SPORTS RECREATION & SPORTS LIABILITY: LITIGATING CASES INVOLVING INJURIES TO MINORS

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I. Introduction

Unintentional injuries are the leading cause of death among Canadian minors.[1] Between 1990 and 2007, over 1.6 million children and youth received emergency room treatment for unintentional injuries at hospitals across Canada.[2] Sports and other recreational activities are common precipitating events of serious injury among minors.[3] The ramifications of these injuries to a child can be profound, particularly in cases involving even "mild" trauma to the brain. In the context of litigation, the costs associated with the loss of future earnings and future care can be significant, with damages in some cases being assessed in the millions.

While the spectre of eight figure exposure may seem daunting enough, several factors conspire to make cases involving injuries to minors particularly difficult to navigate from the defence perspective. With this in mind, the following paper will address common legal and strategic elements to be considered when attempting to settle cases involving injuries to minors.

II. The Advantages of Settlement in Child Injury Cases

When faced with legitimate exposure, a myriad of factors tend to militate in favour of settlement. In the context of an injury to a minor, predictability takes on a heightened importance for several reasons. First, injuries involving children invariably make for emotionally charged cases. Should a matter proceed to trial, an injured child and the consequent devastation wrought on the family can evoke considerable sympathy from a trier of fact.[4] Accordingly, from the defence perspective, one should be aware of the added risk associated with trying a child injury case, irrespective of the relative merits of the case. This point is exacerbated when presenting before a jury. Despite these sensitivities, a number of child injury cases do proceed to trial, in which case the use of experienced counsel becomes all the more imperative.

A second factor favouring settlement in child injury cases is the inherently challenging nature of predicting an infant plaintiff's realistic range of damages and preparing an appropriate reserve accordingly. This issue arises because a disproportionate amount of damages in child injury cases typically stem from pecuniary losses derived from the loss or diminishment of the minor plaintiff's future earning capacity. As will be delineated in greater detail later in this paper, there exists considerable disagreement among legal, medical, and scholarly communities with

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* With contributing assistance from Ben Carino.

[1] Public Health Agency of Canada, *Child and Youth Injury in Review*, online: <http://www.phac-aspc.gc.ca/publicat/cyi-bej/2009/>; A minor is a person who has not yet reached the age of 18, *See Age of Majority and Accountability Act*, R.S.O. 1990, C.A A.7 at s.1.

[2] *Ibid*.

[3] For instance, in 2010 half of all hockey injuries and nearly one-third of skiing and snowboarding injuries were sustained by individuals between the ages of 10 to 19. *See* Winter Injuries, *More than 5,600 Canadians seriously injured every year from winter activities*, online: Canadian Institute of Health Information <http://www.cihi.ca/CIHI-ext-portal/internet/en/document/types+of+care/specialized+services/trauma+and+injuries/release_17jan12>.

[4] Particularly given the injuries typical of major infant cases, including scarring, brain injury, and injury to the eyes and appendages.

respect to the quantification of a minor's future earnings. Consequently, when provided with an opportunity, settling at an earlier juncture may result in lower compensation for future loss of earning capacity, as projections in this regard tend to rise exponentially as a gamut of experts become involved as the case moves closer to trial.

Cases involving child injuries can remain in limbo for protracted periods as the plaintiff argues that additional information is required to glean the extent of the injury to the child. This can create a situation wherein the case remains active, without being set down for trial, for extended periods as the plaintiff awaits the pendulum shifting in their favour (i.e. a bad report card demonstrating the alleged deleterious effects of the subject injury).

Wood v. Hospital for Sick Children[5] is demonstrative of this strategy and sets out the test the plaintiff must meet in order to substantiate a motion to stay an action. In *Wood*, the infant plaintiff, who was 5 months old at the time, was given an overdose of morphine. In September 2000, an action was commenced against the hospital and staff arising from damages sustained by the minor as a result of respiratory arrest and brain anoxia. The plaintiffs brought a motion to stay the action pursuant to s. 106 of the *Courts of Justice Act* to allow for further time to evaluate future damages.[6] The plaintiffs took the position that the full effect of the infant plaintiff's brain injury was not ascertainable until much later in the injured minor's development. The plaintiffs' position was that it would not be known until the injured minor had at least two years of primary education. The court determined that in order to substantiate a stay of proceedings pursuant to s. 106, the plaintiff bears the burden of demonstrating that the continuance of the action would work an injustice to the plaintiff because it would be oppressive, vexatious or an abuse of process. Then the court had to examine whether a stay would cause an injustice to the defendants.[7] In the end, the court sided with the defence, holding that protracted periods of litigation are inherently burdensome to defendants and that no evidence had been proffered to rebut the defence expert's assertion that diagnostic tools existed to provide an immediate assessment of the infant plaintiff.

Having discussed some of the primary considerations mitigating in favour of settling a child injury case, we proceed to review two areas particularly salient to litigation involving infant plaintiffs.

III. Calculating Loss of Earnings

In cases where a loss of earning capacity is alleged, a trier of fact is faced with the ominous task of choosing between competing expert evidence approximating the sum an individual would have earned but for the injury that forms the basis of litigation. While the difficulty of coming to an accurate assessment in such instances is appreciable, historical information with respect to the claimant's education, employment, personality, and physical health can assist in building a reasoned, if imperfect, opinion. Conversely, estimating future earnings in child injury cases requires the same act of divination but without, or with significantly

[5] [2002] 62 OR (3d) 336 (S.C.J.).
[6] Section 106 states: "A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just." R.S.O. 1990, c. C.43, s. 106.
[7] *Supra* at 16.

less, assistance from the records noted above, which in many cases have yet to be established. However, as the Court of Appeal established in *Schrump v. Koot*, the burden of proof placed on the plaintiff is only to demonstrate that there is a "substantial possibility" of a loss of future income.[8]

Despite the difficulty inherent in coming to such a formulation, there is an expanding body of case law in which the courts comment on how various socio-economic factors should be considered when predicting the level of education a child plaintiff would have achieved and, consequently what his or her potential earnings would have been in the absence of the injury at issue.

Given the absence of a long history of earnings, professional and personal information, courts will favour a holistic approach to determining a child's future earnings. Specifically, courts will look at the plaintiff's: (1) academic achievements, where available; (2) evidence of general intelligence and personal life; (3) the academic and professional achievement of the claimant's parents and siblings.

Carere v. Cressman[9] is a clear example of how courts assess future earnings claims involving minors. In *Carere*, an action was brought before the Ontario Superior Court seeking, *inter alia*, pecuniary damages stemming from lost future earnings by a child born with cerebral palsy resulting from the negligence of a mid-wife. The plaintiff's family was employed as flooring contractors and lived as members of a Mennonite community whose beliefs prohibited the pursuit of higher education.[10] As a result, the court was able to embark on a relatively straightforward analysis and find that the plaintiff would have earned in his lifetime the average of a Canadian male high school graduate, assessed at $1,094,718.00.[11] The manner in which the court will consider familial history is set out by Henderson J. as follows:

> Four of Paul's six elder siblings graduated from high school. Of these siblings, two of them achieved some post high school education, but none achieved any university education. I note the education of the two oldest siblings was suppressed because of the family's devout adherence to the belief of their Mennonite community that higher education should be pursued. Both of Paul's older brothers went into business as flooring contractors but neither obtained any trade certificate. In addition, I note that Paul's father, Fred, has been engaged as a flooring contractor for most of his working life.
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> Given the family History, I find that if Paul had not suffered from cerebral palsy he would have graduated from high school and

[8] *Schrump v. Koot* [1977], 18 O.R. (2d) 337 (C.A.).
[9] [2002] O.J. 1496 (Ont. S.C.J.).
[10] *Ibid* at 152.
[11] *Ibid* at 151.

> without further education become an independent flooring contractor, or worked in a similar business.[12]

Although the court in *Carere* showed little hesitation in concluding that the minor plaintiff would have met the relatively low bar of education previously attained by his family, courts have been far more reticent to impute exceptional academic and/or professional achievements by parents onto a minor. In *Chow (Litigation Guardian of) v. Wellesley Hospital*,[13] the plaintiff argued that the loss of future earnings of a child born with severe mental and physical handicaps, stemming from the alleged negligence of the attending doctors, should be assessed based on the presumption that he would have become a dentist like both of his parents. Rejecting this argument, Lissaman J. states as follows:

> The defendants argue that there is no economic or other basis to support the contention that a child will assume the career of his or her parent. The strongest socio-economic link between parents and children, as mentioned above, is educational achievement. The only reliable exercise in prediction, submits the defence, stems from the fact that Michael's parents are both university-educated. The only thing that can be said with any certainty is that Michael would have completed university. We will never know what Michael would have done with that university degree.[14]

In the sports and recreation context, the court came to a similar conclusion in *Stein v. Sandwich West (Township)*.[15] In *Stein*, the plaintiff, a minor age 17, came into forceful contact with the boards while playing hockey after his skates struck a hole in the arena's ice surface. The minor plaintiff suffered a severe injury to his vertebrae and spinal cord resulting in quadriplegia. It was alleged that the municipality and its employees were negligent in failing to maintain an ice surface of a sufficient strength and quality fit for playing hockey. Both the plaintiff and defence called numerous expert witnesses, including four-time Stanley Cup champion and Hockey Hall of Fame member Gordie Howe, who spoke to the appropriateness of the plaintiff's skate sharpening.[16] With respect to future earnings capacity, the plaintiff's experts presented an income loss projection of $2,792,987.00 based on the presumption that the injured minor would have graduated from Windsor University, gained admission to law school, and proceeded forthwith to a partnership position within a law firm.[17] The court rejected this approach, finding it to contain too many "serious contingent factors."[18] Instead, the court focused on the average industrial wage in the region and added a premium to account for the minor plaintiff's academic achievements, resulting in an estimated loss of future earnings in the sum of $1,200,000.00.[19]

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[12] [1999] O.J. No. 279 at 152-153.
[13] *Ibid* at 287.
[14] *Ibid* at 298-299.
[15] *Stein v. Sandwich West (Township)*, 1993 CarswellOnt 1866.
[16] *Ibid* at 42-45.
[17] *Ibid* at 103.
[18] *Ibid* at 104.
[19] *Ibid*.

Chow and *Stein*, therefore, stands for the proposition that courts will generally limit the extent to which they are willing to opine on the future earnings only to whether or not a university degree will be obtained. Courts will not impute graduate, doctoral, or professional level educational achievement on a minor plaintiff.

While exceptional familial performance by the plaintiff's parents may give rise to a presumption that he or she would have received a university education, the reverse is not always the case. That is to say, where the parents have not received post-secondary education and no intervening factors exist, such as the Mennonite belief system referenced in *Carere*, some courts have been unwilling to assume the injured child would have ended their studies similarly.

In *Dryden (Litigation Guardian of) v. Campbell Estate*,[20] the Ontario Superior Court considered an income loss claim by a 13 year old who sustained severe brain trauma after the vehicle in which he was travelling was struck by a drunk driver. The defence presented evidence that neither of the minor's parents had completed their high school education, with both having dropped out by Grade 10.[21] However, Cavarzan, J. was not prepared to follow this argument, pointing out the arbitrary nature of such a finding, and emphasizing the academic successes, though somewhat limited, of the plaintiff's sister. To this end, he states:

> I find it difficult to credit the suggestion in this case that Scott Dryden would not have proceeded beyond high school. Using the educational level achieved by the parents as the yardstick for predicating the education level to be achieved by their children, seems to me to be an unduly crude and arbitrary indicator. This is especially so where we have no evidence concerning neither the parents' I.Q. scores, nor the life circumstances which may have limited their opportunities to pursue higher education. An additional consideration in this case is that Scott's older sister Leigh-Anne attended Wilfred Laurier University for two years. She abandoned her studies for financial and personal reasons unrelated to academic performance. It would have been wrong, therefore, to predict her level of academic achievement based upon the record of her parents.[22]

The court also seemed compelled by the plaintiff's comportment as a witness, noting that despite his substantial mental impairment, he possessed a "wit and insight which bespoke an intellectual potential which might well have taken him beyond the high school level in his formal education".[23]

In sum, the educational level of a minor plaintiff's family members is the most common metric used to predict future level of education. It seems clear from *Chow*, however, that the

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[20] [2001] O.J. No. 829.
[21] *Ibid* at 138.
[22] *Ibid* at 139.
[23] *Ibid* at 140.

courts will not necessarily take the next step and rely on an infant plaintiff's parental income or specific profession as a predictor of the infant's future earnings. Despite the case law, assessing future earnings remains nonetheless "a somewhat speculative exercise"[24] with courts such as that in *Dryden* willing to take a broader approach to their analysis.

IV. Obtaining Approval of Settlement

Minors benefit from special procedural protections under the *Rules of Civil Procedure* (the "*Rules*")[25] some of which can introduce a set of unique challenges to the defence.

The *Rules* set out the parameters for when, and by whom, a child must be represented. Under the *Rules*, a party under disability is a general term that includes minors, mental incompetents and absentees under Rule 1.02.[26] A proceeding must be commenced or defended on behalf of a party under disability by a litigation guardian.[27] In Ontario, the limitation period is delayed for a minor plaintiff during the time in which he or she is not represented by a litigation guardian.[28] Unless there is some other person willing, able and qualified to act as litigation guardian for a minor party, the court will request the appointment of counsel from the Office of the Children's Lawyer ("OCL").[29] A parent may act as litigation guardian for a child, but should not do so where a child has a separate cause of action for contributory negligence.[30] The role of a litigation guardian is to provide a child with independent legal representation "in a manner consistent with the children's best interests."[31]

The *Rules* impose a heightened level of judicial scrutiny on settlements involving a minor plaintiff. Section 7.07(1) of the *Rules* requires a judge's approval to note a child in default or to discontinue an action by or against a child. The court must also approve any settlement of a claim by or against a child who is a party to a proceeding.[32] Any party seeking settlement under Rule 7.08(4) must serve and file a notice of motion or application with: (a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement; (b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement; (c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and, (d) a copy of the proposed minutes of settlement.[33]

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[24] *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (Ont. C.A.).
[25] R.R.O. 1990, Reg. 194.
[26] *Ibid* at r. 1.03(1).
[27] *Ibid* at r. 7.01(1).
[28] Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, s. 6.
[29] Rule 7.04 (1) of the *Rules of Civil Procedure*.
[30] *O. (B.A.) (Guardian ad litem of) v. G. (J.M.)* (1994), 99 B.C.L.R. (2d) 305.
[31] *Grande (Litigation Guardian of) v. Grande* (1997), 34 O.R. (3d) 645 (Div. Ct.).
[32] Rule 7.08 (1) of the *Rules of Civil Procedure*.
[33] *Ibid*.

The consequences of failing to adhere to any of the aforementioned requirements can be severe. Namely, the settlement will not bind the minor. The minor will then be able to recover damages regardless of the prior settlement.[34]

In *Otto Rivera et al v. Sayaka LeBlond et al*,[35] the court reviewed the application of Rule 7.08:

> Rule 7.08(4) and the obligation of the court pursuant to its parens patriae jurisdiction require a party seeking approval to submit sufficient evidence to make a meaningful assessment of the reasonability of the proposed settlement of the claims of a person under a disability…This is a serious and substantial requirement…It requires full disclosure of evidence regarding the material issues… Rule 7.08(4) does not, however, require a full trial of the material issues… it is necessary to provide sufficient evidence to demonstrate that the proposal is secure, provides a real benefit to the disabled person and adequately addresses the long-term needs and interests of the disabled person.[36]

In other words, a motion seeking settlement approval under Rule 7.08 requires full and complete assessment of the material issues under a process as rigorous as trial.[37] The court will not approve settlement unless it is beneficial to do so for the child. When considering a potential settlement, a judge may refer the material to the OCL and can ask for any objections it may have to the proposed settlement and for recommendations for revision. In *Tsaoussis (Litigation Guardian of) v. Baetz*,[38] the Court of Appeal emphasized that the court's discretion to intervene in proposed settlements involving minors should be unfettered by the desire of the non-infant parties. Accordingly, the court states that a court must "abandon its normal umpire-like role and assume a more interventionists mode" in protecting the "best interests of minors who are parties to legal proceedings."[39]

V. Conclusion

Child injury cases introduce a litany of unique challenges. However, given the prevalence, and importance, of minors in sport, recreational, and resort focused enterprises, encountering such cases is inevitable. Being aware from the outset of the substantive and procedural hurdles discussed in this paper can assist defence litigants in minimizing exposure and achieving an efficient resolution of claims involving minor plaintiffs.

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[34] Justice Festeryga "Obtaining Approval for Judgments for Minors" H.L.A. program, Thursday, February 17th 2005, *Closing Tough Cases : The Personal Injury Lawyer's Challenge*.
[35] *Otto Rivera et al v. Sayaka LeBlond et al*, 2007 CanLII 7396 (ON SC).
[36] *Ibid* at 25-26.
[37] *See McRitchie et al v. Dr. Natale et al*., 2011 ONSC 3400.
[38] 41 O.R. (3d) 257.
[39] *Ibid* at 24.