even with government assistance

and services, most families struggle to cope. Parents usually end up providing most of the care themselves, at great personal expense and sacrifice. They worry about what will happen to their children if and when they are no longer able to care for them. Few families can afford to purchase the care and therapy their injured child needs now, let alone over the course of a lifetime, an expense that could easily be in the millions of dollars.

Fortunately, there is no limit to the amount a court can award for the cost of care. The court is entitled to award as much as is necessary to ensure that the injured child receives the care and services they need for their lifetime.

The process of determining what amount of compensation should be provided to your child involves a number of assessments by appropriately qualified experts, such as—in the case of a child living with cerebral palsy—a pediatric physiatrist (physician who specializes in the rehabilitation of children), a pediatric neuropsychologist, an occupational therapist, a physiotherapist, a speech language therapist, and a vocational expert. An expert qualified as a life care planner prepares a comprehensive report listing all of the various supports, services, and equipment that will be required to provide for the child for their entire lifetime, as well as associated costs.

In practical terms, in the context of a birth injury resulting in cerebral palsy, compensation typically includes the following:

- **Attendant Care:** This covers the costs of hiring a properly qualified support worker during the day and/or night to provide the child with the additional care and support required due to their disability, as well as the costs of housekeeping and home maintenance services. For a child with a severe birth injury, this may include home care by nurses or personal support workers. Where family members provide some or all of the extraordinary care, they are entitled to be compensated for the care they provide.

- **Therapy:** This includes the costs of all therapy the child may require over their lifetime (e.g., physiotherapy, occupational therapy, speech language therapy, psychological therapy, aquatic therapy, hippotherapy, therapy dog).
- **Case Management:** This includes the costs of a caseworker, often a nurse or occupational therapist, who plans and organizes the various supports and services required for the child.
- **Equipment:** This covers the costs of the wide variety of equipment and technological devices a child living with cerebral palsy may benefit from (e.g., wheelchairs, a wheelchair-accessible van, lift systems, adapted sports equipment, therapeutic pool, communication devices).
- **Medical Supplies and Medication:** This covers the costs of items such as feeding equipment, hygiene supplies, and medication.
- **Home Modifications/Purchases:** This covers the costs of either renovating the child's current home to make it fully accessible for the child or, alternatively, if it is not possible to renovate the current home, it covers the additional costs associated with building or purchasing an accessible home (e.g., lifts, ramps, grab bars, railings).
- **Other:** In addition to the above, compensation may include the costs of any other item or service recommended by an expert.

LOSS OF INCOME/LOSS OF INCOME EARNING CAPACITY

Each child diagnosed with cerebral palsy is affected differently. Some children with cerebral palsy grow up and find gainful competitive employment with earnings similar to what they would have earned without any injury. These people will have a limited (if any) claim for compensation under this category.

For many children, however, the combination of physical challenges, communication barriers, cognitive limitations, fatigue, and/or numerous medical and therapy appointments make finding competitive employment as adults simply unrealistic. Their focus, instead, is typically on finding meaningful and enjoyable ways to contribute to their communities through volunteer opportunities. In these circumstances, their claim for compensation for the loss of their ability to earn income as a result of their disability can be significant.

Compensation for loss of income is calculated by comparing the amount of income the person would have earned had they not suffered their injury with the amount of income they will be able to earn with their injury (if any). In the case of a birth injury, it is generally assumed the child would have attained a level of education and earnings similar to what their parents and/or siblings achieved, had they not been injured at birth.

NON-PECUNIARY DAMAGES ("PAIN AND SUFFERING")

This category of compensation is meant to compensate an injured person for their physical and emotional pain and suffering. While the previous categories of compensation are meant to reimburse the injured person for the financial costs associated with their injury, this category of damages is meant to provide an additional fund of money to be used to provide solace to the injured person for what they have lost. Damages for pain and suffering are also known as general damages.

In Canada, general damages are awarded based on the nature and severity of the underlying injury. Although there are no hard and fast rules about how much to award for any particular injury, Canadian judges and juries rely on similar past cases, meaning they tend to award general damages along a range or spectrum established by previous court decisions involving similar injuries. This means

that when a judge or jury decides how much to award for general damages in a particular case, they will likely consider what courts in the past have awarded in cases involving similar injuries. The same considerations apply when the two sides of a malpractice lawsuit are negotiating a settlement out of court. Since no two people are exactly alike and no two cases are identical, it will always be possible to distinguish prior cases from the case at hand. Still, prior case law is an important consideration when assessing general damages for pain and suffering.

In the late 1970s, the Supreme Court of Canada placed an upper limit on the amount of compensation allowable under this category of damages of $100,000 (other monetary claims are not limited). The court's concern at the time was that this was a difficult claim to quantify and did not rely on any objective measure. The court observed that no amount of money could possibly truly compensate a person for the pain and suffering associated with a catastrophic injury, and they feared an escalation of the amount of compensation awarded under this category, as has occurred in the United States of America.

This upper limit of non-pecuniary damages has increased over time to reflect inflation and is, at the time of writing, approximately $450,000. In deciding what amount of compensation an injured person is entitled to receive, the court will consider a variety of factors, including the injured person's age, the nature of the injury, the severity and duration of the pain, the level of disability, and the loss of lifestyle or impairment of life. A child living with cerebral palsy as a result of a birth injury is typically entitled to be compensated at, or close to, the maximum allowable amount of damages.

CLAIMS OF FAMILY MEMBERS

Immediate family members of patients injured by medical malpractice may have claims of their own, the extent of which depends on the

legislation in the province in which the child was born. Immediate family members are spouses, parents, children, siblings, grandparents, and grandchildren of the injured patient. In many cases, these family members provide care and services to the injured plaintiff, for which they can receive compensation. Family members can also be compensated for money they have spent to purchase care and other services that would not have been required but for the injury to their loved one. Immediate family members can also be compensated for the loss or change of the relationship that results when their loved one is injured or killed as a result of medical malpractice.

OTHER CATEGORIES OF COMPENSATION

In addition to the above, compensation may also be available for:

- The child's lost opportunity to form an interdependent relationship and benefit from the associated cost sharing of co-habitation.
- The professional services of a financial planner and/or corporate trustee to invest and manage the settlement/judgment funds to ensure it is properly invested and lasts for the entirety of the child's life

Damages in birth injury cases are often amongst the highest awards in all personal injury cases. This results from the considerable care needs of children with serious neurologic injury.

When your BILA lawyer is successful in recovering a substantial damages award for your child, great care is taken to ensure that the funds are carefully invested and protected so that your child's future is secure even when you may no longer be able to take care of them. This goes a long way to providing you with peace of mind.

CHAPTER 8 THE COURT PROCESS, SETTLEMENT, AND TRIALS

by Chris Wullum and Sadira Garfinkel

Once the decision has been made, after investigation and consultation with your lawyer, that there is merit in pursuing a claim for compensation and damages related to a birth injury, the court process starts with filing a lawsuit.

The court process, sometimes referred to as the litigation process, can be complex and unfamiliar to someone who has never been through it before. Most people will have seen segments or examples of the court process on television and in movies. While some of what

you may have seen is an accurate representation of what occurs, the reality is that there are many more steps to the court process than you will see on screen, and a lot of work occurs in preparation and behind the scenes.

It is important when starting the court process that you have an understanding of the various steps and an overview of what to expect. Your BILA lawyer will be able to navigate the court process in a way that should bring some ease and understanding for you in what can be a difficult, confusing, and even stressful experience.

Every court jurisdiction has its own court rules that set out specific details on how each step in the process should occur and over what timeframe. There are many similarities in the court rules between provinces and territories, but each jurisdiction will have its own subtle differences. For that reason, it is always best to consult with the lawyer in the province in which your baby was born. For the purposes of this chapter, we'll set out the typical steps in the court process that exist generally across Canada common to most jurisdictions.

THE PLEADINGS

Statement of Claim or Notice of Civil Claim

Pursuing a lawsuit starts with the filing of a formal court document that names the parties to the lawsuit and sets out the basic allegations, or material facts, about what occurred. It also offers a description of the various types of damages being sought against the parties being sued. This initiating document is usually referred to as a Statement of Claim or Notice of Civil Claim, depending on the jurisdiction. In this chapter, we will simply refer to the document that starts a lawsuit as the Claim.

In the Claim, you are seeking damages and are known as the plaintiffs. The parties being sued (e.g., doctors, nurses, hospitals,

midwives) and contesting the claim for damages are known as the defendants.

In birth injury claims, given that the person who has suffered the injuries is a minor under the age of eighteen and likely has a disability, the Claim will usually need to be commenced through a litigation guardian(s). A litigation guardian is essentially someone who will act in the interests of the infant plaintiff in pursuing the claim, making decisions and giving instructions in respect of the claim on their behalf. In most cases, this would typically be the parents or other legal guardian of the child. It should be noted that the litigation guardian may also be responsible for any cost award made against the plaintiffs in a lawsuit if the claim turned out to be unsuccessful.

Statement of Defence or Response to Civil Claim

Once served with the Claim, the defendants will then have a period of time, which will be specified in the court rules or through agreement of counsel, to file with the court a written response to the claim in a document known as a Statement of Defence or Response to Civil Claim, depending on the jurisdiction (referred to in this chapter as the Defence). Similar to the Claim, the Defence will set out the basic responses of the defendants to the allegations made by the plaintiffs in the Claim.

THE DISCOVERY STAGE

After the Claim and Defence have been delivered, the next significant step in the litigation process is usually referred to as the discovery stage. The purpose of this stage is to allow the parties in the case to obtain a greater understanding of the facts and details of the opposing party's case through the disclosure and discovery of documents and testimony. This allows each side the opportunity to

better understand and assess the opposing side's case, to know what case they must answer to at trial, and to promote the possibility of settlement through the disclosure of evidence. This is done through direct questioning of the parties by opposing lawyers and through disclosing relevant documents.

There are generally two parts to the discovery stage in a court proceeding. The first involves documentary discovery, in which the parties compile a list of all of the relevant documents that they have in their possession, power, or control. This list of documents is known in most jurisdictions as an Affidavit of Documents, as the party will attach the list of documents to a sworn affidavit confirming that the list is a full and proper description of all such documents in their possession, power, or control.

In a birth injury case, such relevant documents will usually include the medical charts and records concerning the infant plaintiff, starting from the time of the incident in question up to present date. It will also usually include other documents such as therapy, counselling, or school records, as well as documents related to the caregivers and their circumstances. Documents to be disclosed usually include the medical records of the mom and any other records that might be relevant to the claims being made or damages sought (e.g., tax returns to show income loss, employment records).

It should also be noted that evidence disclosed in the discovery phase is protected by a principle known as the implied undertaking rule. This rule prevents an opposing party from using evidence disclosed in the discovery phase for anything other than the specific litigation.

The second aspect of the discovery stage is generally known as examinations for discovery or questioning. Examinations for discovery or questioning are a vitally important part of a birth injury lawsuit. It is part of the discovery stage, in which the lawyers may ask questions and seek answers under oath from the opposing parties to the case. This questioning typically takes place in a boardroom with

a court reporter or stenographer present to transcribe what is said. Counsel for the party being examined is present with their client and has the right to object to any questions asked by opposing counsel that are irrelevant or otherwise inappropriate for discovery. There is no judge present and, as a result, the process usually occurs in a slightly more informal manner than how evidence might be presented at trial.

The purpose of an examination for discovery or questioning is to allow each party to better understand the evidence of the opposing party's case and to seek admissions of facts and evidence of the case. In a birth injury case, counsel for the plaintiffs have the opportunity to ask questions of each doctor or nurse named as a defendant in the Claim. Conversely, counsel for the defendants are entitled to question the adult plaintiffs, usually the parents or other guardian or caregiver, about their recollection of events that led to the injuries, as well as questions relevant to the claim for compensation and damages.

An examination for discovery or questioning can take several hours (or even days), depending on the facts and complexity of the case. It is important that you spend time with your lawyer in advance of examinations or questioning to prepare so that you know what to expect in the form of possible questions from opposing counsel.

The examinations or questioning are an important step in the litigation process as it is an opportunity for each side to learn many specific factual details of the opposing side's case. It allows counsel to further assess the evidence of the case and even allows them to assess how the person being examined may present as a witness at trial. It aids counsel for the parties in assessing the relative strengths and weaknesses of the claim or defence, and, therefore, can play an important part in influencing settlement of a case.

EXPERT REPORTS

As already discussed in this book, an important aspect of any birth injury malpractice case comes from obtaining and relying upon experts who provide opinions on various medical issues and damages issues relevant to the case. While expert reports might be obtained early on in the process, and in some cases prior to even initiating the Claim, as part of the litigation process, the parties need to disclose written reports that set out details of the expert opinions they intend to rely upon at trial. Each jurisdiction will have its own specific Court Rules governing the form, content, and timing of such written expert reports.

PRE-TRIAL CONFERENCES WITH A JUDGE

In most jurisdictions, once the discovery stage is complete, the court process will require counsel for the parties to meet with a judge from the court to discuss the status of the litigation. Such meetings will have different names depending on the court's jurisdiction, but are often referred to as pre-trial conferences or case management conferences.

The judge at such conferences will discuss the issues and facts of the case with counsel often with a view to determining if there is any possibility of a settlement or if the case needs to proceed to a trial to be decided. They will also usually discuss the number of witnesses expected to be called, the number of days of trial required, and other logistics associated with a trial.

MEDIATION

In some jurisdictions, there is a mandatory mediation process required of the parties to see if they can reach an agreement for a settlement. Even without a requirement for mediation, it is also

open to the parties to voluntarily agree to use mediation to discuss and seek a settlement to the case.

The purpose of mediation is to involve the services of a trained third party, called the mediator, who facilitates a discussion of settlement between the parties. In some jurisdictions, the mediator can be a Judge of the Court who will act as a mediator for the parties. In those instances, the judge who acts as a mediator would not act as the judge at the trial of the matter if it did not settle through the mediation process. Whether the parties can reach a settlement of the claim through discussions at a pre-trial, case conference, or mediation depends on the willingness of each party to negotiate and try to reach an agreement without the necessity of a trial.

The value of a settlement is often measured by how each party views the strengths and weaknesses of their case and their willingness to negotiate and seek a compromised resolution of it.

SETTLEMENT

While not all birth injury claims resolve by way of settlement, most of the claims taken on by BILA lawyers will be settled out of court, without the need for a trial. BILA lawyers accomplish this in a number of ways. BILA lawyers carefully investigate all potential cases to ensure that only meritorious claims are advanced. There is no incentive to advance a claim if a breach of the standard of care cannot be proven or if the necessary causation cannot be established through expert witnesses or if the costs of pursuing the claim will be more than the potential recovery.

Settlements can and do occur at virtually any stage in the court process, though in many birth injury cases settlement does not occur until the later stages of the process and sometimes a settlement can even occur immediately before a trial is set to begin.

There are two main reasons that a claim does not resolve and a trial may be necessary: either the defence simply refuses to settle the

case or else the parties cannot agree on the settlement amount. These reasons are discussed below.

DEFENDANT REFUSES TO SETTLE

A settlement requires the agreement of both parties. In exceptionally rare cases, the plaintiff will instruct their lawyer not to settle the claim. This rarely happens in birth injury cases, since most medical malpractice victims are simply seeking compensation for their child's injuries and are content to resolve the matter out of court.

The same cannot be said of all defendants. In some cases, the defence will take a firm position on a case and will not agree to settle the claim for any amount. When this happens, it is usually because the defence believes they have a strong, defensible case on the merits. This may relate to either the standard of care, causation, or both.

In medical malpractice cases, defendants or their lawyers will often take a so-called "principled approach," meaning they will only settle those cases where there is a real risk that a court will find in the plaintiff's favour. If the defence is able to deliver strong reports in support of the care provided, this may strengthen their resolve, making settlement more difficult, and, in some cases, impossible.

Sometimes, the medical professional being sued may simply refuse to settle the case, believing it will reflect badly on their reputation. Some defendants honestly feel they did nothing wrong and that the care they provided was in keeping with the standard of care. These defendants may wish to be vindicated at trial. In those circumstances, there is little that can be done to settle the case. No one can force a defendant to settle, and everyone is entitled to their day in court, should they so desire.

PARTIES CANNOT AGREE ON AMOUNT OF SETTLEMENT

Some cases are taken to trial because the parties cannot agree on the amount of compensation that the defendant should pay to the plaintiff. If there is a significant discrepancy between the parties regarding how they value the claim, then a trial may be necessary. Given the risks of a trial, this situation usually only develops when the amount the defendant is willing to pay is vastly less than what the plaintiff will accept.

For many medical malpractice plaintiffs, the prospect of a trial is terrifying and one they want to avoid if at all possible. Indeed, no trial is without risks and challenges, and birth injury trials are exceptionally complex and challenging. That is precisely why it is crucial that the lawyers advancing the case have extensive knowledge and experience in this domain.

TRIAL

If the parties cannot achieve a settlement of the case, either through their own negotiations or through the assistance of a mediator or judge, the case will proceed to a trial for determination. A trial is the formal court proceeding where evidence, both documentary and oral testimony from witnesses, is presented to a judge or jury who will then decide whether the claim succeeds, and, if so, what damages should be paid to the plaintiffs by the defendants.

In some jurisdictions, a birth trauma case may be tried in front of a jury of six people. This occurs only rarely, usually because it is thought by many lawyers that these cases are too complex for a jury of lay people. On the other hand, some lawyers feel that juries are adequately equipped to handle cases of this nature.

In birth injury cases, trials usually last several weeks to months. Given their complex nature, there will often be many witnesses that

are required to give oral testimony to the court and volumes of documents to present, usually in the form of the medical records.

A trial will usually proceed with the plaintiffs going first to present their evidence in support of their case. This will include calling each of their witnesses to give testimony to the judge or jury. Typically, the parents and other family of the infant plaintiff will be called as witnesses to give their recollection of events and to provide information and descriptions of the plaintiff's injuries. There may be other witnesses called, such as treating doctors and other caregivers and therapists. Witnesses will also include the various experts retained on the case by plaintiffs' counsel to provide their opinion evidence to the court.

The counsel calling the witness to the stand to give testimony will question them in what is known as a direct examination. Counsel for the opposing party is then entitled to cross-examine the witness in an attempt challenge or impugn the witness' evidence.

In a birth injury malpractice case, some of the most important witnesses will be the expert witnesses called by both parties. Typically, there will be several expert witnesses called by each party at a birth injury trial and therefore, the evidence of these various experts can take many days or weeks to present.

Once the plaintiffs have presented all their evidence, the defendants will be given their opportunity to lead their own evidence, including calling their witnesses and filing any additional documents they wish to place into evidence. Your lawyer will have the opportunity to cross-examine each witness called to testify by the defence.

Once all of the witnesses have been called and all of the evidence has been presented, counsel for the parties will be entitled to summarize their facts and arguments to the judge or jury, in what is known as the closing arguments or submissions.

The judge or jury is then tasked with making a decision as to who wins or loses the case and assessing the quantum of damages being sought. Where the case is tried by a judge, they will often take time,

sometimes several weeks or several months, to reflect on the evidence and argument of the parties at trial before rendering their decision. This is known as the court "reserving judgment." The judge will then usually issue their decision by way of written reasons that detail the basis for the decision, including the facts and legal arguments that were accepted and relied upon by the judge in reaching that decision.

APPEALS

In some instances, the decision of the judge following trial may still not be the end of the court process. The unsuccessful party has a right to appeal the decision of the trial judge to the Court of Appeal in the jurisdiction where the claim commenced.

An appeal is usually heard by a panel of three appellate judges, and the hearing consists of legal argument by counsel. Generally, no new evidence or testimony is permitted to be given to the Court of Appeal unless special permission is granted.

From a Court of Appeal decision, an unsuccessful party's only means of further challenge to the decision is to seek leave to appeal to the Supreme Court of Canada, the highest level of court in our country. "Seeking leave" means the party wishing to appeal must first obtain permission from the Supreme Court to pursue such a further appeal. The Supreme Court of Canada rarely grants leave to appeal, as it generally only hears a limited number of cases and looks to consider issues that may be of general or wider public importance.

The court process can be a lengthy one, especially as birth injury cases are complex and involve many medical issues, damages issues, experts, and medical charts and records. There are many stages and aspects to a lawsuit that require a great deal of work, strategy, preparation, and skill. The guidance of a skilled litigation counsel with experience in birth injury cases is therefore crucial for navigating the court process.

AFTER THE TRIAL: NEXT STEPS

CHAPTER 9 OTHER OPTIONS TO SUING

by Iman Jomha

It is important to consider your motivation for commencing a lawsuit. The primary purpose of a lawsuit is to recover monetary damages. Sometimes those injured through medical negligence are also seeking a better understanding of the situation and/or accountability from the responsible health practitioner.

There are two main avenues of complaint/investigation:

1. Complaint to the hospital/health region.
2. Complaint to the physician or other health professional's professional regulatory association.

The information provided in this chapter is intended as a general overview. Each province and territory has its own College of Physicians and Surgeons, the statutory self-regulating body responsible for licensing physicians, investigating complaints, and, where warranted, disciplining physicians for inappropriate conduct. Similarly, each health region and authority in Canada has its own internal investigative process to assess complaints. If either of these are avenues you wish to pursue, you will need to determine the appropriate steps to initiate a complaint in your province or territory. Your lawyer may be able point you in the right direction.

This chapter will review both avenues to pursue a complaint against healthcare practitioners, the interplay between these administrative processes and the litigation process, and the applicable time limitations. After consulting with a lawyer, you may choose to pursue these avenues instead of, or in addition to, a lawsuit, depending on the facts of your case.

COMPLAINT TO THE HOSPITAL/HEALTH REGION

If the patient concern is related to care provided by nurses, other hospital staff, or the hospital itself, the patient can file a complaint through the Patient Relations or Quality Services department of the hospital. In most provinces and territories, hospitals are operated by

a health authority or health region. Each authority or region will have its own internal administrative process for receiving and investigating patient complaints. The appropriate department to contact for the hospital in issue, and the process for filing a complaint, can usually be found by looking at the website of the relevant health authority or region.

While the process will vary between health regions, generally, a patient advocate or client representative will be assigned as a liaison between the patient, hospital, and involved hospital staff. This representative will investigate the complaint and make inquiries of the involved staff and appropriate department heads. In some instances, this may give rise to a meeting between the patient, the involved staff, and the hospital administrator. Often a written report will be provided to the patient in response to the concerns raised. In rare cases, this process may result in disciplinary action. More often, it may lead to changes in policies and procedures intended to improve future patient outcomes in similar situations.

Lawyers are usually not involved with this process and it is important to understand that this process does not generally result in a monetary award. This process is intended to facilitate the exchange of information between the hospital and patient and ensure quality improvement at the hospital. These meetings can be a useful opportunity for the patient to receive answers to any concerns and questions.

COMPLAINT TO THE HEALTH PROFESSIONAL'S REGULATORY ASSOCIATION

Most healthcare professionals, including physicians, registered nurses, dentists, chiropractors, and pharmacists, are members of self-regulating professions. The government of each province has established a regulatory framework under which these professions must govern their own members. Generally, each profession is obligated

to have a process to investigate and rule on any complaints regarding its members.

To file a complaint with a professional regulatory body, the patient typically completes a form outlining the complaint and signs authorizations enabling the investigator to access relevant medical records. The investigation is often lengthy as the investigator will obtain and review the relevant records, interview involved individuals, and write a report.

The complaints process generally does not lead to monetary compensation for the patient; however, it facilitates the exchange of information and allows the patient to obtain details about the events in issue. In some instances, the complaint may be referred to a committee to review whether disciplinary action or practice conditions should be imposed. The committee may gather further information and may hold a formal hearing. The complaints process can be useful in helping the patient better understand what may have led to a negative outcome in their case, providing some degree of closure.

The College of Physicians and Surgeons

Physicians are licensed and regulated through the College of Physicians and Surgeons ("the College") in the relevant jurisdiction. If a patient has a concern with the care provided by a physician, they may file a complaint with the relevant College. In some circumstances, it may be appropriate to file a complaint with the College in your province on territory about a physician's conduct. This may be particularly warranted in cases of unprofessional or unethical conduct or situations where a physician has demonstrated a serious lack of skill or knowledge.

The website for the College in each jurisdiction will provide specific information about filing a complaint in that jurisdiction. While the process may vary between jurisdictions, generally, the College will request that the patient fill out a form summarizing the care

received from the relevant physician(s) and the patient's concerns. The College will then contact the involved physician(s), and any other physicians who may have relevant information, to obtain the physician's response to the concerns raised. The College may also retain a medical expert to review the care and opine on whether the doctor acted appropriately.

In most cases, after completion of its investigation, the College will issue a written summary of the physicians' responses and the College's findings to the patient. In some instances, a hearing may be involved. If the College is critical of a physician's care, they may impose sanctions which will also be outlined in the written summary. Imposed sanctions most commonly involve practice changes such as attending continuing education courses or keeping more accurate records. It is rare for sanctions to be imposed that impact the physician's ability to continue practicing medicine. Most often, a complaint to the College does not to lead to disciplinary action; however, a patient may wish to ensure the College is aware of their concerns in case there has been a pattern of similar behavior from the physician in issue.

INTERPLAY BETWEEN ADMINISTRATIVE PROCESSES AND THE LITIGATION PROCESS

A patient may simultaneously pursue all three processes: litigation, professional regulatory complaint, and complaint to the hospital or health authority. These processes are not mutually exclusive.

There is legislation in place in most jurisdictions which prevents the use of information arising from complaints to a professional regulatory body or hospital/health authority in litigation. This means that any information received during the complaints process from the health practitioner, College, or health region cannot be used directly as evidence in litigation. However, the information

that arises may be helpful in assisting your lawyer in investigating whether litigation is warranted in your situation.

It is important to remember that the only process through which you can seek financial compensation is litigation.

APPLICABLE TIME LIMITATIONS

While in all jurisdictions there is a legislated limitation date by which a court action must be filed, there are typically no limitation periods for filing administrative complaints.

If you intend to bring a medical malpractice case in court, you would be well-advised to consult with your lawyer before initiating an administrative complaint. In some cases, it may be preferable not to lodge an administrative complaint. In other cases, you may decide to wait to commence a lawsuit until after the outcome of the administrative process is known. It is important to understand, however, that your limitation period for filing a lawsuit is not suspended while an administrative investigation underway. Therefore, it is essential that you discuss your case with a lawyer as soon as possible to ensure any relevant limitation date is not missed.

CHAPTER 10 WHAT LEGAL FEES HAVE TO BE PAID?

by Charles Gluckstein

Abby had a prolonged second stage labour that lasted over 15 hours before her doctor performed a C-section. The C-section took thirty minutes as her baby had been wedged in her pelvis. At birth, her baby required resuscitation. A medical team managed to get the baby to start breathing again, and Abby and her husband Doug were able to see their daughter before they took her to the NICU for further testing. Their daughter now lives with cerebral palsy and will require life-long care.

Abby and Doug cannot afford to provide for their daughter and want to pursue a medical malpractice claim but have concerns about the cost of a lawyer. BILA lawyers do not charge any fees for the initial investigation and consultation. In fact, any legal fees to a case that is going to be pursued are taken from the settlement. It is important to have a lawyer with a background in birth trauma pursue these cases given the complexities involved in both obstetrics and neonatal trauma. A BILA lawyer has the expertise and experience to get a successful result for Abby and Doug.

As birth injury lawsuits can span over many years, your BILA lawyer will devote significant time, effort, and skill in advancing your case. Just like you, your lawyer will have to wait until the end of the case for compensation.

This chapter will provide you with a general overview of the costs that are associated with pursuing your birth injury case, as well as the typical arrangements for paying legal fees.

COSTS OF THE PRELIMINARY INVESTIGATION

Before commencing a lawsuit, and as described earlier in this book, your BILA lawyer will conduct a preliminary investigation to determine whether your claims are viable and worth pursuing. The preliminary investigation can take some time as it involves requesting and reviewing the relevant medical records, and can involve consultation with several medical experts.

The first step is to obtain copies of the relevant medical records for your BILA lawyer to review and assess the merits of your case. Generally, your BILA lawyer will agree to obtain copies of these records at their expense. There are situations in which your BILA lawyer may request a deposit (known as a monetary retainer) in order

to conduct the preliminary investigation of your case. The size of the monetary deposit depends on the anticipated cost of the preliminary investigation and can take into account the complexity of the case, the volume of relevant medical records, and the number of medical experts that need to be retained and consulted.

The review of the records is a timely process that requires the lawyer and their team to analyze the fetal heart rate strips, neonatal records, imaging, and hospital charts to understand the chronology and develop a theory of what happened to the baby during the delivery.

RETAINING YOUR BILA LAWYER

Once the preliminary investigation is completed, and your BILA lawyer agrees to take on your case, your relationship will be governed by a retainer agreement. In most cases, your BILA lawyer will agree to using a contingency fee agreement (CFA). A CFA states that you only pay legal fees if you receive compensation for your claim either by way of negotiated settlement or by winning at trial. If you are not successful in your case, you don't owe legal fees to your lawyer.

In addition to legal fees, there is also the cost of disbursement expenses which include the various costs paid directly to third parties on any lawsuit, such as expert fees, transcripts costs, photocopy costs, postage, courier fees, court filing fees, and the like. Disbursement expenses are in addition to legal costs and are usually identified and treated separately within any retainer agreement.

There are some cases in which a CFA might not be appropriate, though this will be determined on a case-by-case basis.

Because BILA lawyers span across Canada, the particular agreement that you enter with your lawyer will be governed by the rules set out for the province in which they operate. Your BILA lawyer will ensure that you understand the particulars of your agreement and will be able point you to any applicable resources (if they exist) to ensure this.

LEGAL FEES PAYABLE AT THE CONCLUSION OF THE CASE

The legal fees owed to your BILA lawyer at the conclusion of your case are referred to as solicitor-and-client fees, which are ultimately deducted from the settlement or trial award at the conclusion of the lawsuit. The solicitor-and-client fees are generally a percentage of the total damages awarded that both you and your BILA lawyer had agreed upon, and which is outlined in the CFA.

BILA lawyers are highly qualified and experienced lawyers with strong reputations who work hard to advance their clients' birth injury claims. They strive for early and optimal resolution of claims, whenever possible, with the help of qualified medical experts. Should the matter not resolve through private negotiation, then your BILA lawyer will skillfully advance your case at trial to ensure that you have the best chances at success. The legal fees charged by BILA lawyers are meant to be fair and reasonable, and yet reflect the expertise we bring, the successful results we secure for our clients, and our individualized approach that we take with each case we work on.

If you are successful in your lawsuit, the compensation received from the defendants will include an amount for damages plus some contribution toward your legal costs. The specific rules that pertain to legal costs vary by province but are applicable whether your claim resolves by way of negotiated settlement or at trial. As these costs only cover part of your BILA lawyer's fees, you will be responsible for paying the balance of the legal fees out of the award received.

If your case proceeds to a trial, the defendants may pay you a higher percentage of your legal costs (on what is known as a substantial indemnity basis), as compared to if your claim resolves by way of settlement (on what is known as a partial indemnity basis). Being awarded substantial indemnity costs will reduce the solicitor-and-client fees owed to your BILA lawyer.

Just as you may be owed legal costs if you are successful in your case, the same principle can apply to the defendants if they are successful at trial. If you lose a case, you may owe the other side a portion of their legal costs. This is one of the reasons why your BILA lawyer will conduct a preliminary investigation before starting a lawsuit to determine if there is likely merit to bringing a claim. As with any lawsuit, a lawyer cannot guarantee success, but BILA lawyers will always strive to lessen the risk that your case may not succeed and will give you advice at the outset and throughout on merits of the case and the likelihood of success.

Your BILA lawyer will work tirelessly to advance your case to achieve the best possible result. If the case proceeds to a trial, there is always a risk that the judge will prefer the defence expert evidence to the plaintiffs' expert evidence. If that were to occur, then your case may be dismissed, and you, as litigation guardian for the claim may be ordered to pay either partial or substantial indemnity costs to the other side. Again though, one of the roles of your BILA lawyer is to help reduce and avoid that possibility by working closely with you and giving you advice on the risks and merits of the case throughout.

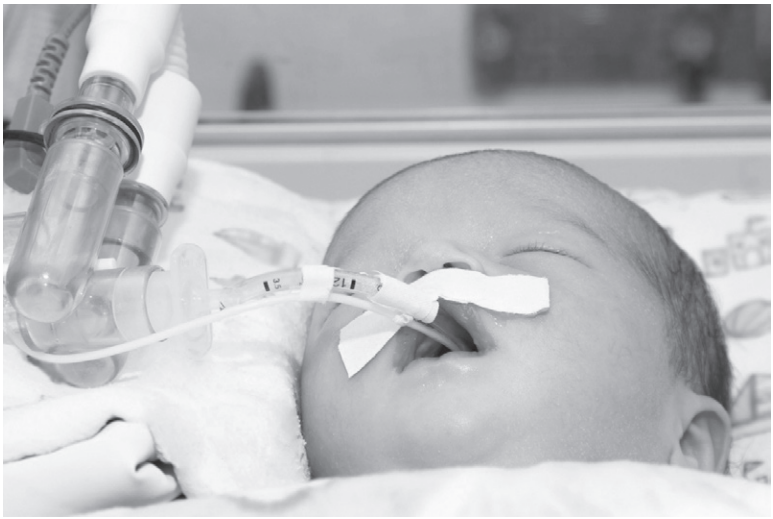
As outlined in the previous Chapter 8: The Court Process, Settlement, and Trials, cases involving minors or incapable parties require that a litigation guardian be appointed to act on their behalf. The litigation guardian is required to act in the best interests of the child or person under a disability throughout the life of the lawsuit, and is the person that your BILA lawyer will take instructions from. These cases require involvement from the court at their conclusion, and require that any proposed negotiated settlement of the claim be approved by a judge. Not only will the judge review the details of the proposed settlement, but the solicitor-client fees that your BILA lawyer is proposing to charge will be scrutinized. In doing so, the courts ensure that the settlement is in the best interests of the minor or incapable party, and that the legal fees being charged are fair and reasonable.

FINAL NOTE

Every parent wishes for nothing more than a healthy child. When the unimaginable happens around birth and a child is injured, a parent's love is no less, but it changes everything. There are times when these things happen without fault—the birth process can be a risky one. Indeed, that is most often the case. Tragically, there are also times when a child's injury was entirely avoidable. It is then that a BILA lawyer can assist you and your family to meet the substantial obligations involved in ensuring that your child is looked after. Getting a big settlement for your child does not undo the wrong, but many parents agree that a good settlement is almost as life-altering as the original injury.

STEP-BY-STEP CHECK LIST FOR BIRTH INJURY MEDICAL MALPRACTICE SUITS

This checklist is intended to provide you with a helpful overview of recommended steps you should take if you think that your child may have been injured by birth trauma.



Step 1:
Contact a BILA lawyer (or some equally qualified lawyer).

☐ Prepare for your lawyer a detailed chronology that includes:

☐ Information about your own health (e.g., hypertension, diabetes).

☐ Information about your experience during pregnancy.

☐ Details about who provided medical care during your pregnancy.

☐ Your recollection of events surrounding your labour and the delivery of your child.

☐ Details about who the healthcare providers were for you and your child.

☐ The names and addresses of everyone involved in your care and the care of your child.

☐ Details concerning your child's condition and the medical investigations and care provided to your child to date.

Step 2:
Meet with your lawyer.

☐ Provide the lawyer with the chronology you prepared as discussed above and discuss your case with the lawyer.

☐ Ask the lawyer about their experience in acting in cases like yours.

☐ Ask the lawyer what the issues are.

☐ Ask the lawyer about how they get paid and contingency fee arrangement details.

☐ Make sure that the lawyer will do a thorough investigation into the merits of your case before starting a lawsuit.

☐ Satisfy yourself that the lawyer understands obstetrical and newborn medical issues.

☐ Make sure the lawyer knows the significance and importance of the fetal heart tracing.

☐ Make sure that the very first step the lawyer plans to take is to obtain the labour and delivery records, fetal heart tracing, and newborn records to evaluate the merit of your case.

☐ Make sure the lawyer has a good understanding of the nature of your baby's injury and the damages that might result.

Step 3:
Retain your lawyer. After you have decided to retain a lawyer to act for you and your child, you should feel comfortable in relying on the lawyer to:

☐ Complete a thorough investigation of your case.

☐ Sit down with you to discuss the details of your case and the theory of liability.

☐ Explain the basis for your case in plain language.

☐ Ensure that there is a reasonable basis for alleging a breach of the standard of care and causation before involving you in a lawsuit.

☐ Keep you informed through meetings, telephone calls, letters, and emails on all important developments in your case.

☐ Gather up all relevant medical documentation.

☐ Meet with you in person and prepare you thoroughly for examination for discovery or questioning.

☐ Build your case on damages through the retention of appropriate experts.

☐ Attempt to negotiate a settlement of your case only when fully prepared and when there is a clear medical prognosis for your child.

☐ Fully prepare for mediation and, if necessary, trial.

☐ Conduct your case in a manner that is entirely focused on the best interests of your child.

RESOURCES

FOUNDING MEMBERS OF THE BIRTH INJURY LAWYERS ALLIANCE

Richard Halpern
Ontario
halpern@gluckstein.com

John A. McKiggan K.C.
Atlantic Canada
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Chris Wullum
Manitoba, Saskatchewan
and Nunavut
cwullum@tappercuddy.com

Paul McGivern K.C.
British Columbia and Yukon
paul@pacificmedicallaw.ca

Joe Miller K.C.
Alberta and
Northwest Territories
jmiller@weirbowen.com

CEREBRAL PALSY RESOURCES

There are many local organizations that provide services and supports for families of children living with cerebral palsy. For a list of organizations in your area, please contact the BILA lawyer in your province.

CP Associations by Province

The Cerebral Palsy Association in Alberta (CPAA) cpalberta.com

CPAA is a registered non-profit organization that supports people affected by cerebral palsy and other disabilities in Alberta, whose mission is to enrich and support the lives of children and adults with cerebral palsy and other disabilities through programs and services.

Cerebral Palsy Association of BC (CPABC) bccerebralpalsy.com

CPABC is a non-profit organization that advocates for, and provides resources and support to, people with cerebral palsy and their families.

Cerebral Palsy Association of Manitoba (CPAM) cerebralpalsy.mb.ca

CPAM is an independent non-profit association that offers information, referrals, support, and advocacy to anyone affected with CP and to those interested in, or working with, people affected by CP.

Ontario Federation for Cerebral Palsy (OFCP) ofcp.ca

OFCP is a non-profit charitable organization dedicated to supporting people with cerebral palsy in Ontario, with the goal of supporting independence, inclusion, choice, and full integration into the community.

The Cerebral Palsy Foundation (Saint John) Inc.

This non-profit organization represents persons with cerebral palsy across New Brunswick by providing financial assistance, general information about cerebral palsy, and support services to its members.

Cerebral Palsy Association of Newfoundland and Labrador cerebralpalsynl.com

This is a registered non-profit organization committed to improving the lives of people affected by cerebral palsy and other disabilities across the province by promoting awareness, acceptance, and understanding.

The PEI Cerebral Palsy Association cerebralpalsypei.com

This organization advocates on behalf of persons with cerebral palsy and their families and works to raise awareness in society of the abilities of individuals with CP.

NATIONAL AND INTERNATIONAL RESOURCES

Kids Brain Health Network neurodevnet.ca

Kids Brain Health is the new name of NeuroDevNet, the first trans-Canada initiative to focus on improving diagnosis, treatment, and support for families raising children with brain-based disabilities.

CP Support Canada cpsupportcanada.ca

Canadian Cerebral Palsy Sports Association (CCPSA) ccpsa.ca

The CCPSA is an athlete-focused national organization administering and governing sport opportunities targeted to athletes with CP and related disabilities.

CanChild Centre for Childhood Disability Research canchild.ca/en

CanChild is a non-profit research and education centre focused on improving the lives of children and youth with disabilities and their families.

Canadian Disability Resources (CDRS) disabilityresources.ca

CDRS is a charitable organization, with the goal of promoting health by providing recycled medical equipment to needy persons with physical disabilities and by developing educational materials and resources for persons with physical disabilities.

Cerebral Palsy International Research Foundation cpirf.org

CPIRF is a not-for-profit organization dedicated to funding research and educational activities directly relevant to discovering the cause, cure, and evidence-based care for those with cerebral palsy and related developmental disabilities.

United Cerebral Palsy ucp.org

This is an international non-profit charitable organization and hub for local affiliated cerebral palsy associations that educates, advocates, and provides support services to ensure a life without limits for people with cerebral palsy.

Convention on the Rights of Persons with Disabilities

un.org/en/observances/day-of-persons-with-disabilities/resources
Canada is a signatory country of this convention, which sets out basic fundamental rights of persons with disabilities.

NATIONAL AND PROVINCIAL MEDICAL REGULATORY AUTHORITIES

National

Royal College of Physicians and Surgeons of Canada
royalcollege.ca/rcsite/home-e

Provincial

College of Physicians and Surgeons of British Columbia
300-669 Howe Street
Vancouver, BC V6C 0B4
Phone: 604-733-7758 or 1-800-461-3008
Fax: 604-733-3503
registration@cpsbc.ca
cpsbc.ca

College of Physicians and Surgeons of Alberta
2700 Telus Plaza South | 10020 — 100 Street NW
Edmonton AB T5J 0N3
Phone: 780-423-4764 or 1-800-561-3899
Fax: 780-420-0651
info@cpsa.ab.ca
cpsa.ca

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101–2174 Airport Drive
Saskatoon SK S7L 6M6
Phone: 306-244-7355 or 1-800-667-1668
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cps.sk.ca

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TheRegistrar@cpsm.mb.ca
cpsm.mb.ca

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feedback@cpso.on.ca
cpso.on.ca

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2170, boulevard René-Lévesque Ouest
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Fax: 514-933-3112
info@cmq.org
cmq.org/en

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1 Hampton Road, Suite 300
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info@cpsnb.org
http://cpsnb.org/en/

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Fax: 902-422-5035
registration@cpsns.ns.ca
www.cpsns.ns.ca

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199 Grafton Street
Charlottetown PE C1A 1L2
Phone: 902-566-3861
Fax: 902-566-3861
cpspei.ca

College of Physicians and Surgeons of Newfoundland & Labrador
139 Water St, Suite 603
St. John's NL A1C 1B2
Phone: 709-726-8546
Fax: 709-726-4725
cpsnl@cpsnl.ca
cpsnl.ca

Yukon Medical Council
c/o Registrar of Medical Practitioners
Box 2703 C-18
Whitehorse YT Y1A 2C6
Phone: 867-667-3774
Fax: 867-393-6483
ymc@gov.yk.ca
yukonmedicalcouncil.ca

Health and Social Services
Government of the Northwest Territories
PO Box 1320
Yellowknife NT X1A 2L9
Phone: 867-920-8058
Fax: 867-873-0484
professional_licensing@gov.nt.ca nthssa.ca/en

Department of Health and Social Services
Government of Nunavut
P.O. Box 1000 Station 200
Iqaluit, Nunavut X0A 0H0
Phone: 1-877-212-6438
info@gov.nu.ca
chpca.ca/listing/the-government-of-nunavut-department-of-health

OTHER LINKS

BILA website
BILA.ca

The Canadian Bar Association
cba.org/Home

Directory of Canadian Certified Counsellors
ccpa-accp.ca/find-a-canadian-certified-counsellor/

Being a Caregiver (Service Canada)
servicecanada.gc.ca/eng/lifeevents/caregiver.shtml

Disability Benefits (Government of Canada)
canada.ca/en/services/benefits/disability.html

BIRTH INJURY LAWSUIT
A PARENT'S GUIDE

Birth Injury Lawsuits: A Parent's Guide is the only consumer education guide in Canada written specifically for parents. The book is written in plain English to educate families whose children may have suffered a birth injury as a result of medical malpractice. We wrote this guide to help you understand how birth injuries happen, and what legal rights you and your child may have so that you can make an informed decision about whether to pursue a medical malpractice claim.

For more information about Birth Injury Claims you can visit our website at BILA.ca or contact us by calling toll-free 1-800-300-BILA (2452)

BILA | BIRTH INJURY LAWYERS ALLIANCE

The Birth Injury Lawyers' Alliance of Canada is the largest group of lawyers in the country dedicated to birth trauma cases. From coast to coast, the members of the Birth Injury Lawyers' Alliance of Canada are tireless advocates for families affected by birth injuries.

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