

# C: Submission letter seeking Public Guardian and Trustee approval of a settlement under the Infants Act

The Public Guardian and Trustee reviews the assessment of **liability, quantum** and the **legal fees** claimed in a minor's case. In order to assess whether a settlement falls within a reasonable range of damages, the Public Guardian and Trustee must have access to the same information that the parties had in arriving at their settlement amount

The party submitting the settlement for approval should include the following information in their Submission Letter: (For a more detailed discussion see the Continuing Legal Education Society of BC publication [Public Guardian and Trustee Handbook](#)).

1. Identifying information for the minor. This includes the minor's full name, address, and date of birth. Copies of the birth certificate and social insurance number should also be provided if available.
2. Full name and address for the guardian(s) with parental authority to settle a proceeding relating to the minor.
3. A concise narrative description of the accident;
4. If liability is in issue, enclose copies of witness statements, police reports, discovery transcripts, photographs or diagrams of the accident site, etc., along with an analysis of the liability issue and case law supporting any negligence attributed to the minor;
5. A description of the minor's injuries and advice on the minor's current medical status and copies of all medical-legal information such as:
  - ambulance crew report
  - hospital admitting records
  - all medical-legal reports
  - clear, close-up photographs of scarring
  - Head Injury Symptoms Form
  - evidence from parents (particularly useful in very small claims where there may not be a

full medical-legal report on the minor) (see Child/Parent/Guardian Questionnaire);

In serious injury cases please also include:

- actuarial reports
  - vocational assessments
  - economic reports re: loss of opportunity
  - rehabilitation assessments
  - cost of future care reports
6. In serious injury cases, details should be provided as to how it is proposed the minor's funds will be paid out (e.g. lump-sum payment or structured settlement). Include details of and rationale for any proposed structured settlement;
  7. Case law supporting assessment of quantum for more serious or unusual injuries or where particular cases were important in reaching the settlement amount;
  8. Where the Health Care Costs Recovery Act, S.B.C. 2008, c. 27 and its accompanying regulation apply, the submission must include confirmation that the claim for recovery of health care costs has been addressed to the satisfaction of Provincial authorities.
  9. When a minor's recovery is limited due to insufficient insurance or the involvement of an uninsured or unidentified motorist, the applicant should advise the Public Guardian and Trustee and outline the applicable law. If there is a pro rata division of available insurance, the settlement submission should outline the other claims to help the Public Guardian and Trustee and the court to assess the reasonableness of the pro rata division. The settlement submission should deal with any other issues affecting the minor's recovery of damages. Examples may include availability of Underinsured Motorist Protection (UMP) or the deduction of collateral benefits. The Public Guardian and Trustee should be provided with confirmation that

each possible source of compensation for the minor was explored, even if it did not result in any further compensation. In addition, a statutory declaration should be provided by the defendant confirming his or her financial situation, and identifying assets, liabilities and income, in order for the court to ascertain if there was any potential recovery against the defendant; and

10. Details of legal fees and disbursements including, where possible, copies of the contingency fee contract with the minor's litigation guardian and computerized time records and/or an estimate of hours expended together with the lawyer's hourly rate.

## **Other matters**

### **1. Family Compensation Act**

When considering Family Compensation Act claims, the Public Guardian and Trustee will require counsel to break down the minor's claim as to the various heads of damage and provide information in support of his or her assessment. For example:

- Loss of love, guidance and affection - information regarding the relationship between the minor and the deceased parent.
- Loss of household services - details of the services provided by the deceased parent, including household chores, maintenance and childcare. Actuarial reports quantifying same should be included.
- Loss of financial support - employment history and actuarial reports should be provided.
- Loss of inheritance - historical pattern of saving. Courts have made nominal awards even in cases of low income earners with no savings; therefore counsel should provide a rationale if no settlement under this head of damage is proposed.

While the loss of financial support is often made available to the surviving parent for the support of the minor during the years of his or her dependency, the Public Guardian and Trustee takes the position that compensation for loss of guidance and loss of inheritance should not

be utilized for maintenance of the minor, and therefore, should be paid to the 'Public Guardian and Trustee in trust for [the minor]' until the minor reaches age nineteen.

### **2. First Nations minors**

There is an understanding between the Public Guardian and Trustee and the Minister of Aboriginal Affairs and Northern Development that the Public Guardian and Trustee reviews settlements proposed for First Nations minors in British Columbia. The process is the same as for all other minors.

### **3. Litigation guardian**

Rule 20-2 of the Supreme Court Civil Rules deals with persons under disability. Rule 20-2(2) states "that a proceeding brought by or against a person under legal disability must be started or defended by his or her litigation guardian."

Rule 20-2(5) provides that a person ordinarily resident in British Columbia may be a litigation guardian of a person under disability without being appointed by the court.

Where no one is willing or able to act as litigation guardian for a minor, the Public Guardian and Trustee may be requested to act as litigation guardian.

If a minor is in the continuing custody of the Director under the Child Family and Community Service Act, does not have a guardian, or if the guardian appointed is dead, refuses to act or is incompetent at law to act, the Public Guardian and Trustee is the minor's property guardian. Therefore the PGT is the minor's litigation guardian in any legal proceeding (see section 51 Infants Act and section 50(1) Child Family and Community Service Act).

### **4. Head injuries**

In cases where the minor has sustained a blow to the head, the Public Guardian and Trustee often requests that the minor's parents or guardian complete a Head Injury Symptoms Form. Pre and post-accident school records and hospital admitting records may also be helpful.

Where it appears that there may have been a serious head injury with permanent consequences, a neuropsychological report will likely be requested.

## 5. Legal fees

A fee agreement entered into by a guardian or litigation guardian is not binding on a minor without approval of the Public Guardian and Trustee or the court. Usually, approval of legal fees is obtained at the same time the settlement is approved or the court makes an order following a judgment at trial

For settlements of \$50,000 or under, excluding interest and costs, the Public Guardian and Trustee reviews and approves the proposed fee. This review is a part of the function of reviewing the entire settlement submission. For settlements over \$50,000, excluding interest and costs, the court approves the legal fee, after considering the Public Guardian and Trustee's comments. The amount payable under the contingency fee agreement should be detailed along with any voluntary reduction that is being applied.

When the Public Guardian and Trustee has jurisdiction over a settlement of \$50,000 or under, excluding interest and costs, it usually approves up to a 25% contingency fee without the requirement of an extensive fee submission. Counsel claiming up to 25% on a small settlement may simply advise on the number of hours dedicated to the matter (if recorded) or provide an estimate of the hours, advise of the major steps taken in the matter, and provide counsel's year of call to the bar. A more detailed submission based on the criteria established in case law may be required when a legal fee of greater than 25% is claimed on a settlement of \$50,000 or under. The Public Guardian and Trustee's counsel advises if there are further questions or if more detailed submissions on the legal fees are required.

When the Public Guardian and Trustee is providing statutory comments for the court, the Public Guardian and Trustee requires a more detailed fee submission based on criteria established in case law. Generally, the larger the legal fee claimed and the larger the premium over the hourly rate involved, the more detail required in the submission on legal fees.

When the Public Guardian and Trustee reviews legal fees, it considers the factors identified by the court in *Harrington (Guardian ad litem of) v. Royal Inland Hospital* (1995), 14 B.C.L.R. (3d) 201 (C.A.). *Harrington* followed *Yule v. Saskatoon (City)* (1955), 16 W.W.R. 305 (Sask. Q.B.), affirmed (1955), 17 W.W.R. 296 (Sask. C.A.). These factors have been expanded in subsequent cases and were summarized in *British Columbia (Public Guardian and Trustee) v. Ralston*, 2008 BCCA 372 at paragraph 21 to include:

- the financial circumstances of the plaintiff;
- the risk to the law firm where it
- carries disbursements;
- the complexity of the issues;
- the experience and skill of defendant's counsel;
- the experience and skill of plaintiff's counsel;
- the risk assumed by plaintiff's counsel that there would be no pay for effort expended;
- the time expended by plaintiff's counsel;
- the importance of the case to the plaintiff; and,
- whether the settlement is a good settlement.

Some cases suggest the timing of the settlement is also important. (See *Harrington*; *Murphy, Battista v Tejani* 2009 BCSC 1782 at par 88)

## **6. Administration of funds for minors by the Public Guardian and Trustee**

Under the Public Guardian and Trustee Fees Regulation, the PGT charges various fees and commissions for the administration of trusts. A detailed description of fees and commissions can be found at [www.trustee.bc.ca/fees](http://www.trustee.bc.ca/fees).

Section 14(1) of the Infants Act gives the Public Guardian and Trustee discretion to release part or all of the funds held by the Public Guardian and Trustee in trust for a minor, for the minor's maintenance, education or benefit prior to the minor turning 19.

Requests by parents or minors for release of funds may be made in writing to the Child and Youth Services Department at the Public Guardian and Trustee.

When considering requests for funds, the Public Guardian and Trustee will bear in mind the obligations of those charged with the support and maintenance of a minor and their ability to meet those obligations. The Public Guardian and Trustee contacts the minor 2 months prior to the minor's 19th birthday with instructions on how funds can be collected. A statement of account is provided setting out all income earned, all deductions of any discretionary encroachments, applicable taxes, and the Public Guardian and Trustee's management fees (Infants Act, s. 43).

## **7. Public Guardian and Trustee's review fee**

The Public Guardian and Trustee charges a fee for reviewing applications under the Infants Act. This fee is based on a sliding scale, depending on the proposed settlement amount. The fee is payable upon submission of the settlement for review.