

# Caring for kids: A practical guide to acting for children in injury cases

Representing a child in a personal injury action can be the most meaningful and personally rewarding work a plaintiff lawyer can experience. Often, the tragedy of the situation is overwhelming, but so too are the many decisions which need to be considered to ensure the best result in the circumstances.

sue by a 'next friend', 'tutor' or 'litigation guardian', unless there is some statutory provision to the contrary.<sup>1</sup>

The selection of this person usually will not be a difficult task. The requirement that the guardian not act adversely to the interests of the plaintiff means that non-defendant parents are most suitable for the position. They will have the greatest knowledge of the child and the impact of the injuries upon them. The practice of most jurisdictions is that a litigation guardian must act by a solicitor.<sup>3</sup>

## THE CLIENT

Although we speak of the child as our client, the legal and practical client is usually one or both parents. Often the parents were involved in the accident and can be the negligent party. This can result in one parent being wracked with guilt and wanting to avoid the whole situation.

But in most cases, the parents become extremely determined to see their child gets the greatest assistance possible. More than any other client, they tend to become fearless in reaching their goal.

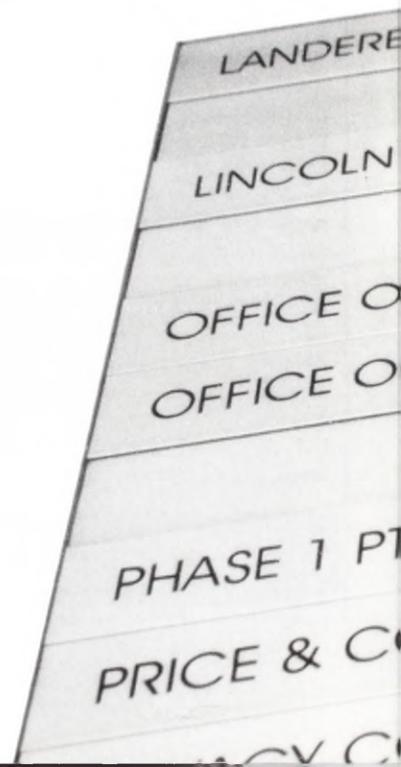
Careful explanation of the legal process is essential at each stage of the proceedings. Parents are usually only too happy to assist in obtaining information or evidence. To allow them to be uninformed, however, will cause great anxiety, which is never appreciated.

In most jurisdictions a child must



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The most important potential complication for a litigation guardian is that if the defendant is awarded costs, the litigation guardian is personally liable for those costs.<sup>4</sup> This must be clearly explained to the litigation guardian. A solicitor may also act as a litigation guardian, provided they have no adverse interest.

When the child reaches 18 and has full capacity, the litigation guardian ceases to have authority in the proceeding.<sup>5</sup>

### TO SUE OR NOT

For years the automatic action of plaintiff lawyers has been to sue and sue quickly. As the legislators have sought to restrict common law rights, statutory schemes have become more prevalent.

In this context, a careful comparison needs to be made of entitlements available 'as of right' under the statutory scheme and the damages attainable at common law. A dual scheme, like the one that exists in Victoria for transport accidents,<sup>6</sup> is one example. A child who is severely injured in a transport accident in Victoria may receive loss of earning capacity benefits for their entire working life under the statutory scheme. But this entitlement stops

when damages for loss of income are awarded.<sup>7</sup>

Where liability is unclear, or there is some lack of clarity about future work capacity, a common law action may be full of danger. In Victoria, some actions have just sought damages for pain and suffering so as not to interfere with loss of income rights.

### COMMENCEMENT

When to start an action on behalf of a child must always be carefully analysed. With suggestions being made throughout Australia that doctors are open to legal action from children for too long, the limitation period may be reduced. But the option to sue at any time up to age 24 is still available in many jurisdictions.

Where the child is very young at the time of injury, a large number of factors can come into play.

Are the deficits caused by the injury clearly evident? Early childhood teachers often view all their students in the best possible light. If the child is predicted to have learning and educational difficulties, it is often preferable to wait

until a realistic appraisal is made by the teachers or aides most closely involved with the child's intellectual development.

Is the available assistance or compensation likely to be restricted? Over the last two decades state governments have impacted on the benefits available to injured people. New laws have nearly always resulted in an erosion of rights and benefits.

There are few votes in helping the injured and the current wave of change throughout Australia will not expand the rights and compensation available to our young clients. This possibility, ever present, but not necessarily certain, can be a strong impetus to starting court action early.

Will the economic benefit diminish in the future? An award of damages is invested by the court until the child turns 18 or until further order if the injuries deprive the child of appropriate mental capacity.

The Victorian Supreme Court Senior Master's office has a record of investment return that is far higher than

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the consumer price index and many other funds. Delaying proceedings and leaving substantial sums of money with the insurer takes away the opportunity to maximise the amount available to the injured child through compounding interest.

All plaintiff lawyers know that court action can cause stress and anxiety. Where the injured person is a child, the stress and anxiety can greatly increase. Some parents do not want to even consider the legal side of their child's injuries for a long period. They need time to adjust to what has happened to their current and future family life.



“Even the hardest insurance litigator will become more reasonable when it comes to assisting a child's future.”

Other parents see the issue of legal proceedings as a major hurdle to getting on with their lives, and just want the case over. Many parents harbour anger towards the wrongdoer, which doesn't seem to settle until the civil process is concluded. This means the harmony and health of the child's family can often improve when legal proceedings are finished.

There is no obvious or simple answer to how long a case should be delayed, apart from the fact that plaintiff lawyers must be able to clearly present to a court the potential problems arising from the child's injury.

## CONTRIBUTORY NEGLIGENCE

A common question when children are involved in litigation is whether it was within their capacity to be responsible for their possibly negligent actions.

The folly of youth is that children can be incapable of exercising care and caution for their own safety. The High Court in *McHale v Watson*<sup>8</sup> found that a child is guilty of contributory negligence if the child fails to take such reasonable care for his or her own safety as is appropriate for an ordinary child of that age and understanding.

In that case, Acting Chief Justice McTiernan said children 'are expected to exercise the degree of care one would expect, not of the reasonable average man, but of a child of the same age and experience'.<sup>9</sup>

## FUTURE INCOME LOSS

The importance of the common law system is most obvious in a case involving a child. Instead of looking at a formula, a jury or judge hearing an action for damages can look at potential future earnings that existed when the injury occurred.

The easy way to calculate a child's future earnings is to assume the child would have grown up to earn the average weekly wage. But this formula can do a disservice to many children.

The careers and earnings of the parents and siblings should be carefully examined to show a potential for a greater than average earning potential. School reports could also be used to project an exceptional career path.

In 1990, the Australian Bureau of Statistics published a survey of income increments people achieved as they progressed through their careers.<sup>10</sup> Unfortunately, an updated catalogue has not been produced, but the 1990 survey can be obtained from the ABS for a fee.

The bureau also provides information about average wages for particular occupations. A thorough search of ABS material will always be helpful in preparing a case.

The Australian Council for Educational Research has conducted

research into how likely children are to enter higher education based on non-academic factors. Of course, this could be a double-edged sword if the child is from a disadvantaged or non-English speaking background.

Actuarial advice is also invaluable when assisting children. Because all jurisdictions are required to reduce projected earnings to current values in accordance with a particular interest rate, actuarial evidence is needed to give a current value to the increasing wage levels throughout a career.

Children's cases also challenge the notion of reducing lump sum loss of earnings calculations because of the vicissitudes of life. While we automatically assume negative changes will occur in the future lives of older people, children have many positive vicissitudes in their futures. An investigation of the contingencies of sickness, accident, unemployment and industrial disputes in the future life of a child can reveal a much smaller reduction factor for vicissitudes of life than the rate normally assumed in adults cases.

## SPECIAL DAMAGES

The damages claim for a child's future medical costs can be very high. Where damages run into millions of dollars it is normally because a proper analysis of care and equipment needs has been made. Child development specialists and occupational therapists must provide expert evidence regarding the replacement timetables for wheelchairs and other equipment. Extra support may be required when milestones such as puberty are reached.

## GENERAL DAMAGES

There is no doubt that children have an advantage when a court assesses general damages. Judges and juries quickly appreciate the lost potential that injury to a child represents. Similarly, even the hardest insurance litigator will become more reasonable when it comes to assisting a child's future. And insurers don't want publicity that shows them fighting a tragically injured child.

For this reason, a direct and solid approach to negotiations can produce positive results. In most cases, the parents will also opt for this approach.

In presenting the case, there will usually be no shortage of witnesses. These could be 'before and after' witnesses or people who observed the child's future potential. Most family friends and associates can find positive characteristics in a child.

### COURT APPROVAL

The law may be an ass sometimes, but it got it right when it required that the court approve negotiated claims for infants and disabled people. Usually, this is not a rubber stamp.

For instance, a court in Victoria will sanction a settlement only when it has been provided with:

- An affidavit of consent from the litigation guardian.
- Advice in writing from counsel.
- A supporting affidavit from the

solicitor for the plaintiff with all relevant documents.

- The written offer from the defendant

The requirement for a court-sanctioned settlement gives the community and, most importantly, the child's relatives the peace of mind that an independent official also believes the settlement is correct.

The litigation guardian is obliged at the time of possible settlement to consider the legal advice and instruct the solicitors on the course of action he or she believes is in the child's best interests.<sup>11</sup> The guardian must ensure that all the advice is clearly understood and carefully considered.<sup>12</sup>

The ultimate criteria which must be satisfied before a child's case can be settled is that the prospect that the child would receive a greater sum by rejecting an offer and proceeding to court is outweighed by the risk of receiving a sum less than the suggested compromise.<sup>13</sup>

A person who rejects an offer of compromise, and then receives a lesser amount through the courts, is obliged to pay the costs of both sides, backdated to the day the offer was rejected. However, a child has no choice about the acceptance of an offer without the approval of the court on the terms previously detailed.<sup>14</sup>

It is, therefore, inappropriate in many circumstances to impose cost penalties on a party that had a very restricted opportunity to accept an offer of settlement. Plaintiff lawyers should highlight this restriction when addressing the court on the issue of appropriate cost orders.

### COSTS

Just as children are protected in the acceptance of offers of settlement, they are also protected in the amount of costs they are required to pay.

The court has rejected proposed settlements that are inclusive of costs. ►

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The courts want to know the value of the substantive claim.<sup>15</sup> All proposed settlements should require that the defendant pay the party/party costs, to be determined separately by the court in the event of disagreement.<sup>16</sup>

When it comes to payment of the child's solicitor/client costs (those costs not payable by the defendant), the Court Registrar or similar independent authority will hold custody of the compensation. This body must not release the payment until it is satisfied the bill is reasonable. Where a dispute between the solicitor and the custodian of the funds exists, the custodian can request that a court official or taxing master check the bill.

In Victoria, the custodian of the court fund, the Senior Master, does not require immediate examination by a court official. The solicitor for the infant must show the costs recovered from the defendant on a party/party basis and the costs reasonably incurred and payable by the client. An assessment by a reputable costs consultant will usually be accepted in providing the estimate of these costs.

#### ACCESS TO FUNDS

While the damages compensation paid to the court fund or special trust must be invested until the child reaches 18 years of age or until further order, access to the money can still be obtained.

In Victoria, the Master of the Supreme Court can allow the child or the guardians to have some of the award of damages before the time it is due for release.

Funds may be used for constructive purposes, subject to the court's discretion. In Victoria, the criteria for assessing requests for early release of funds include:

- How will the recipient benefit?
- Are there sufficient funds for the request?
- How will any interest of the beneficiary be protected?<sup>17</sup>

Funds are used to pay for many things, such as maintenance and school fees or the purchase of a car or home. The reasonable cost of voluntary assistance provided to an injured person can be claimed in court. These so-called *Griffiths v Kerkemeyer*<sup>18</sup> damages are paid to the carer upon approval by the court. However, the court is not legally obliged to make the payment.

Invested sums usually have solid income earning potential because of the volume of money available for investment. This means the investment return tends to be at the higher end of comparative returns in the financial markets.

The child will receive the money when he or she turns 18, provided there is no continuing disability and that appropriate documentation proving the age of the child has been being lodged at the court.

#### CONCLUSION

Making a positive difference to people's lives is something most plaintiff lawyers strive to do. Helping a family with an injured child is one area where this can be achieved. **PL**

#### Endnotes:

- <sup>1</sup> eg rule 15.02 in Victorian Rules of Civil Procedure.
- <sup>2</sup> *ibid*, rule 15.03.
- <sup>3</sup> *ibid*, rule 15.02(3).
- <sup>4</sup> *Ex parte Brockelbank* (1877) 6 ChD 358.
- <sup>5</sup> *Feeney v Pieper* [1964] QWN 23.
- <sup>6</sup> *Transport Accident Act* 1986 (Vic).
- <sup>7</sup> *ibid*, s 53(2).
- <sup>8</sup> (1966) 115 CLR 199.
- <sup>9</sup> *ibid*, p 205. See Anthony Wright's article on contributory negligence in this edition of *Plaintiff*.
- <sup>10</sup> *Survey of Income & Housing Costs and Amenities* 1990, Australian Bureau of Statistics, catalogue no 6546.0.
- <sup>11</sup> *Whittal* [1973] 3 All ER 35.
- <sup>12</sup> *Barbour's Settlement* [1974] VR 572.
- <sup>13</sup> *Elliot v Diener* (1978) 21 ACTR 21; *Clement v Basset* (1987) 46 NTR 36.
- <sup>14</sup> Rule 26.06 in Victorian Rules of Civil Procedure.
- <sup>15</sup> *Sztockman v Taylor* [1979] VR 572.
- <sup>16</sup> *McLennan v Phelps* (1967) 86 WN (NSW) 86.
- <sup>17</sup> Victorian Senior Master's Office information booklet.
- <sup>18</sup> (1977) 139 CLR 161.

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