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Coming of age

Litigating acquired brain
injuries in children

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Coming of age

Litigating acquired
brain injuries in children

BY SHANE H. KATZ & VERONICA S. MARSON, SINGER, KWINTER

Acquired brain injury (ABI) is an umbrella term used to describe brain damage that occurs after birth which is not related to a congenital neurodevelopmental disorder. ABI can have a number of causes including trauma, stroke, brain tumours, oxygen deprivation, and brain inflammation. Of these, the most common is Traumatic Brain Injury (TBI), which is caused by trauma to the head. Among children and youth, the number of ABIs grows every year. According to the Centers for Disease Control and Prevention, each year in the U.S., almost half a million emergency room visits by children aged 0-14, are made for ABI [Law et al., 2011]. In Canada, where injury is the leading cause of death among children and youth, brain injuries account for 50 per cent of all deaths resulting from injury [Think First]. ABI is a leading cause of lifelong acquired disability in children and remains an important public health issue in Canada.



Changing perspectives on pediatric ABIs

For many years, ABIs in children were not considered to be as significant as those in adults. Medical professionals believed that children were able to recover from ABIs better than adults due to the neural plasticity of their brains and their brains' ability to reorganize after a brain injury. The chances of a child recovering from brain injury were thought to decrease as they got older. Children and adolescents who developed problems at school after recovering from brain injuries were often misdiagnosed as experiencing ordinary growing pains.

However, recent research has found that children are actually at greater risk than adults of experiencing cognitive, behavioural, social, and vocational problems following an ABI [Cole et al., 2009]. Research has shown that children who experience ABIs in early childhood and elementary school are actually worse off than those who sustain them in adolescence. This is due to the potential of ABI injuries interfering with the acquisition of basic skills required at later stages of development and when environmental demands become increasingly complex [Cole et al., 2009].



Approaches to litigating pediatric ABI cases have evolved alongside changes in understanding ABIs in children. In recent years, the emphasis has become early intervention, that is: to provide immediate support to injured children and their families, early diagnosis, and to ensure that children are connected with specialized rehabilitative care.

It is now clear that the consequences of ABIs in children are often not apparent until many months or years after an injury. Important long-term predictors of recovery in children following ABIs include the size and site of the lesion, the age of the child at the time of injury, the child's pre-morbid ability, and environmental factors including the provision of rehabilitation services, socio-economic status, and levels of family functioning [Slomine et al., 2009]. That being said, further research is still required to better understand children's developing and maturing brains, particularly with respect to recovery rates, ABI duration, and variability among children of different age groups and demographic backgrounds during critical periods of transition [Gordon et al., 2012]. The functional impact of current rehabilitative treatments also needs further measurement in order to determine how to better support the short- and long-term needs of children with ABIs [Gordon et al., 2012].

Developments in pediatric ABI litigation

Approaches to litigating pediatric ABI cases have evolved alongside changes in understanding ABIs in children. In recent years, the emphasis has become early intervention, that is: to provide immediate support to injured children and their families, early diagnosis, and to ensure that children are connected with specialized rehabilitative care. Case managers and social workers have played an important role in coordinating children and families affected by ABIs and multidisciplinary professionals involved in post-injury care. Some personal injury lawyers have also begun using specially-trained professionals to work with families, treating physicians, and other medical professions to facilitate communication in children's acute care and early rehabilitation stage [Brown et al., 2012].

The use of experts is another significant development in litigating ABI cases involving children. Experts have become particularly important in pediatric ABI claims in preparing Life Care Plans that quantify and provide detailed information regarding the current and future care needs of children with ABIs. Reports prepared by certified life care planners in pediatric ABI cases provide a comprehensive summary of a child's injuries, the results of any testing or investigations that have taken place, the type of medical and rehabilitation treatment the child received, and the opinions of the child's treating professionals regarding diagnosis and likely prognosis. Life Care Plans and other expert reports on children with ABIs are important in ensuring that children with ABIs and their families receive the rehabilitative treatment, education, emotional support, assistive devices, transportation, and environmental modifications that they require.

Special considerations in litigating pediatric ABI cases

A number of issues arise when litigating ABI cases involving children in Ontario. The following are a few examples:

The Child Must Have a Litigation Guardian – Rule 7.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 states that a child under the age of 18 needs to be represented by a litigation guardian. A litigation guardian's role is to represent the child's best interests and to assume any potential cost consequences arising from the child's lawsuit. They sign all of the paperwork for the child and provide instructions to counsel. Most often, they are a family member. In cases where no family member is available to represent a child or there is concern that the litigation guardian will not represent the child's best interests, the Children's Lawyer will be appointed to act as the child's litigation guardian.

The Child May Be Asked to Provide Evidence – Rule 31.03(5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 states that the litigation guardian or the child who is a party to an action can be examined for discovery. Children under the age of 14 are assumed to have the

capacity to testify according to section 16.1 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 as long as they are able to understand and respond to questions. That being said, Rule 31.11(5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 allows a trial judge discretion to decide whether a child's words can be read or used as evidence at trial.

Courts have ordered children with ABIs to be examined particularly where they are primary plaintiffs in an action. For example, in *Dmytrenko (Litigation Guardian of) v. Vandendor*, [2005] O.J. No. 2517, a 10-year-old plaintiff, suffering from cognitive and psychological impairments following a closed head injury was ordered to attend an examination for discovery comprised of two 20-minute periods with a break in between, even though his litigation guardian had already been examined. The court reasoned that even though the child had no recollection of the accident that caused his injury, his evidence would shed some light on his current level of functioning.

Counsel representing children suffering from ABIs should be aware of the potential cognitive, behavioural, emotional, and physical challenges their clients can have when being interviewed or examined for discovery. Counsel should try to determine ahead of time whether their client has sufficient understanding of their injuries. Efforts should be made to ensure that questions presented to children with ABIs are clear, concise, and developmentally-appropriate. Particular attention

should be paid to any signs of fatigue and counsel should be prepared to take breaks and adjourn a meeting to another day or time to accommodate their client's needs.

Court Approval is Required for Any Settlement – It is important to note that once a litigation guardian provides instructions to settle a child's ABI claim, Rule 7.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 still requires that a motion be made to a Superior Court judge to approve any settlement. This is done to ensure that the best interests of the child suffering from an ABI are protected. In cases where a child's ABI is severe, it will be necessary to appoint a Guardian of Property and to prepare a comprehensive Management Plan outlining how they intend to manage the child's settlement funds to support the child's current and future well-being. Additional applications may also need to be submitted in cases where a child with ABI is incapable of managing their finances as they approach the age of eighteen.

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