

**A Lunch and Learn Seminar Presentation  
to Sick Kids Hospital**

# **Families, Children and Health Care Professionals in Court – A Case Study Approach**

**PART I (April 23<sup>rd</sup>, 2008):**

**Families and Trauma: Litigation and Accident Benefit Processes – A Case Study  
Approach**

**PART II (May 7<sup>th</sup>, 2008):**

**The Role of the Health Care Professional in Court Examination in Chief and Cross  
Examination of an HSC Health Care Professional**



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# Thomson, Rogers Seminar to Trauma Unit Sick Kids Hospital:

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Overview of the Legal Process Concerning Traumatic  
Injuries to Children – A Case Scenario Approach

# Motor Vehicle Accident Case Scenario

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- On July 2nd, 2004 the Sam family were involved in a road rage incident that culminated in a rear-end collision causing their vehicle to start on fire.
- Sally Sam age 15 and her sister Samantha age 9 suffered serious injuries.
- Their mother, also in the vehicle, suffered serious injury.
- Sally and Samantha were hospitalized at Sick Children's Hospital.
- Before the accident Ms. Sam and her husband had separated.

# Injuries - Sally

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- Lumbar haematoma.
- Bilateral anterior column acetabular fracture.
- Coccyx fracture.
- Left tibia and fibula fracture.
- Third degree burns to right elbow and right buttocks requiring grafting.
- High level cognitive changes.

# Injuries - Samantha

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- Third degree burn over left scapula.
- First degree burn on right posterior neck requiring grafting from left thigh donor site.
- Absence seizures.
- Nightmares.
- Closed head injury.

# Hospitalization at Hospital for Sick Children

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- Sally remains in hospital for thirty-seven (37) days and then discharged to Bloorview.
- Samantha remains in hospital nineteen (19) days and then discharged to Bloorview.

# Family's Involvement in the Legal Process

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- On admission to Bloorview, clients are referred to legal counsel.
- Insurer had previously appointed Occupational Therapist.
- Legal counsel has an accident benefit department which is separate from a tort department.
- Although reports are requested for tort purposes, law firm number one fails to dispute insurer's attendant care assessment.

# Family's Involvement in the Legal Process

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- Family suffers from lack of required attendant care and financial difficulties on top of difficulties relating to transportation, treatment and inability to care for each other.
- Ms. Sam writes counsel expresses dissatisfaction with lack of assistance.
- Counsel responds with a letter discharging clients.
- Family referred to Thomson, Rogers

# Initial Actions

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- Case Manager engaged.
- Replace insurer appointed occupational therapist.
- Family interviews and selects a new occupational therapist, Form 1 completed.
- Submit claim for attendant care.
- Arrange psychologist involvement.
- Submit applications for catastrophic impairment for Sally and Samantha.
- Arrange team meetings, invite adjuster to discuss family's needs.

# Legal Fee Arrangements

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- Partial indemnity costs payable by at fault parties and in some case accident benefit insurer.
- Solicitor and client fees payable by client at end of case to a maximum percentage.
- No retainer initially or usual during case.
  - Cat, Non-Cat.
- No payment of report/record costs.

# Accident Benefit Entitlements for Medical and Rehabilitation

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- Psychologist for chronic pain.
- Speech language pathologist.
- Physiotherapist, together with HSC staff, social worker, Occupational therapist, psychiatry and structured cognitive behavioural therapy for Samantha (PTSD).
- Liaison between psychologist and school.
- Tutoring.
- Transportation arranged for clients to travel to school and medical appointments and on some social outings.

# Attendant Care

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- Occupational assessment of attendant care results in a conclusion that each girl requires twenty-four hour attendant care and mother requires twelve hour attendant care.
- Private attendant care providers are engaged.

# Housekeeping and Home Maintenance

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- Private housekeeping is arranged for family members.
- Moving expenses are payable by insurer to move to a more appropriate home.

# Non-Earner Benefits

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- On attaining the age of sixteen and one-half years of age, Sally obtains entitlement to non-earner benefits as she suffers complete inability to carry on a normal life.

Case Law: **Walker v. Ritchie**: Court considered non-earner test

- Complete inability to take part in competitive athletics.
- Social life evaporated.
- In school with massive support – doing poorly.
- “Completely prevented from engaging in the two most important activities of her life and only marginally able to engage in a third”.
- On that basis, the court concluded “she has been prevented from engaging in substantially all the activities in which she ordinarily engaged”.

# School Re-Entry

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- Before the accident both girls were bright, athletic and engaging with a large social circle.
- Following the accident both girls suffered physical and cognitive difficulties which prevented them from fully engaging in school and in social interactions with their classmates and friends. There was teasing.
- School resource specialist engaged.
- School Principal involved in several meeting with lawyer, clients, case manager.

# Steps in Law Suit – Notice and Disclosure - Before Action Can't Sue Unless:

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- Apply for accident benefits.
  - Notify insurer within 7 days
  - Submit application within 30 days
- Serve Notice of intention to sue within 120 days.
- Provide Defendant with information.
- Undergo examinations requested by Defendant.
- Provide Statutory Declaration of circumstances surrounding the incident and nature of claim.

# Time Limits for Starting a Law Suit

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- Claims occurring after December 31, 2003:
  - claim may be started within two years with some exceptions.
- Exceptions:
  - municipal roadways, notice within ten (10) days and action within two years.
- Rights of Children:
  - Persons less than eighteen years of age have until two years following their eighteenth birthday to sue.
- Exception:
  - If a party has had a parent or other relative sue and has had a Litigation Guardian appointed on their behalf, then party has two years from the date of the Litigation Guardian appointed to sue.
- *In Practice:*
  - Actions for all parties are started within two years of the date of the accident.

# Children's Rights in Litigation

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- For children to be able to sue for general damages for pain and suffering they must suffer a permanent, serious impairment of an important physical, mental or psychological function.
- to prove that, a person must suffer impairment which<sup>\*\*</sup>:
  - (1) substantially interferes with most of the usual activities of daily living, considering a person's age;
  - (2) for the function that is impaired to be an important function of the impaired person, the function must be important to the usual activities of daily living, considering a person's age; and
  - (3) for the impairment to permanent the impairment must:
    - have been continuous since the incident;
    - be expected not to substantially improve;
    - “be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances”.

<sup>\*\*</sup> Applies to all incidents that occur on or after October 1st, 2003

# Evidence Required to Prove “Permanent Serious Impairment”

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- must provide evidence from one or more physicians that explains:
  - nature of impairment;
  - permanence of impairment;
  - specific function affected by impairment; and
  - importance of the specific function to the person.
- the physician’s evidence shall also include conclusion that the impairment is directly or indirectly sustained as a result of the use or operation of an automobile.
- in addition to the physician’s evidence, a person shall adduce evidence that corroborates the change in function.

# Deductible

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- from any amount awarded for pain and suffering which does not exceed \$100,000.00, must be deducted \$30,000.00.
- for family members' claims who have not suffered injury themselves, for any claim that does not exceed \$50,000.00, must be deducted \$15,000.00.

# Other Claims

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- Health Care Expenses (past benefits paid deducted).
- Future Loss of Income.
  - Eighty percent of net loss of income to trial;
  - One hundred percent of gross loss of income following trial.
- Home Maintenance and Housekeeping Expenses.
- Loss of Interdependent Relationship.
- Management Fees.

# Settlements

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- Structured Settlements – required if an award is more than \$100,000.00 and Plaintiff is less than eighteen years of age.
- Court approval required for those under eighteen years of age.
- Children’s’ Lawyer involved.
- Must appoint Guardian.
  - Court can determine if Guardian is qualified.

# Success in Accident Benefit Cases

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- Apply for CAT Designation
- Entitlement to benefits must be anchored in opinions from authoritative and involved practitioners.
- Consider obtaining supportive report from:
  - treating psychologist.
  - social worker
  - treating occupational therapist.
  - treating physiotherapist.
  - treating speech therapist.
  - educational resource specialist.

# Success in Accident Benefit Cases

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- If the CAT Designation or treatment recommendations are not accepted by insurer:
  - Counsel must be prepared to apply for mediation immediately;
  - Fail the mediation;
  - Apply for arbitration;
  - Bring motion for interim benefits; and/or
  - Proceed to arbitration for CAT Designation.
- Counsel must secure access to benefits before the need for the benefits is lost or compromised.
- Assess long term needs of clients.
- Involve adjuster in process.
- Keep accident benefit and tort cases entwined.

# Success in Non-Catastrophic Cases

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- Ensure that all steps possible are taken to determine if client is or will become entitled to catastrophic designation.
  - Psychological assessment.
  - Neuropsychological assessment.
  - Psychiatric assessment.
- Insurer should be asked to pay the cost of these assessments; however, if unwilling, law firm should honour these costs and proceed to mediation to dispute the insurer's denial of same, and any other denials made by the insurer of treatment recommendations.

Case Law: **Desbiens** - Catastrophic entitlement based upon addition of neurologic / psychologic impairments to physical impairments.

# Success in Litigation - Tort Law Suit

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- Obtain all witness information and information provided by all parties to police.
- Video tapes of interview.
- Newspaper articles.
- Hire reconstruction engineer.
- Obtain reports from treating practitioners in accident benefit context to assist with respect to tort entitlements.
- Obtain school references from teachers comparing pre and post accident function.
- Obtain education records from parents.
- Obtain report from economist as to likely loss of earnings.
- Arrange for life care planner to prepare future care cost assessment.

# Steps in Law Suit: Examination for Discovery

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- Preparation for same:
  - Evidence of the parties.
  - Evidence of police.
  - Evidence of family members.
  - Evidence from practitioners.
- It is extremely rare that children under age twelve will be personally involved in the litigation process by being asked to attend the examinations for discovery.
- Ordinarily, their Litigation Guardian (usually a parent) will attend and answer questions concerning the injuries sustained and the circumstances surrounding the accident together with resulting impairments.
- Children may however be asked by Defence counsel to attend at one or more medical evaluations to assess their injuries and impairments suffered. Ordinarily the parent will be allowed to attend the assessment.

# Quantifying Claims

Microsoft Excel - hsc demo.xls

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	A	B	C	D	E	F	G	H	I	J	K
1		<b>WITHOUT PREJUDICE</b>	<b>Plaintiffs' Unprotected Assessment (Scenario 1)</b>				<i>Prepared using the Personal Injury Damages Calculator 2007</i>				
2		File Name	Sally and Samantha Sam v. defendant				Internal File Number		91900		
3		Damage Assessment (as of)	November 5, 2007								
4		Date of Incident	March 2, 2003								
5											
9		<b>DAMAGE ASSESSMENT</b>									
10		<b>GENERAL DAMAGES</b>		<b>Amount</b>		<b>PJI rate</b>	<b>PJI</b>	<b>Total</b>			
11		Sally.		\$312,440.00		23.39%	\$73,095.13	\$385,535.13			
13				\$100,000.00		23.39%					
14				\$30,000.00		23.39%					
15				\$30,000.00		23.39%					
16				\$30,000.00		23.39%					
17				\$30,000.00		23.39%					
18				\$30,000.00		23.39%					
24		<b>PAST DAMAGES</b>		<b>PJI Rates</b>	<b>PJI since</b>	<b>Amount</b>	<b>Less Benefits</b>	<b>Net</b>	<b>PJI rate</b>	<b>PJI</b>	<b>Total</b>
25		Past Loss of Income (Scenario 1)		Half Rates	Incident Date	\$108,437.00		\$108,437.00	7.02%	\$7,610.63	\$116,047.63
26		Past Attendant Care (provided by Donna Greer)		Half Rates	Incident Date	\$344,824.78		\$344,824.78	7.02%	\$24,201.46	\$369,026.24
36		<b>FUTURE DAMAGES (specified amounts)</b>				<b>Amount</b>	<b>Less Benefits</b>				<b>Total</b>
37		Future Income Loss (Scenario 1)				\$1,553,242.53					\$1,553,242.53
38		Attendant Care				\$5,771,334.00					\$5,771,334.00
39		Rehabilitation Support Worker				\$2,429,447.00					\$2,429,447.00
40		Medical & Rehabilitation				\$1,862,443.00					\$1,862,443.00
41		Housekeeping & Home Maintenance				\$255,003.00					\$255,003.00
42		Management Fee (@ 5%)				\$593,573.48					\$593,573.48
59						<b>Total Damages (without PJI)</b>		<b>Total PJI</b>	<b>Grand Total</b>		
60		<b>GRAND TOTAL OF ALL DAMAGES AND INTEREST</b>				\$13,230,744.79		\$104,907.22	<b>\$13,335,652.01</b>		
62		<b>Notes</b>									
63		Years Since Incident (to assessment date)		4.68							
64		Date Cause of Action Arose (i.e. PJI Commencement Date)		2-Mar-2003		Plaintiff's Date of Birth		25-Jan-1989			
65		Date Statement of Claim Issued		30-May-2003		Plaintiff's Age (as of Assessment Date)		18.78			
66		Applicable annual PJI rate pursuant to s.127/128 of CJA		3.00%		Plaintiff's Gender		Female			
67		Applicable annual PJI rate pursuant to s.127/128 of CJA		3.00%		Plaintiff's Life Expectancy		63.8524			
		Basic Inserts \ DW1 \ DW2 \ DW3 \ DW4 \ DW5 \ DW6 \ DW7 \ Future Care \ Mediation Genie \ Direction \ Release \									
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# Legal Issues Arising from Medical Records and Professional Documentation

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- Pre-accident function.
- “Thin skulled Plaintiff”.
- Assessment of brain injury – no depressed GCS yet cognitive changes.
- Attendant care needs – difference between hospital view of “inability to respond in an emergency” and Form 1.
- Need for long term therapy for impairments not identified in acute records.

# Going to Court - Mediation

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- Once the value of a case is appropriately quantified using all of the experts required, a negotiation in the form of a mediation usually occurs.
- Exception to this would be if the Defendant believes there is no liability on their client and wishes to go to court.
- Mediation normally occurs after examinations for discovery.
- Depending upon the complexity of the case it can take between twenty and fifty hours to properly prepare the required documentation and prepare to attend on the mediation.
- At mediation, counsel for the Plaintiff will often use demonstrative evidence such as medical illustrations, power point presentations, photos and engineering reconstruction.
- Mediation usually takes one day and clients are present.

# Going to Court – Pre-Trial

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- Should the mediation not resolve the matter, counsel will prepare a pre-trial memorandum and attend in court before a Judge.
- The Judge will have read counsel's pre-trial memorandum for both Plaintiff and Defendant and will provide his/her views concerning the reasonable amount of settlement. Clients may or may not be present.
- The presiding Judge will obtain all information related to witnesses at trial, length of trial and discuss any issues in dispute relating to the trial.
- The vast majority of cases will settle as a result of mediation and/or pre-trial.

# Going to Court

## – Lay Witnesses vs. Expert Witnesses

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- Lay witness is a person who has knowledge of the facts which relate to matters in issue.
- An Expert witness is a person who has been deemed qualified by the Court as an expert in his or her profession and as such is capable of providing opinion evidence to the Court in assisting them to make a determination on an issue.

# Going to Court – Qualification of a Witness as an Expert

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- The curriculum vitae is produced and marked as an Exhibit and reviewed.
- The education a person has received, conferences attended, publications, experience in their profession and court experience are canvassed.
- Examples.
- The objectivity of the witness may also be canvassed by examining or opposing counsel since an expert witness has the duty to provide unbiased, objective evidence to the Court.

# Going to Court

## – Preparation of an Expert for Trial

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- Expert witnesses must have prepared a report which includes their findings, opinions and conclusions.
- This report must have been served upon opposing counsel within the timeframes allowed.
- Testimony of Expert Witnesses ordinarily is confined to the four corners of their report.
- Exceptions:
  - If there is evidence before the court of facts which are different from the facts which are relied upon by the assessor/expert in their report, Plaintiff's counsel may request permission to ask the expert to comment on matters not contained within the expert's report. This may be objected to by defence counsel.

# Going to Court

## – Preparation of an Expert for Trial

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- For the purposes of cross examination it is important for expert witnesses to be familiar with all the reports which are relevant to their own reports or to their findings, opinions and conclusions.
- Regularly, defence counsel will ask Plaintiff's expert witnesses to comment upon other reports or to defer to other reports which have been completed after those reports authored by the health care professional being examined.

# Part II – May 7<sup>th</sup>, 2008

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Nicky Brookes will be examined in chief and cross examined based upon records and reports which are within the Hospital for Sick Children's records and possibly in relation to reports from other Occupational Therapists which were generated after discharge from Sick Kids.

12:00 p.m. – Room 5704

**THANK YOU**