



**PRELIMINARY CONSIDERATIONS IN PERSONAL INJURY LITIGATION, or
WHAT YOU DON'T KNOW CAN HURT YOU!**

**By Adam K. Wagman
Howie, Sacks & Henry LLP
Personal Injury Law**

Personal injury litigation is an investment for the plaintiff's lawyer. It is an investment of time, money and energy, all of which are limited resources. Any prudent investor would obtain as much information as possible before making an investment, a plan that certainly should be followed by the plaintiff's personal injury lawyer. The more information that you have at the beginning of a case, the better you will be at estimating the potential for your investment.

Personal injury litigation has become highly specialized over the past decade. Assessing the potential value of a case, and therefore the decision to take a retainer, has become increasingly complex. The law, especially in the area of motor vehicle and accident benefits litigation, is constantly changing. The only way to accurately assess a case and advise a potential client is to obtain as much information as is reasonably possible before taking on the file. The following is a detailed checklist of the information that should be obtained and the factors that should be considered in most personal injury cases. This is by no means an exhaustive list. Every case will have its own unique facts or characteristics and a good lawyer will always be looking at those unique features in addition to matters set out in this list.

Initial Interview

- Date of interview
- Date of incident
- Referral source
- Personal information
 - Name, address, all phone numbers, DOB, alias
 - Health card, social insurance, DL
- Employment information
 - Employer, address, supervisor, job, rate of pay, length of service
 - Employment history (chronology)
 - Educational background
 - Post accident employment
 - WSIB considerations
- Litigation history
 - Previous/current lawyers (and their accounts)
 - Adjusters
 - Statements, settlement discussions
- Injuries
 - Head to toe
 - Timeline
 - Psychological/emotional
 - Head injury
 - Scars

- Treatment
 - Ambulance/hospital
 - GP (pre and post)
 - Specialists
 - Therapists
 - Medication
 - Appropriate specialists and treatment?
- Medical history
 - Accidents, injuries, WSIB claims (litigation history)
 - Family history
 - Other medical conditions
- F.L.A. claimants
 - Identity and DOB (Litigation Guardian)
 - Pecuniary claims
- Out of pocket claims
 - Receipts and journal
- Accident facts
 - Date, time, place, lighting, weather
 - Description and diagram
 - Seatbelt, headrest, airbag, shoes
 - Alcohol
 - Statements
 - Police officer, investigator, charges

- Photos, measurements
- Newspaper articles
- Witness information
- Insurance
 - Your client (auto, workplace, personal, spouse)
 - Damage details
 - Defendant (auto, homeowners, CGL, limits)
- Authorizations
 - Takeover, medical, hospital, OHIP, Revenue Canada, insurance

Damages

- General damages (deductible)
- Past loss of income
- Future loss of income, earning capacity or potential
- Out of pocket expenses
- Future medical, rehab, housing, transportation, care expenses
- Fatalities (FLA claims, loss of support, loss of services)
- Collateral benefits (deductible or not)
- FLA claims (deductibles)
- Emerging claims (e.g. loss of marriagability)
- The numbers game

Liability

- Assessment
- Contributory negligence
- Effect of liability split
- Potential Defendants
 - Protected vs. unprotected
 - Deep pockets

Limitation Periods

- Notice (motor vehicle, slip and fall, Crown property, highway repair)
- MVA
- FLA
- Highway repair
- Medical malpractice
- Accident Benefits
- Unidentified/Uninsured/Underinsured
- Assault
- Public Authorities
- Railways
- Shipping
- Products liability

Pleadings

- When
 - Notice and information
 - Investigation
 - Settlement vs. litigation
- Precedents
- Forum
 - Superior Court
 - Simplified Rules
 - Case Management
 - FSCO
 - Criminal Injuries Compensation Board
 - WSIB
 - CPP, ODSP

Subrogated Interests

- OHIP
- COMSOC (general welfare, ODSP)
- Private insurers
- Protecting accounts
 - Treatment providers
 - Previous counsel

Retainer

- Risk/Reward
- Can the client afford one?
- Can you afford to not get one?
- Outside counsel
- Requesting a retainer during the litigation

The Letter

- Not retained
 - Make it clear!
 - Notice and limitation periods
 - Potential claims
 - Business development
- Retained
 - Financial arrangements
 - Expectation management
 - Possibility of a retainer
 - Retain documents, evidence, journal
 - Opening the file

After reviewing this checklist, it is easy to see why the trend has been towards specialization, not generalization, in this area of the law. In developing a personal injury practice, the emphasis should be on the quality, not quantity, of cases. Not only is it important to

gather as much knowledge as possible in order to assess the quality of a potential case, it is equally as important to recognize when you don't know something important about the case. A personal injury lawyer must be able to recognize the information and evidence that is necessary to obtain in the future, identify the potential legal issues that require further research, and put all of it together in the form of a reasonable, cohesive and persuasive package in order to maximize the value of the claim for the client. Finally, the competent personal injury lawyer must recognize when they need help. When in doubt, consult other lawyers in your firm or outside lawyers and experts for an opinion. If necessary, retain outside counsel to address complexity, workload or financial concerns. But before you do anything, gather as much information as possible. Your success in this area depends on it.

