



## **Considerations when Initiating or Settling a Personal Injury Action**

*This issue of The Voice is written by [Ken W. Shulman, Esq.](#) who is a partner in the Boston, Massachusetts, office of [Day Pitney LLP](#). Ken focuses his practice on estate planning and related issues for families who have children with disabilities and on elder law. He has served as a board member for several human service agencies including the Greater Boston ARC and presently serves as a board member for the Asperger's Association of New England. He also serves on the Combined Jewish Philanthropies Committee on Disabilities and previously served on the Board of Directors of the Massachusetts Chapter of the National Academy of Elder Law Attorneys. He is a co-author of *Managing a Special Needs Trust*, People with Disabilities Press (2012). Ken often serves as a trustee of special needs trusts at his clients' request.*

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*It goes without saying that a significant personal injury, particularly one that causes a permanent disability, is traumatic to the injured person and his family. If litigation is needed to receive compensation for the injuries, the selection of a knowledgeable personal injury lawyer is essential to avoid needlessly compounding the trauma. What many people (and attorneys) don't know, however, is that significant and unnecessary financial losses may result if the lawyer does not consult with an expert about public benefits issues in order to avoid losing valuable governmental benefits that the injured party may be entitled to, such as Medicaid and Social Security benefits.*

*This article highlights several of the unique concerns faced by individuals permanently disabled as a result of an injury caused by the negligent acts of a third party. These concerns apply whether the injury results from something as mundane as a minor auto accident or from a complex medical malpractice. In any case where permanent disabling injuries result, families should take charge when initiating personal injury litigation to ensure the best results.*

### **Selecting the Right Personal Injury Attorney**

*In certain areas of the law, including special needs planning and personal injury litigation, families are best served by an attorney with significant experience. Individuals, parents and guardians should always select an attorney who is knowledgeable about the unique needs of disabled clients and their families. It is critical that any attorney taking on this type of action: (1) fully understands the scope of the disability and its impact on the entire family;*

*(2) demonstrates a willingness to consult with experts in Supplemental Security Income (“SSI”), Medicaid and other public benefit programs that may be critical to an injured party’s long-term well-being; and (3) considers the impact of trial and settlement on the possible loss of public benefits. It is impossible to value and litigate a case effectively without this commitment and knowledge.*

### **Education and Experts**

*The family must sometimes educate the personal injury attorney on the details of the injured person’s disability. Indeed, families can make a significant impact on the outcome of their personal injury lawsuit by directing their attorneys to the appropriate experts. These experts can inform not only the family’s own attorney but, ultimately, the defendant, judge, or jury about the medical and economic ramifications of a disabling injury.*

*For example, the extent of certain injuries is not always obvious. The lasting and permanent effects of traumatic brain injury, for instance, may be latent, not appearing until years after the initial trauma. An uninformed attorney, judge, or jury might undervalue the costs associated with raising a child with such an injury or the future costs for the delayed care of maintaining an adult who suffered a head injury. Whatever the injury, to appropriately value all damages, a personal injury attorney may need to retain a variety of experts including an economist to project lifetime financial data, a doctor or other expert on the disabling condition to speak to the plaintiff’s particular disability and a “life care planner,” who can attest to the plaintiff’s likely lifetime care needs (and associated costs). The right personal injury attorney will be willing to invest the time and resources necessary to address these important issues.*

### **Identifying All Possible Plaintiffs**

*Litigation may involve multiple plaintiffs because the negligence that causes a disabling injury, or aggravates a pre-existing one, rarely impacts the immediate victim alone. Families of a child with disabilities can suffer in a variety of ways. In some cases an injury to another family member may be direct, for instance where a parent or sibling is hurt in the same automobile accident. In other cases the injury is indirect, as in a serious medical malpractice case where a parent, though not physically injured herself, must forgo employment to care for the injured child.*

*While damages associated with a direct injury can be obvious, indirect injuries require a more thoughtful analysis. For instance, an uninformed personal injury lawyer might underestimate the true cost to parents in terms of time away from work: lost opportunities for advancement, specialized day care, home remodeling, or respite care. The attorney could also overlook additional plaintiffs, including siblings or a spouse, who have less*

*obvious injuries but have still suffered. A good personal injury lawyer will spend time to identify all potential plaintiffs and grasp the accurate physical, emotional and financial dimensions of the family's injuries. Identifying other family member plaintiffs is also important for public benefits planning for reasons discussed below.*

### **Benefits Considerations**

*Attorneys representing individuals receiving public benefits should always consult with an attorney who specializes in special needs trusts and public benefits before negotiating a settlement or proceeding to trial. Some means-tested public benefits may be terminated if an individual receives a settlement. If an individual receives medical benefits, typically Medicaid or Medicare (or both) at the time of the injury, the state Medicaid agency or the federal Medicare agency usually must be reimbursed immediately from any settlement or court judgment awarded directly to that individual. It is sometimes said that Medicare or Medicaid has a "lien" on the settlement proceeds or court awarded damages, typically equal to what Medicaid or Medicare paid for the injured person's care directly related to the injury. Some private health insurance plans may also have the right to seek reimbursement from any settlement or judgment. In certain cases, this amount may be reduced based on program regulations, negotiations, or the amount of the settlement or judgment. As a general rule, however, if Medicare or Medicaid paid for care resulting from the injury, and the settlement or court award is paid directly to the plaintiff, there will be some amount of reimbursement that will have to be made upon the receipt of funds.*

*If the plaintiff also receives SSI (and in some states, Medicaid independent of SSI), any funds awarded directly to the plaintiff in excess of the initial reimbursement requirement will have to be transferred to a "safe harbor" trust, also known as a (d)(4)(c) "pooled trust," or [d\(4\)\(a\) "special needs trust," to preserve benefit eligibility](#). A special needs trust must provide that the state or states providing Medicaid coverage be reimbursed at the beneficiary's death from any remaining assets in the trust before distributions can be made to other parties. In many states a pooled trust must either provide that the state providing Medicaid coverage be reimbursed at death or alternatively that the balance in the pooled trust be retained for the benefit of other pooled trust beneficiaries. For this reason, these trusts are sometimes referred to as "payback" trusts. As currently interpreted by Medicaid agencies and most courts that have ruled on the issue, this reimbursement requirement includes repayment of all Medicaid expenses paid on behalf of the Medicaid recipient whether incurred before or after the accident, not just reimbursement for expenses related directly to the injury. Plaintiffs receiving Medicare may also be required to set aside some of their recovery in a [Medicare Set-Aside Trust](#). (See the Voice articles published in Vol. 4, Issue 12 and Vol. 6, Issue 12 for a more thorough discussion of these trusts.)*

*These Medicaid reimbursement requirements give rise to interesting opportunities for creative thinking when negotiating the settlement of a personal injury case for a person who receives public benefits. For example, even if a child is the only party directly injured in an accident, it might nevertheless be appropriate in some cases to allocate a portion of a settlement to the parents. This arrangement could provide the parents, who are experiencing physical, emotional and financial burdens associated with raising that child, with the additional resources needed to care for the child. The parents' estate plan would then typically include a third-party special needs trust, a type of trust that does not require reimbursement on the death of the beneficiary, to provide for the disabled child after the parents' deaths. This strategy might also reduce the dollars that have to be reimbursed immediately after the settlement to Medicare or Medicaid and avoid or minimize the above-mentioned "payback" requirement after the death of the child.*

*Depending on a state's eligibility requirements for Medicaid, it may be worth foregoing SSI entirely if the settlement is large enough. Some states now offer Medicaid benefits under the Affordable Care Act (ACA) or under certain "Medicaid waiver programs" with no asset limit. Private health insurance may also be available. The ACA allows disabled persons to procure health insurance without regard to pre-existing conditions. Foregoing SSI and its relatively meager stipend, rather than subjecting a family to the lifetime Medicaid reimbursement requirements required by a d(4)(c) or d(4)(a) trusts, may be a wise decision for some.*

### **Additional Considerations**

*This short article provides only a glimpse into the many considerations one must contemplate when embarking upon or settling a personal injury lawsuit involving a disabled plaintiff. Additional considerations include, but are not limited to:*

- A settlement negotiated on behalf of a minor plaintiff, or a disabled adult incapable of consenting to the terms of the agreement, must be presented to the court for approval. Each state has its own procedure for approving settlements for minors and incompetent adults.*
- If a case is decided by a court (judge or jury) rather than by settlement, one may lose some flexibility to minimize the impact on public benefits and thereby maximize the total recovery to the family. A judge or jury will award damages directly to the person or persons they consider to be injured and in the proportions they deem appropriate. Plaintiffs will not have the flexibility to apportion the court award to achieve a more favorable allocation from a public benefits perspective. This factor may be of importance in deciding whether to accept a settlement offer or to proceed to trial.*

- *Settlements and awards for personal injuries are generally not taxable income. In contrast, awards for lost wages or purely emotional damages may be taxable.*
- *Structured settlements increasingly play a large role in settling cases involving significant personal injuries. A “structured settlement” refers to the defendant’s (or its insurer’s) purchase of an annuity for the injured party; the annuity pays certain sums of money over time to the plaintiff in place of a direct payment of cash. Some settlements consist of both a structured settlement and cash.*
- *Structured settlements do not obviate the need for special needs trusts or for considering the issues described in this article. If a structured settlement is used to fund some or all of the settlement, the personal injury attorney and family should still consult with a qualified special needs attorney to determine how best to utilize the structure. The structured settlement may need to be paid to a special needs trust if the injured party wants to preserve eligibility for public benefits.*
- *The long-term administration of a special needs trust is complex work, rife with competing and conflicting interests. Families are strongly encouraged to hire an experienced professional to serve as trustee in these cases.*

*Special needs planning attorneys are often an important member of the team of experts needed to pursue claims when a person is seriously injured. Involving their expertise early in the process can ensure that important public benefits are protected in the process of obtaining compensation for injuries.*

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