



ACCESS TO JUSTICE

LEGAL ISSUES FOR THE INJURED AND PEOPLE WITH DISABILITIES

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BRAIN INJURY LITIGATION

PLAINTIFF WITH A BRAIN INJURY - THE ISSUES

Our legal system is based on adults testifying at trial about the issues in dispute. The more accurate and reliable a person's testimony, the easier it is to persuade the judge or jury to agree with their position.

But when you've had a brain injury, lawsuits are not easy. You can feel you're still the same person, yet have trouble -

- *with memory and concentration* - You may not remember critical pieces of evidence. You can have difficulty staying focused on the questions,
- *understanding all the problems caused by the brain injury* - Rather than admitting to difficulties in your functioning or relationships, you may say everything is fine;
- *controlling your emotions* - In one case, the plaintiff with a brain injury got so upset in court that he used expletives to tell everyone (including the judge and jury) he wanted nothing more to do with the case. His case was dismissed;
- *making good decisions about whether to proceed to trial or settle* - as a plaintiff, you

may have trouble being objective about the benefits and risks of litigation;

- *managing your money* - If you've survived a brain injury, it may be hard to deal with others who want a part of your financial award, particularly if the award is very large. Since this money is often meant to last the rest of your life, it's critical it be handled wisely.

Also, the insurance industry aggressively sends out the message that there's much fraud in personal injury claims. Consequently most juries tend to be skeptical about injuries they can't see - e.g. brain injuries. They may also find it hard to like or believe a plaintiff who can't recall facts or control emotions well.

There's always a tension between helping the client maintain control over his or her life, and protecting the client's best interests...

Even family and friends who know you've had a brain injury may misinterpret your behaviour and describe you in unflattering ways.

INFORMAL PROTECTIONS

How a lawyer acting for a plaintiff with mild or moderate brain injuries can help protect his or her client:

Get to know the client - The lawyer must get a good sense of the plaintiff's functioning in order to decide whether the client needs a litigation guardian, will be able to handle an examination for discovery, etc.;

Negotiate special arrangements at the examination for discovery - If the client is not declared "mentally incompetent", his or her lawyer might still have a family member or friend attend the discovery to correct any errors in the plaintiff's evidence. The lawyer may also have the plaintiff repeat or rephrase key questions to ensure understanding. The discovery may be broken into shorter periods - e.g. two half days vs. one long one.

Strike the jury - Defence lawyers request juries because juries are usually unsympathetic to brain injury. To strike a jury, the plaintiff's lawyer must persuade the judge that the lawsuit is too long and complicated (e.g. lots of expert evidence and/or the plaintiff's evidence may be difficult to interpret) for a jury;

Have experts and non-experts testify before the plaintiff does - Experts can't make blanket statements about the reliability of the plaintiff's evidence (credibility is up to the judge or jury), but experts can testify about the impact of brain injury on the plaintiff's functioning. Non-experts (friends, family, boss, teacher) can testify how the plaintiff's ability to think or understand, or function has changed. All these things prepare the jury and/or judge for how the plaintiff will come across;

Structure any award or settlement - As stated earlier, plaintiffs with brain injuries are vulnerable to manipulation and unconsidered choices when it comes to money. If their settlement is to help them long-term, the lawyer should discuss with the plaintiff and the plaintiff's family putting a significant portion of the funds into a tax-free annuity called a *structure*. If the matter goes to trial, the judge may make an order that the judgment be paid in periodic payments.

FORMAL PROTECTIONS AVAILABLE

The *Rules of Court* provide a number of rudimentary safeguards for plaintiffs with disabilities. **Rule 6** stipulates:

- a person with a disability can only bring a lawsuit through a "litigation guardian";
- the litigation guardian is responsible for making all decisions in the case, and is responsible for any costs incurred as a result of bringing the lawsuit;
- there can be no settlement of a claim of a person under disability (even if the lawsuit hasn't started) without court approval.

Rule 27(11) says you can't examine a "mentally incompetent person" for discovery (ask them questions under oath before trial) without leave of court. You *can* examine the litigation guardian and his or her committee.

Rule 40(28) says essentially the same thing about the person giving evidence at trial.

For all of these, the Rules of Court deem a plaintiff "a person under disability" if they've been declared incapable of managing their affairs under the *Patients Property Act* or have to act through a litigation guardian. The Rules then seem to treat "a person under disability" as being "mentally incapable."

Declaring someone incapable has serious consequences - they theoretically lose the legal capacity to enter into contracts or otherwise manage their financial affairs. Many brain injuries cause losses such as difficulty concentrating or comprehending subtle forms of communication. The very difficult issue is whether they are serious enough to make the survivor a "person under disability."

In cases involving a client with a brain injury, there's always a tension between helping the client maintain control over his or her life, and protecting the client's best interests by calling in a litigation guardian. A lawyer representing a plaintiff with a brain injury must consider all of the options.