

LITTLE KIDS, BIG ACCIDENTS

The Parents' Guide To Child Injury
Cases in Michigan

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Cover Illustration by the beautiful Kylie, the nine year old daughter of the author.

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LEGAL ADVICE

I am not allowed to give legal advice in this book and you should not take the information in the book as legal advice. It is intended to be informative and to provide you and your family with a basic understanding of your rights. If you hire my firm to represent you or a family member for a case, I will fully explain to you your legal rights under Michigan law and assist you in filing your claims. If you have already hired a lawyer before reading this book, you should contact your lawyer with specific questions about your rights and benefits.

Many cases resulting from serious injuries to children involve complex legal issues or questions where the outcomes are heavily, if not completely, influenced by the individual facts of the case. Therefore, for specific legal advice, it is advisable to consult with an attorney who has experience representing the interests of children in injury claims. Anyone who wishes to consult with Mr. Buckfire about a specific case can find his contact information at the back of this book.

WHO I AM AND WHY I WROTE THIS BOOK

As a Michigan personal lawyer for twenty years, I have represented seriously injured clients from babies to senior citizens. As a parent of young children, I am very aware that every parent's biggest fear is their child being sick, injured, or harmed by another. As a lawyer who has specialized in representing injured children throughout my career, I have found it incredibly rewarding to bring them justice through the legal system.

As you would expect, the big businesses, hospitals, and insurance companies that are my adversaries in these cases are very unsympathetic to an injured child. Rather than accept responsibility for their actions that caused harm upon a child, they deny fault and wage an aggressive defense, regardless of truth.

When a child has been seriously injured, the parents are often angry and sad, sometimes filled with guilt, and overwhelmed by the legal process that may ensue. It is therefore often wise to hire a lawyer, and the lawyer should be one with experience in child injury cases.

I have earned a national reputation as a child injury lawyer and have recovered many millions of dollars in settlements for children. I never back down from my adversaries because I know that a child and his parents are counting on me to win their case. I do not take this responsibility lightly.

I see many different types of accident cases involving children. These include:

- Auto Accidents
- Boating Accidents
- Birth Injury Cases
- Medical Malpractice Cases
- Traumatic Brain Injuries
- Burn injuries
- Child Abuse and Sexual Assault
- Lead Poisoning
- Animal and Dog Bites
- School Injuries, including Bus Accidents and Playground Injuries
- Swimming pool accidents or drowning
- Snow Ski Injuries
- Summer Camp and Daycare injuries
- Swing Set or Play Equipment Injuries
- Defective or Dangerous Toys
- Food Poisoning
- Sports Injuries
- ATV and Off Road Vehicle Accidents

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I wrote this book for several reasons. First, I wanted create awareness about the most common injury accidents involving children, so that parents and family members can take appropriate precautions to avoid them. Second, I wanted to offer knowledge and comfort to those parents who find themselves in the awful position of having a child who has been seriously injured due to someone's negligence or carelessness. My final goal was to provide information regarding the legal rights of injured children and explain how our legal system can help remedy the wrongs of others and bring justice to a child. I hope that you find this book to be a valuable resource.

-Lawrence J. Buckfire, attorney

CHAPTER ONE

Basic Facts: Children, Accidents & Legal Claims

Auto Accidents

By far the most common type of injury accident involving children is one that also involves a motor vehicle collision. According to the National Center for Statistics and Analysis (NCSA), nearly 250,000 children are injured every year in car accidents. This means that on any given day nearly 700 children are harmed due to accidents on our roadways. Of the 250,000 kids injured each year, approximately 2,000 die from their injuries. Children make up about 5% of total fatalities due to car accidents. In fact, for children between the ages of 2 and 14, motor vehicle accidents are the leading cause of death.

Car accidents are also the leading cause of acquired disability (e.g., brain injury, paralysis) for children nationwide. And approximately 20% of the children who die in a car accident each year are killed in accidents involving a driver who is legally intoxicated. Nearly half of these children were killed while riding as passengers in an automobile driven by an intoxicated driver.

The failure of a child to wear a seat belt or use a safety seat is a contributing factor in more than half

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of the cases involving children who die in car accidents. Not only is an unrestrained child a potential distraction to the driver of the vehicle, but also the failure to wear a seat belt dramatically increases the chance that a child will suffer much more serious injury or death.

Under Michigan law, all children between the ages of 0 and 3 years old are required to be properly secured in an approved child car seat. For children between the age of 4 and 7 years of age, the legal requirements vary based upon the size and weight of the child. If a child in that age group is less than 4'9" in height, an approved child booster seat is required. If a child in that age group is taller than 4'9", the child must wear an approved and properly fastened safety belt. All children who are ages 8 through 15 years old must wear an approved and properly fastened safety belt. All passengers between the ages 16 through 18 years old sitting in the front seat, as well as the driver, must be properly belted.

Interestingly, children are not required to wear seat belts while riding on a school bus. The National Highway Traffic Safety Association (NHTSA) has determined that school busses already have "built-in protection" for children based on the special construction and side of bus seats, so that seat belt restraints are unnecessary. However, school bus

crashes occurring at speeds greater than 35 mph still pose a serious risk of harm to children who are riding on the bus.

Schools should provide adequate adult supervision while children are boarding and exiting the bus. All bus stops should be located in safe locations that minimize the need for children to cross the street. Parents are well advised to trace their child's normal route to and from school while identifying potential danger spots and also to instruct their child about where to walk and cross the street.

Pedestrian Accidents

In cases involving children who die in traffic accidents, at least 30% involve children under the age of 15 who are pedestrians. Pedestrians account for about 30% of all traffic fatalities involving children under the age of 15 years. NHTSA estimates that more than one-fifth (22%) of children between the ages of 5 and 9 who were killed in traffic crashes were pedestrians.

Children under the age of 10 still need supervision when crossing the street. Often times, a school-age child will forget about vehicles traveling in the street and dart out suddenly and without warning. Many pedestrian accidents involving school-age children

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(ages 6 to 11) occur in the morning and afternoon, and at times when children are typically at play.

Most child pedestrian accidents are preventable. Parents need to be educated about the development limitations of their children in understanding the dangers of a motor vehicle. Parents can also teach younger children about the dangers of playing near the roadway or when it is appropriate to cross the street. And finally, law enforcement can play a pivotal role by diligently enforcing traffic laws in areas where children are active and by making drivers aware of pedestrian crossings.

Bicycle Accidents

Other than automobiles, bicycles are associated with more childhood injuries than any other consumer product. More than 70% of children ages 5 to 14 (27.7 million) ride bicycles. This age group rides 50% more than the average cyclist, accounting for 21% of all bicycle-related deaths and nearly 50% of all bicycle-related injuries. More than 130 children die every year in bicycle accidents and approximately 270,000 are treated in emergency rooms for injuries.¹ Nearly half of these children sustain a traumatic brain injury because of their failure to wear a helmet-or wear a safe and properly fitted helmet.

Studies have shown that a properly fitted helmet can reduce the risk of bicycle-related brain injuries by as much as 88%. Properly fitted bike helmets can prevent an estimated 75% of fatal injuries to children each year. Motor vehicles are involved in approximately 90% of the fatal bike crashes that happen each year. About 60% of child fatalities in bike-versus-auto crashes occur on residential streets. A child who does not wear a helmet is fourteen times more likely to suffer a fatal crash than one who does. Clearly, the chances of injury and/or death decrease dramatically when a child wears a protective helmet while riding a bicycle.

Legal Claims for Car Accidents

In Michigan, there are two (2) types of claims that a child may have due to injuries sustained in a car accident. The first type of claim is for No-Fault insurance benefits and is often referred to as a First Party claim or PIP (personal injury protection) claim. The second claim is a claim for damages due to bodily injuries against the negligent driver and owner of the at-fault vehicle. This claim is called a Third Party claim or Bodily Injury Liability claim.

First Party Claims for No-Fault Benefits

All children injured due to a motor vehicle are entitled to Michigan No-Fault Insurance benefits, even if their

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parents or guardians did not have a Michigan auto insurance policy, and they are entitled to receive them regardless of their own fault. For example, a child who darts out in the street and is struck by a passing motorist is still entitled to receive these benefits.

There are many factors that determine which insurance company is responsible for paying No-Fault benefits. In cases involving children, typically the No-Fault insurer that insures the child's parents or relatives has priority legal responsibility to pay for the child's No-Fault benefits. If there is no insurance in the household, then there are rules for determining which insurer has the responsibility to pay for the child's benefits.

In cases involving children, these benefits typically include unlimited lifetime medical expense coverage, medical mileage, attendant care and other benefits, such as home and vehicle modifications. If the child is a teenager and working, the benefits can include wage loss benefits for up to three years following the accident.

No-Fault benefits available to a child injured in a motor vehicle accident include all reasonable and necessary expenses related to the accident. All medical bills that are reasonable and necessary and related to the car accident are covered by the No-Fault insurance company. These medical bills include,

but are not limited to, hospital bills, doctor bills, physical therapy bills, prescriptions, ambulance bills, medical appliances such as a wheel chair, walker, back brace, etc., and transportation expenses for medical appointments. There is no limit on the amount of money that the No-Fault insurance company must pay for accident related medical treatment and these benefits are available for lifetime.

In serious injury cases, family members often provide in home *attendant care* to an injured child, while the child recovers from his or her injuries. These benefits are paid to have a person attend to the injured child's needs while he or she recovers from his or her injuries. These services can include, but are not limited to, assisting with toileting, showering, feeding, medications, and supervision. The care provider can be a family member, friend, nurse or someone from a nursing agency.

Other benefits include transportation expenses for medical appointments and home modification expenses. Home modification benefits are paid when the injured child cannot comfortably live in his or her current home or apartment because of physical limitations caused by injuries from the accident. The insurance company is required to pay for remodeling for items such as handicapped ramps, additional rooms, wider doorways, and even bathrooms and showers to make it easier for an injured child to live in the home.

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There are strict time limits on First Party claims. You must file a written Application for No-Fault Benefits with the proper insurance company who has priority for paying your child's claims within one year of the date of the accident. If you fail to do so, you will not be able to obtain No-Fault Benefits. Also, written claims for attendant care, wage loss benefits, medical expenses, household services, and other no-fault benefits must be sent to the proper insurance company within one year of the date of the expense.

If you fail to meet these deadlines, you will not be able to obtain recovery or reimbursement for the claim or expense. In addition, if an insurer fails to pay a medical bill, wage loss claim or any other claim, you must file a lawsuit against the insurer within one year that the expense was incurred to preserve your child's right to that particular claim.

Third Party Claims for Bodily Injury Damages

In addition to the claim for No-Fault benefits, an injured child may be entitled to make a claim for damages due to pain and suffering against the driver at fault for the accident. A claim can also be made against the owner of the car that caused the accident. This claim is called a Third Party claim or Bodily Injury Liability claim.

If the driver of the other car was at fault in the accident and a child suffered a serious injury or disfigurement (like a scar), the child can sue the driver and the owner of the other car. A claim is made against the driver and owner of the car that caused the accident, and your child's damages are covered by their insurance company.

Also, if your child is injured as a passenger in his or her parent's car and the parent was at fault, the child can make a claim against the parent. In these cases, the court appoints someone other than the parent to act as the child's representative in the lawsuit.

Typically, a person must file a Third Party lawsuit with the court within three years of the date of the accident. However, in cases involving children the deadline in which to file the lawsuit is extended until the child's 19th birthday. In order to protect your child's rights, we recommend that you contact an attorney immediately to find out the time limitations involved in suing the driver and owner of the car that caused the accident.

For a more detailed explanation and analysis of the legal rights after a Michigan car accident, you can request our book **"The Ultimate Michigan Car Accident Handbook."** The book has been called the *"best book ever written for consumers on their rights after a Michigan car accident."*

Dog Bites

According to the Centers for Disease Control and Prevention (CDC), an estimated 68 million dogs are kept as pets in the United States. More than one million dog bites are reported each year. And there are estimates that an equal number of dog bites (one million) go unreported each year. Of the one million or so dog bites reported each year, about 60% involve an injury to a child. Approximately 70% of dog bite wounds are inflicted on the child's face. Children ages 5 to 9 have the highest dog-bite-related injuries.

If you plan to have young children and a dog, it is best to adopt the dog while it is young and introduce it to the children during the toddler age. However, dogs need to be introduced to children of all ages. Young toddlers will act differently around the dog than a 10-year-old child will. Children should be involved with the training sessions of the dog. This allows the dog to experience the child as an authoritative figure, thereby decreasing the chances that the dog will bite the child. Children should be involved in other caretaking activities, like feeding, grooming, and bathing the dog.

Parents should never leave young children along with a dog, particularly if the dog has limited experience with that child. You can teach children to recognize fearful or aggressive behavior in a dog so they can

take steps to avoid or minimize the risk of a bite. And finally, parents should set good examples of how to treat the dog. Children tend to emulate their parents' behavior, which would include the parents' interaction with the dog.

Overview of Michigan Dog Bite Laws

In Michigan, the law recognizes three potential causes of action arising out of a dog attack incident: (1) statutory strict liability; (2) common-law strict liability; (3) and common law negligence (including statutory and ordinance violations).

Michigan has enacted *statutory strict liability* under what is commonly referred to as the "Dog-Bite Statute." Under this law, if a dog bites a person, without provocation, while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog is liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

This means that if someone is bitten while lawfully on public or private property, the owner of the dog is automatically liable for any injury or damage the dog causes as long as the dog was not provoked.

In addition to strict liability under the dog-bite statute, Michigan law recognizes two other potential causes of action arising out of a dog attack incident: *common-law strict liability* and *common law negligence* (including statutory and ordinance violations).

Some people believe that the one-bite rule is the law in Michigan. This rule means that the owner is not liable or responsible if the dog had never bitten anyone before your incident. This law **does not exist** in Michigan and dog owners are not entitled to a free bite.

For a more detailed explanation and analysis of the legal rights after a Michigan dog bite, you can request our book **"The Ultimate Michigan Dog Bite & Animal Attack Handbook."**

School & Day Care Injuries

Many children spend a great part of their day in day care or in school. Parents put a great deal of trust in these facilities to provide proper supervision and safe environments for their children. When a child is injured in one of these settings, there are several potential legal claims that can be pursued depending on the nature of the injury and the type of accident.

Possible legal claims for these types of child injuries include the failure to provide proper supervision, the

failure to provide safe premises, the failure to keep the child away from dangerous items, and the failure to prevent the child from being injured or bullied by other children. Most day care agencies and schools are insured for these types of claims.

If the child is injured in a public school, there are certain legal obstacles to overcome due to the grants of immunity from being sued that Michigan law gives to public schools. An experienced child injury lawyer will carefully review the facts of the case and advise you whether Michigan law permits the filing of a claim.

Playground Injuries

The CDC reports that more than 200,000 children ages 14 and younger are treated at emergency rooms each year for playground-related injuries. About 45% of injuries on playgrounds are severe (i.e., fractures, internal injuries, concussions, dislocations, and amputations.) About 75% of nonfatal accidents occur on public playgrounds, with most occurring at schools and daycare centers. Between 1990 and 2000, there were 147 deaths of children at or under the age of 14. Fifty-six percent of these deaths were caused by strangulation and 31% occurred due to falls onto the playground surface. Most of the deaths (70%) occurred in home play areas.

A child injured due to a playground injury has a number of potential legal claims. These include claims for defective equipment, claims for a lack of protective safety measures, and claims for negligent supervision. Since many playground injuries occur on school grounds and during school hours, there are legal obstacles that may prevent a claim, even for a very serious injury, to be filed. It is important to contact an attorney as soon as possible after such an incident so that a prompt investigation can be performed.

Swimming Pool and Water Accidents

The CDC reports that there are on average nearly 10 drowning accidents occurring every day. More than one in four fatal drowning accidents involve children ages 14 and younger. For every child who drowns, there are at least 4 others who visit the emergency room for nonfatal submersion injuries. Nonfatal drowning injuries can be catastrophic and can cause permanent brain damage, including problems with learning and memory, and permanent loss of brain function.

There are certain risk factors that exist for fatal and nonfatal drowning accidents. A major risk factor is the absence of pool barriers; another is the absence of parental supervision. Most pool accidents involving children occur within minutes after the child was last seen alive. Many pool incidents occur because the

child has easy access to the water. Drowning incidents that occur in natural settings like lakes, rivers, and oceans increase with the child's age.

Parents can take certain steps to minimize the risk of a drowning incident. First, it is essential that children be taught to swim at an early age. Most swim schools teach children how to get to the side of a pool and climb out of a pool. Barriers and safety fences are also essential to prevent children from entering into a pool area itself, and pool alarms can alert a parent if a child enters into a pool without their knowledge.

However, there is no substitute for continuous adult supervision both when children are in the pool and even outside of a pool. Do not let children use improper inflatable devices without direct supervision. Toys like "water wings," "noodles," and "inner tubes" are not designed to keep swimmers safe. These toys can give a child a false sense of security, thereby encouraging the child to take greater risks (e.g., venturing out into deeper water). Also, do not engage in other distracting activities, like yard work, while children are in the swimming pool. If you are unable to keep constant supervision, pull the children out of the pool until you are able to devote your complete attention to them.

There are several legal theories that are used to pursue claims for children injured in swimming pool

accidents. Claims for damages can be filed due to the lack of proper supervision, the failure to have safety devices at the pool (life hook, life preserver, emergency phone), and even poor maintenance at the pool. In pools that are not properly maintained, children can have difficulty with their footing and may not be observable if they are below a filthy water surface. Also, the failure to have functioning pool lights is a major risk factor, especially when children are swimming at night. These vary depending on the type of pool and the location of the pool (residence, school, public, hotel, etc.) where the incident occurred.

Household Accidents

Home injuries are one of the top reasons why children under the age of 3 years visit the emergency room. Nearly 70% of children who die at home from unintentional injuries are age 4 and younger. Young children have the highest risk of being injured at home because that is where they spend most of their time. Examples of these types of accidents include falling down stairs, ingesting poisonous substances, getting electrical shocks or burns, and being subject to cuts or amputations from playing with sharp or dangerous objects.

A child injured due to a dangerous or defective product may have a claim against the manufacturer or seller of the product that causes the injury. If the

accident occurs in someone else's home, a claim can potentially be made against the homeowner where the incident occurred if the child was unsupervised or permitted to play with a dangerous object or around a dangerous condition. The homeowner's insurance company of that individual will often pay a settlement to the injured child.

Medical Malpractice

Children who are victims of medical malpractice often suffer significant injury or death during the birthing process. Birth injuries include cerebral palsy, shoulder dystocia, Erb's palsy and other injuries that arise during pregnancy or at the time of birth. Defects and neurological injuries caused at or before birth often affect the child and the family for a lifetime.

Medical negligence cases involving children include death and permanent brain damage. Because medical negligence cases are often settled or resolved confidentially, there is no reliable database to show the actual number of children who are victims of medical negligence. Many times the negligence goes unreported due to the parents' unawareness and/or because the child's injuries are less than catastrophic or severe.

The legal basis for most medical malpractice cases is the failure of the medical provider to timely diagnose

and treat a medical condition or illness. **The most common types of conditions or illnesses that give rise to a child medical malpractice case include:**

- Birth Injuries & Defects
- Cerebral Palsy
- Erb's Palsy
- Shoulder Dystocia
- Jaundice
- Meningitis
- Pneumonia
- Appendicitis
- Testicular Torsion
- Lyme's Disease
- Hip Dysplasia

In addition to proving negligence by a medical professional, the victim must also establish that the ultimate outcome would have been better had the malpractice not occurred. For example, a doctor might fail to timely diagnose appendicitis in a child complaining of severe abdominal pain, but if the diagnosis is ultimately made and the child undergoes the necessary surgery without any additional injuries or damages, there would be no case. This is simply because the medical error did not result in an additional injury to the child.

Also, many procedures and surgeries have the potential for complications and a bad result or

outcome may just be a normal risk of the procedure. In addition, many illnesses and conditions have a poor prognosis even with the best possible medical care. Therefore, a poor outcome or injury does not necessarily mean that there was malpractice committed by the medical provider.

To pursue a medical malpractice lawsuit, it is necessary that a physician review the medical records and sign an Affidavit stating that the child's doctor or a hospital provided negligent medical treatment. An experienced medical malpractice lawyer will seek out the best possible medical experts to review the records and give an opinion as to whether the child was the victim of medical malpractice.

For a more detailed explanation and analysis of the legal rights regarding medical malpractice cases in Michigan, you can request our book **"The Ultimate Michigan Medical Malpractice Handbook."**

Lead Poisoning

Lead poisoning is a devastating injury to children throughout the United States. Lead is a neurotoxin that affects a young child's developing central nervous system. Children are especially vulnerable to the effects of lead poisoning.

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The degree of lead exposure is measured by a blood test. Most often, the diagnosis of lead poisoning is discovered through routine health department tests or pre-school admission examinations. Blood lead levels are measured in "micrograms" of lead per "deciliter" of blood, or "ug/dL." As determined by the Center for Disease Control, any level over 10 ug/dL is considered to be an elevated level and a child would be at risk. A level over 20 ug/dL is considered high and requires full medical evaluation. A level over 40 ug/dL requires prompt medical attention and a level over 70 ug/dl is critical and can result in coma or even death.

The injuries caused by lead poisoning are well documented. The effects are permanent and irreversible and often become more noticeable as a child ages and the tasks in school become more difficult. A common diagnosis of lead poisoned children is attention deficit disorder and hyperactivity (ADHD), learning problems, speech and language impairments, and decreased IQ. and brain. The treatment for lead consists of removing a poisoned child from the environment, provided a high iron diet, and quite often includes chelation therapy.

Lead-based paint is the biggest lead hazard in our environment. The primary source of the lead is through chipping and peeling lead-based paint and through the inhalation of dust particles. The federal government estimates that lead paint is present in

three out of four homes built before 1978, but only homes that are not properly maintained constitute potential hazards to children.

The biggest hazards are often on window sills and in window troughs, where there is frequent friction which causes the old paint to peel and chip. Other primary sources include outdoor porches and soil around the home, where child often play with paint chips that have fallen from the exterior of the property. More recently, toys imported from China have been found to contain lead paint and this has raised additional concerns.

Children who suffer lead poisoning have several possible legal claims. The primary defendant in these cases are landlords who rented homes or apartments to the child's family and failed to properly maintain the lead based paint surfaces inside or outside the home. A child who is lead poisoned as a result can file a lawsuit alleging that the landlord violated the duty to provide safe and sanitary housing and also violated Michigan statutes and local ordinances.

Other claims for child lead poisoning can be brought against property management companies, maintenance companies, and other locations where a child is lead poisoned, like a school or daycare center. Additionally, if a child is poisoned due to a defective toy or other

product, a claim can be made against the maker, distributor, and seller of the product.

Child Abuse/Shaken Baby Syndrome

Child abuse can take many forms. It can manifest itself as the slow and insidious chronic neglect of a child by their primary caregiver, or it can be as shockingly apparent as a broken limb or a shaken baby. Often, a single child will experience more than one kind of abuse or neglect. Tragically, more than 2,000 children die each year from child abuse and neglect across the United States.

Federal law provides a foundation definition of child abuse and neglect in The Child Abuse Prevention and Treatment Act (CAPTA), which individual States must incorporate into their own definitions. Basically, child abuse and neglect can be separated into four categories: physical abuse, neglect, emotional abuse, and sexual abuse.

One form of physical abuse is known as "Shaken Baby Syndrome," a type of inflicted traumatic brain injury that happens when a baby is violently shaken. A baby has weak neck muscles and a large, heavy head. Shaking makes the fragile brain bounce back and forth inside the skull and causes bruising, swelling, and bleeding, which can lead to permanent, severe brain damage or death.

Shaken baby injuries usually occur in children younger than 2 years old, but may be seen in children up to the age of 5. Emergency treatment for a baby who has been shaken usually includes life-sustaining measures, such as respiratory support and surgery to stop internal bleeding and bleeding in the brain. Doctors may use brain scans, such as MRI and CT, to make a more definite diagnosis. In comparison with accidental traumatic brain injury in infants, shaken baby injuries have a much worse prognosis. Children with shaken baby syndrome often require lifelong medical care.

If you suspect that a child is being abused and neglected, the best thing you can do to protect that child is to take action immediately. It is very important to act quickly before that child's life is irrevocably altered by a catastrophic event resulting from the abuse or neglect. Not only is acting quickly in the child's best interest, but it is also the law. Anyone who could have prevented the child's injury or could have reported the suspected abuse before the child was affected could be held liable for damages if they fail to act.

It is important to know that in many states, including Michigan, that most health practitioners and child care professionals, including teachers, are required to report suspected cases of abuse or neglect in a timely manner. The failure to report suspected child

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abuse in a timely manner can result in significant additional injuries to the child. The failure to investigate and report suspected child abuse can give rise to a civil lawsuit for physical injuries, disability, pain and suffering, medical bills, and future lost wages sustained by the injured child.

For a more detailed explanation and analysis of the legal rights regarding personal injury cases in Michigan, you can request our book **"The Ultimate Guide to Injury Cases in Michigan."**

CHAPTER TWO

Important Legal Ramifications In Child Injury Cases

Does a Legal Claim Exist?

A child may have a legal claim arising from an injury accident. A legal claim arises when the child is entitled to compensation for the injuries and damages proximately caused by the accident. Whether a child has a legal claim for injuries sustained in an accident will depend on many different factors.

Generally, a child will only have a legal right to recover compensation if the injuries were caused by another party's negligence. In Michigan, the term "negligence" is defined as a person's failure to exercise "ordinary care," or the kind of care that would be deemed appropriate in the particular situation that led to the child's injury. Not only can a person be found negligent, but so can a corporations and governmental agencies.

Oftentimes, it is easy to determine whether a party was negligent, such as when a driver runs a stop sign or fails to yield to pedestrians in a crosswalk. The violation of a known rule, statute, or regulation can also provide evidence of a party's negligence. For example, if a person injures a child and also violates

a statute or regulation while doing so, that violation may be admissible in a subsequent trial to prove that the person was negligent.

Negligence of the Child

Under Michigan law, a child under the age of 7 years old cannot be found to be negligent. This means that any time a child under age 7 has a legal claim for injuries caused by an accident, that child is deemed fault-free for purposes of deciding which party negligently caused that child's injuries. A child 7 years and older can be held to be negligent.

For example, if a 4 year old child jumps into a swimming pool at a neighbor's home with no adults present, the neighbor may be negligent for failing to supervise the child at his home. However, the child cannot also be determined to be negligent for jumping in the pool without adults present based upon age alone. If the child was 10 years old, the neighbor could argue that the child should have known better and should be apportioned a percentage of the fault.

Even though a child of 7 years and older can be found negligent, the child is held to a different standard than an adult under Michigan law. A child is only negligent if that child fails to exercise the ordinary care that a "reasonably careful child of the same age, capacity, and experience would exercise under the

same or similar circumstances." Thus, a 7 year old is held to a different standard as an 11 year old. An exception to this rule exists where the minor engages in a dangerous and adult activity, for example, driving an automobile. In this circumstance, he or she is charged with the same standard of conduct as an adult.

Parental Negligence and Parental Immunity

Usually when a child has been injured in an accident, the conduct of the child's parents is called into question. Typically, the insurance company will try to blame the parents and argue that the child was injured in large part due to the parents' failure to adequately supervise the child. But this argument often fails because Michigan recognizes that the conduct of a parent is often protected by what is called the Parental Immunity Doctrine.

Under this doctrine, a negligent parent is immune from liability for injuries caused to the child where the conduct of the parent involved: (1) an exercise of reasonable parental authority or (2) reasonable parental discretion regarding the provision of food, clothing, housing, medical and dental services, and other care. The Parental Immunity Doctrine is based upon the public policy of maintaining family tranquility and avoiding the fear of undermining parents' control and authority over their children.

The courts in Michigan have rejected numerous attempts to blame a parent for injuries caused to the child based on allegations of inadequate supervision. Thus, if a parent fails to supervise a child's behavior, he or she is immune from liability for any injury that may result from that negligence, even when the child's injury is severe.

However, child abuse or neglect is not a reasonable exercise of parental discretion. Also, the Parental Immunity Doctrine does not apply when the child's injuries are due to the parent's negligent driving. That means a child is still permitted to pursue a legal claim against his parent if the injuries arose from a car accident that was caused by the parent.

Statue of Limitations

There are strict time deadlines, called the Statute of Limitations, for filing lawsuits in Michigan. The time limits are different on when a person may bring a legal clam arising from an injury accident. This is no different for claims brought by children. However, the general rule in the State of Michigan is that a child has until the child's 19th birthday to bring a claim, even if the general limitations period is much shorter.

For example, the statute of limitations for a dog bite case in Michigan is three from the date of the injury.

This means that a person must file a lawsuit within

three years of the date of the incident or the claim will be forever time-barred. However, if a 4 year old child is bitten by a dog, the child still has until his 19th birthday to file a lawsuit against the dog owner. This allows the child to make his own decision after becoming a legal adult to file a lawsuit, even though the child's parents decided not to do so many years earlier.

It is usually not a good idea to wait this long to resolve the claim, especially if the case involves injuries to a younger child. With the passage of time, it often becomes difficult to locate witnesses and other evidence that is necessary to prove and win a case. However, certain exceptions may justify waiting until after the age of majority, depending on the facts of the claim.

There is a different statute of limitations period for medical malpractice cases involving children in Michigan. Children are not given until their 19th birthday to file their lawsuit. For medical malpractice cases involving a minor less than eight years of age, the statute begins to run on the minor's 10th birthday or within the two-year medical malpractice statute of limitations, whichever time period is greater. Where a minor under 13 suffers an injury to the reproductive system, the statute begins to run on the minor's 15th birthday or within the general two-year statute of limitations, whichever time period is greater. There

are also requirements even before a malpractice case can be filed in Michigan and these also have specific deadlines.

Due to the complexity of these time limits and deadlines, it is important to contact an attorney as soon as possible even if you are only considering filing a lawsuit so that the claims are not later destroyed due to a missed deadline.

Claims Against the Government

There are occasions where a child is injured and the potential defendant is a government entity. Possible cases against governmental entities include injuries that occur in school or in a public building, due to a defect in a roadway or sidewalk, or as a result of medical malpractice in a state or government hospital.

If a child has a claim against a governmental entity, such as a town, municipality, county, or state, certain requirements must first be met. Primarily, several statutes in Michigan require that the governmental entity be put on formal written notice of the potential claim within a specified time frame. This can be as soon as sixty days after the accident for certain types of cases.

This time deadline is completely different than the statute of limitations and this period is not extended

until the child's 19th birthday. Therefore, if parents believe that a governmental entity was negligent for injuries to their child, they should pursue the case immediately so that they do not miss a required deadline.

Children Testifying in Court

If a lawsuit has been filed to recover financial compensation for a child's injuries, that child may be called to testify in court. However, most cases involving children never go to trial. Therefore, the chances that a child will be forced to testify in court are extremely low.

The general rule in Michigan is that every person, regardless of age, is competent to testify unless the court finds otherwise. However, a child's competence to testify may be a potential issue whenever very young children are involved. Nonetheless, children as young as four (4) years old have been allowed to testify. The burden of proving that a child is incompetent to be a witness is on the person challenging the competence.

The test for a child's competency to testify is whether a child has the capacity and sense of obligation to testify truthfully and understandably. It is a matter of a trial judge's discretion as to whether a child is competent to testify.

Likelihood of Going to Court

Most child injury cases settle without going to court or trial. Statistically speaking, the chance that a typical personal injury case will go to trial is extremely small, probably less than 5% of all cases. The likelihood that a personal injury case involving a minor child will go to court is probably even smaller. In cases where the evidence of liability against the defendant is strong and the injuries are fairly serious, the likelihood of the case going to court will be even smaller.

Despite the low probability of a child injury case ever going to court, the case should nevertheless be thoroughly prepared as if it were going to trial. Insurance companies and their attorneys will not agree to pay a premium settlement offer unless they are convinced that there exists a strong possibility of a jury awarding much more money if the case were to go to trial. A case that has been completely and thoroughly prepared will therefore increase the likelihood that the case will settle short of trial.

CHAPTER THREE

Dealing with the Insurance Company

In those cases where a child has been injured by a negligent party with insurance, the parents may have to deal directly with the insurance company if they had not yet hired a lawyer. Parents will need to address questions of liability and damages, including payment for the past and future medical expenses and other damages incurred by the child. This can be a daunting and intimidating task. The parents of the injured child are already under a tremendous amount of stress, given the traumatic nature of their child's injury.

Insurance adjustors are trained to take advantage of people who do not have legal representation so that the insurance company can resolve or settle the claim as cheaply as possible. The adjuster may act friendly and interested in helping the family of an injured child, but adjuster's ultimate goal is to convince the family that there is no case and encourage them to accept a small settlement. He may offer to pay a portion of the medical expenses but will deny any claims for the actual injuries themselves.

Adjustors are also trained to take recorded statements from accident victims and witnesses without an attorney present. They often try to get

the interviewee to admit things that are either not true or partially true and many times the person does not even understand the question. The adjuster then gives this statement the insurance company lawyer to use against the victim later on in court. I would strongly advise any parent from speaking to an insurance adjuster without having a lawyer present. If you do decide to give a statement to the adjuster, definitely do not let the adjuster record the conversation.

Here are some of the other tactics the adjuster will use against claimants so they will accept much less money than what the claim is worth:

1. **Using delay tactics.** The adjuster is a master of using delay tactics to wear people down. He or she knows that many people (80-90%, according to some insurance company estimates) will grow tired of the delaying tactics and simply throw up their hands and say, "Enough!" These people will accept the low-ball offer just to be done with the entire unpleasant process.
2. **Requesting unnecessary information.** Yes, it's true that the insurance company will need records, receipts, bills, reports, and other documentation to support the claim. But sometimes the request for documentation is

unnecessary—for example, asking for medical records from 10 years before the accident, or asking for tax returns from the same period. Such information typically is unnecessary and is only requested to delay resolution of the claim. Insurance adjustors know that repeated requests for unnecessary documentation can easily frustrate people and wear them down so that they are more likely to accept a low settlement offer.

3. **Disputing the medical treatment.** Despite the absence of any medical training, the adjuster may question the need for treatment or certain procedures or worse: second-guess your own doctor. Many times it does not matter to the adjuster that your treatment has been recommended by a reputable licensed physician.
4. **Disputing the medical charges.** Sometimes the adjuster will only agree to “accept” 70, 80, or 90% of your past medical charges. Again, such an assertion is made without having any medical background to support such a position. When “nickel and diming” the consumer, the well-trained adjuster knows that most people will not hire a lawyer to challenge the refusal to pay a small portion of the medical bills.

The problem is that as a parent you are responsible for all medical bills for your child and will have to pay out of your own pocket whatever the insurance adjuster does not pay. If the adjuster tells you that the medical provider will accept payment of 50% of the bill as payment in full, this is usually not true. If you are inclined to take this risk, I would suggest getting something in writing from the medical provider accepting a partial payment as a payment in full.

5. **Telling you not to hire an attorney.** Sometimes the insurance company will tell you that hiring an attorney is unnecessary. This is illegal. Other times, the adjuster will try to prevent you from retaining an attorney by falsely stating that any settlement money you receive will go entirely to the attorney. Still, other times the adjuster may threaten to “deny” the claim if you hire a lawyer. If a claims representative tries to steer you away from retaining an attorney, this should be your first clue that using an attorney may actually produce a much higher recovery for you (even after deducting the attorney’s fee).
6. **Misrepresenting insurance policy benefits.** Sometimes the adjuster will misrepresent the amount of the insurance coverage that is

available to you. Or worse, the adjuster won't tell you that the or certain types of benefits even exist. This tactic may be used to entice you into accepting a smaller settlement than the injured child deserves to receive.

This is especially true in cases involving business and corporate defendants who might have umbrella insurance policies, which are high limit insurance policies that are added to the regular liability policy. The adjuster may tell you the limits of the liability policy without disclosing to you that there is a substantial umbrella or "excess" policy. If you learn about this umbrella policy after you settle your case and have signed a release of all claims, your child is out of luck and can never come back and obtain more compensation in the future.

Misrepresenting insurance policy information is also common in auto accident and pedestrian accident cases. The adjuster may not reveal the actual insurance policy limits or any umbrella policies and may also not disclose that certain types of insurance coverage can be "stacked" on each other to provide more coverage. The adjuster may also not tell you about your own auto insurance coverage that may help your child, like uninsured motorist's

coverage and underinsured motorists coverage. These may also substantially increase any settlement that your child might receive.

7. **Acting as your friend.** There are times when the claims adjuster will "befriend" you and make it appear that he or she is watching out for your interests when in fact that is not the case. Sometimes the adjuster will give you advice about the type or frequency of your medical treatment, and then decide later on not to pay for the treatment because it is "excessive."
8. **Make false promises.** There are times when the adjuster will make promises to you that he or she knows can't be met. The adjuster's primary loyalty is to his/her employer (the insurance company) and to his/her insured (the negligent party). Any adjuster who makes promises "for your benefit" inherently creates a conflict of interest. Oftentimes the adjuster already knows that a conflict is created by promising to protect your interests, but he/she knows this is the one way to get you to lower your guard and get you to agree to terms that your attorney would never allow.

There are just a few of the tactics the insurance industry will use to accomplish its

goal of getting parents to accept smaller settlements for their injured children. Parents need to be aware that they are dealing with professional negotiators who strive to fulfill the insurance company's primary objective: to settle claims for much less than they are worth. Lower settlements mean bigger company profits. If parents begin to feel overwhelmed, they should not hesitate to consult with an attorney who has expertise in child injury claims.

CHAPTER FOUR

Children and Traumatic Brain Injury

Unfortunately, traumatic brain injury (TBI) is very common among children who are victims in accidents. According to the Centers for Disease Control, nearly one million children suffer a traumatic brain injury (TBI) each year.³ More than 100,000 of these children require hospitalization. These figures probably underestimate the incident rate of TBI among children because many children require hospitalization.

In my practice I regularly see TBI cases involving children who display a complex array of problems following head trauma. These include:

1. ***Physical impairments.*** These include speech, vision, and hearing impairments, as well as light sensitivity, headaches, seizures, partial paralysis of one or both sides of the body, and balance problems.
2. ***Cognitive impairments.*** These include long- and short-term memory issues, impaired concentration, mental processing difficulties, and language problems.
3. ***Psychosocial, behavioral, and emotional impairments.*** These problems can manifest as

fatigue, emotional outbursts, inability to control anger, depression, personality changes, impaired coping skills, and the feeling of being overwhelmed in response to normal daily activities.

Since most brain injury cases in litigation involve mild TBI (MTBI), the existence of the condition is often a central and disputed issue in the case. Most of the time the MTBI victim's diagnostic imaging tests (i.e., X-ray, CT and MRI scans) will appear normal. This is because the damage to brain tissue, consisting of nerve fibers and cells, is often microscopic and therefore may not be detected by conventional radiology imaging techniques.

Many times, a child will be tested by a neuropsychologist to determine the extent of the injuries and impairments of brain function. The neuropsychologist uses a written battery of tests and interviews occurring over the course of a few hours in one day, or several hours over a few days, to help measure brain impairment or dysfunction. The test results on children can provide information on the child's ability to learn, communicate, plan, organize, and relate to other people. The neuropsychological assessment will provide critical information that parents and teachers can use to build effective educational plans for the brain-injured child.

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In cases involving children who have suffered a traumatic brain injury, monetary compensation can be sought for the child's pain and suffering, disability, loss of social pleasures, and other non-economic damages. Other claims for damages are made for special education needs, special housing needs, and necessary supervision for the safety of the child. In addition, claims for a child's loss of potential earnings over the child's lifetime are made to show the amount of earnings a child lost due to a brain injury.

CHAPTER FIVE

The Legal Process for Child Injury Claims

The legal process for child injury claims differs from the legal process for cases brought by adults. For starters, a child under the age of 18 is considered a minor. In Michigan, a minor cannot file a lawsuit on his or her own. This can only be done by a *guardian ad litem* appointed by the court. A *guardian ad litem* is someone (usually a parent or legal guardian) who the court believes will adequately protect the child's interests and do what is best for the child in the lawsuit that is being filed on the child's behalf.

The person who files a lawsuit is called the *plaintiff*. The person or entity that is being sued is called the *defendant*. The defendant will most likely be represented by a lawyer hired by the insurance company to defend the case.

After the lawsuit is filed and the defendant is served, both sides participate in a process of asking for and exchanging information about the case. This process is called *discovery*. This includes written questions to each other, requests for documents and records, and obtaining medical records and reports.

The discovery process may also include a *deposition*. A deposition is a face-to-face meeting where the

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attorneys are allowed to ask a witness questions under oath while a court reporter transcribes the session. Depending on the age of the child, the defense attorney may elect to take the child's deposition. The parent or guardian is allowed to sit with the child during the proceeding and the child's attorney is also present.

The discovery phase may also include a request by the other side that the child submit to medical examinations, or a psychological or neuropsychological evaluation, or all three. When a lawsuit involves a claim for personal and psychological injuries, the law permits the defendant to use a doctor or psychologist chosen by the defense to examine and evaluate the injured person. This can be a stressful event, particularly in cases involving children.

Many attempts are made to settle the case after discovery has taken place. This includes mediations and settlement conferences with the court. The parents work with their child's attorney during this process to obtain a settlement that is in the best interest of the child. Quite often, a mediator will be appointed by the court to assist the parties in working out a settlement.

If the case does not settle, it will proceed to trial. At a trial, a judge or jury will listen to the testimony and review evidence presented to them. At the

conclusion, a verdict will be rendered in favor of one of the parties.

CHAPTER SIX

The Wrongful Death of a Child

Nothing is perhaps more tragic or sad than the wrongful death of a child. The pain of the loss may be magnified even more because of the manner in which the child died – for example, if the child’s death was due to another person’s negligence or could have been prevented with reasonable safety precautions.

Because this book covers the subject of child injury claims, it would not be complete without addressing the subject of a child’s wrongful death caused by another’s negligent or reckless conduct. There are special laws in place that address this type of claim.

While clearly no amount of money will ever bring back the child or make up for such a terrible loss, the law recognizes such a claim and gives a parent a specific right of redress against the responsible party.

The recovery of compensation may play a part in holding the responsible party accountable for such a terrible harm, and may also act as a deterrent to future similar acts. The claim may also assist parents in the grieving process and help bring closure, although the memory of that event will almost certainly never go away. For those parents who are experiencing such a tragic loss, I want this chapter to make them aware of the specific laws, procedures,

and issues that may arise in a wrongful death case brought for the death of their child.

In Michigan, a wrongful death claim is governed by certain laws called *statutes*. A wrongful death claim is based on statutory laws – as opposed to common law, which are laws created by our courts in other past cases. The laws governing such a claim may differ from state to state. Usually, but not always, the law of the state where the death occurred will be the law that controls the cause of action against the responsible party.

Michigan's Wrongful Death Law

In Michigan, parents, siblings, and grandparents may recover damages for the loss of a minor child, but a stepparent may not recover unless he or she adopted the child. These claims are subject to the Michigan Wrongful Death Act. The damages include loss of society and companionship, loss of support, and economic loss. The estate of the deceased child can also be compensated for the child's conscious pain and suffering.

In certain circumstances, parents, siblings, and other kin of a deceased child have been precluded from wrongful death recovery. For example a child's estranged biological father was denied recovery for companionship damages where he had not developed

a family relationship with his two-year-old daughter. In addition, a grandparent who had been estranged from a grandchild for 13 years and made no attempt to maintain a relationship was excluded from the proceeds of a wrongful death settlement.

Wrongful Death of a Fetus

Under Michigan law, a person can recover damages if conduct against a pregnant woman causes a miscarriage or stillbirth or causes physical injury to or the death of the embryo or fetus, regardless of gestational age. Under the law, the death of an embryo or fetus is to be treated as any other death for purposes of a wrongful death action, and viability of the fetus is not an issue.

Legal Process for Wrongful Death Claim

The legal process for a wrongful death case is similar to other types of injury cases, except that the only person who may legally bring a claim is the *Personal Representative* (PR) of the child's estate. The PR must be appointed by the court. A petition is filed that asks the court to appoint a person as the PR. In the case of the wrongful death of a child, the PR is often a parent (unless, of course, a conflict exists). The PR will then have full authority to proceed with the lawsuit and agree to a settlement."

Damages for Wrongful Death of a Child

As discussed earlier, the damages recoverable for the wrongful death of a child include loss of society and companionship, loss of support, and economic loss. The estate of the deceased child can also be compensated for his or her conscious pain and suffering.

Evidence of the child's role in the family, relationship with other family members, and quality and length of time spent with family members are all elements of the loss of the child's society and companionship.

When a parent seeks recovery for damages sustained because of the wrongful death of a child, the parent's comparative negligence is relevant to the issue of the parent's damages. However, the comparative negligence of the parent may not be imputed to the child in determining damages to the estate of the child for conscious pain and suffering.

CHAPTER SEVEN

The Settlement Process for a Child's Injury Claim

In Michigan, there are special conditions that must be met in the settlement of a child injury claim. In every settlement of a minor's claim, whether filed in court or not, there must be approval of the settlement by either a circuit court or probate court judge. This is true whether your child was represented by an attorney or whether you handled the case yourself.

The court may also appoint a Guardian Ad Litem, usually an attorney, to review the facts and injuries and make a written recommendation to the court regarding the sufficiency of the proposed settlement. This is way that the legal system ensures that the settlement is in the best interest of the child and is fair and reasonable.

For every settlement involving a child, a written petition must be filed with the court requesting approval of the settlement. The court then sets a hearing to listen to testimony regarding the case and the reasons that the person bringing the claim believes that the settlement is in the best interest of the child. The person bringing the claim on behalf of the child and the child must be present at the hearing with their attorney.

The court requires that evidence of the child's injury and medical treatment be presented at the hearing to justify the settlement amount. If the child has disfiguring scars from an injury, the judge will want to look at them. Depending on the location of the scars, the judge will look at them in open court and then describe on the "record" what was observed. In other situations, the judge will look at photographs of the scars before approving the settlement.

The court must also approve the attorney's fees and costs associated with the representation of the child. Most times, the attorney's fees are charged pursuant to a signed Contingency Fee Agreement that sets the attorney's fee as a percentage of the settlement. The attorney's fee is usually paid from the settlement recovered on behalf of the child.

At the conclusion of the hearing, the court enters an Order Approving Settlement of Minor. The Order specifies that the settlement is reasonable and in the best interest of the child. It also approves the requested attorney's fees and costs. This document permits the parties to then sign any remaining paperwork to finalize the settlement and to obtain the settlement funds.

There are a number of ways that a court will permit the settlement funds to be placed. Because the funds belong to the child, the court is very protective of

those funds and has specific requirements and rules about accessing and spending the money. Parents and guardians are not given free discretion to spend the money, even though it may be well intentioned, without first obtaining court permission.

Restricted Accounts for Minors

One option is to place the settlement funds in a restricted account with a major bank. These funds may not be accessed by the child until the child turns 18 years of age. The account may only be accessed sooner with a court order. Usually, the judge will not allow the child or the child's parents to access the funds before the child's 18th birthday unless there is good reason, such as to pay for the child's ongoing medical treatment or educational needs. The court may specifically restrict the bank from allowing withdraws or expenditures of the account funds without court permission.

Annuity Purchase/Structured Settlements

Another option is to use the settlement proceeds to purchase an annuity, or structured settlement, on behalf of the child. An annuity will provide a stream of payments to the child at different time intervals over the child's lifetime. This can include a monthly allowance until the child turns 18 years old and then payments on a specified basis after the child turns 18

years old. These future payments are considered tax-free. Usually, an annuity is recommended for larger sums of money because the rate of return is much better than that of a standard bank account or certificate of deposit.

One advantage of purchasing an annuity is that the parent can design the payment schedule to the child, even into adulthood. This essentially protects the child from spending the entire settlement just after turning 18. For instance, future payments can be made on an annual basis lasting several years, or on a biannual, or quarterly basis. A lump sum balloon payment can be structured after providing for upfront smaller payments after the child's 18th birthday and then much large payments when the child becomes older, and hopefully more responsible and mature. One down side of an annuity is that the child cannot under any circumstances access the settlement funds before the periodic payments begin.

If an annuity purchase is an option that is being considered, the pros and cons will be discussed with the child's parents by their lawyer to decide on a future annuity payment schedule that best fits the anticipated future needs of the child (i.e., to pay for college or vocational school). Further, the attorney will make sure that the annuity is purchased from a reputable company with a high rating and will also

make sure that the payment schedule is competitive with other annuity companies in the market.

Managed Trust Account

A final option is to use the settlement proceeds to establish a trust account. A trustee is appointed by the court to manage the account. The trustee cannot be a parent of the child or a family member. The trustee cannot have a residual beneficial interest in the trust proceeds. The trustee must be bonded or insured. Often the trustee is a professional trustee or a company that may act as trustee for many other trust accounts. The trustee is required to prepare an annual statement of income, expenses, current assets, and fees charged, and provide this statement to the guardian of the child (i.e., the beneficiary). The statement must be approved by the court. Because a trustee is also entitled to charge a fee for managing the trust and providing an annual report, the settlement proceeds usually need to be large enough to warrant this expense.

Impact of Minor Settlement on Other Benefits or Government Assistance

Special care must be taken to determine whether the settlement will impact the child's right to receive any asset or income-sensitive benefits or certain governmental assistance under public benefit

programs. A seriously disabled child could be eligible for local, state, and federal benefits based on the child's disability. These benefits are also called "collateral source benefits" and may include benefits under Medicare, Medicaid, Social Security Income (SSI), specialized education (20 USC § 1400 et seq.), housing (HUD and local housing authority), attendant care, and other programs. Yet to be eligible for most of these benefits, the claimant must not have access to available resources of more than \$2,000 (with certain exceptions known as exempt resources). A child's settlement proceeds could be considered sufficient resources available to eliminate that child's eligibility for these programs.

There are specific programs, including Special Needs Trusts, that will permit a child to receive a settlement without jeopardizing much needed government benefits. The failure to use these allowable protections can have devastating consequences on your child's present and future right to receive benefits. An experienced child injury lawyer will be familiar with these tools and will make an appropriate recommendation to you.

CHAPTER EIGHT

Determining the Value of a Child's Injury Claim

There is no magic formula or process by which someone can predict with certainty the amount of money that a child's injury case may be worth. There are so many different factors that may influence the value of a claim that it is virtually impossible to create some type of formula that can reliably predict the value of any given case.

An experienced child injury lawyer will be able to provide you with a settlement range for the case based upon the facts of the case and the types of injuries to the child. This range may change during litigation based upon what happens during that process. Sometimes, cases get stronger and other times they get weaker as the lawsuit progresses.

The main factors that are used to determine a fair settlement range for the child include but are not limited to the:

- Degree of negligence by the defendant
- Any negligence attributed to the child
- Nature and extent of the injuries
- Types of medical treatment for the injuries
- Scarring or disfigurement
- Pain and suffering
- Permanency of the injuries

- Medical expenses (past, present, and future)
- Special educational expenses (past, present, future)
- Loss or impairment of future earnings
- Loss of enjoyment of life (past, present, future)
- Fright and shock (past, present, future)
- Embarrassment and humiliation (past, present, future)
- Cost of future care throughout childhood and into adulthood

These factors all work together to determine a fair settlement for the child. For example, if the negligence by the defendant is clear but the child fully recovers from the injury after a short period of medical treatment, then the settlement amount will be less than if the child suffered a permanent injury or disability. Likewise, if there is a dispute over the defendant's negligence but the child has serious injuries, the settlement amount may be higher than the first example. The cases in which negligence is clear and the child has the most serious injuries result in the highest settlements.

In addition to these factors, the amount of the insurance policy available to the defendant is extremely important as is the location where the accident happened. For example, a child might suffer catastrophic injuries after being struck by a negligent motorist, but if the motorist only has the minimum

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policy of \$20,000 then it may be all the child can obtain. Also, several areas in Michigan are considered to have much more conservative jury pools, meaning that it is unlikely that there will be a substantial jury verdict for the child. The insurance companies are well aware of this phenomenon and will try to settle the case for less money in one of those areas.

Because of the great number of factors to consider in evaluating the damages in a child injury claim, it is often necessary to hire experts to help establish the extent of these damages. These experts may include vocational experts, life care planners, economists, psychologists, and/or psychiatrists. Oftentimes the skilled expert can help corroborate evidence and describe the effect that the injuries will have on the child many years in the future. This is even truer when the child was injured at a particularly young age.

No two cases are alike, even if the accident and/or injuries involved are nearly identical. The evaluation of two cases that appear to be similar on the surface may actually produce widely different evaluations due to the other factors listed above. Evaluating personal injury cases takes a lot of knowledge, experience, and some seasoned intuition. Without these traits you may be at a serious disadvantage when negotiating with the insurance adjuster. And unless you are in the business of evaluating and settling personal injury cases for a living, you should look to an experienced personal injury attorney for guidance.

CHAPTER NINE

Signing a Pre-Injury release Document on Behalf of a Child

A "pre-injury release" document is one that attempts to contractually limit or waive a party's right to pursue a claim against a third party for negligence. The document typically states that you agree not to sue or file a claim against another party if your child is injured during a particular activity, even if that party negligently caused your injury. These documents are also called "exculpatory clauses," meaning that they seek to release a party from liability for negligent conduct that may occur in the future. Under Michigan law, this type of pre-injury release cannot be used to bar a child's claim against a negligent party.

These types of pre-injury releases are often required before a child can participate in a sports league, martial arts class, or even attend a school field trip or other event. By signing such a release, the parent does not waive all of the rights of a child and a claim can be brought if the child was injured during the event. However, it still must be established that there was negligence by a person or entity before a valid claim can be asserted.

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For example, a child participating in a youth basketball game cannot file a claim against the league because he hurts his ankle during the game. However, if he injures himself due to a dangerous and defective condition in the gymnasium he may be able to bring a claim. Likewise, the parents of a child who drowns in a public swimming pool may be able to bring a claim against the facility, even though a pre-injury release was signed, if the pool was defective or if the child was not properly supervised by lifeguards while in the pool.

CHAPTER TEN

The Benefits of Hiring a Lawyer

If you have carefully read the previous chapters about the many different legal requirements and nuances involved in children injury claims, it may not take much effort to convince you that hiring an experienced lawyer is a smart move. There are too many things that can go wrong when handling a claim on behalf of an injured child. You want to hire someone who is a professional and who has years of experience dealing with insurance companies.

Remember, the insurance company will be doing everything it can to minimize the claim and avoid paying fair compensation to cover the child's past expenses and future needs. Don't help the adjuster by going it alone; give serious thought to hiring an experienced attorney to handle your child's injury claim, especially when the injuries are serious or permanent.

Whether a Lawyer is Necessary

How do you know if a lawyer is necessary? Not every case requires a lawyer and there are no hard and fast rules about whether a given case needs a lawyer. Generally speaking, the child usually must have suffered a fairly serious injury caused by another

party's negligence to justify involving an attorney. Most experienced child injury lawyers will not want to get involved in a case that has little or no value and in these cases a parent may wish to settle the case directly with the insurance adjuster.

When in doubt, parents should at least consult with an experienced lawyer to learn more about the child's rights and to determine whether the child's rights to government benefits will be jeopardized if there is a settlement for an injury case. A parent will also have to appear in court to ask the judge to approve even a small settlement and the parent will be required to sign a Release with the insurance company before a settlement check will be given.

Contingency Fees

Understandably, most people are wary of hiring an attorney because of the expense. Cases involving injury claims are usually handled by experienced lawyers on a contingency basis. With a contingent fee agreement, the lawyer agrees to defer his or her fee until the case successfully resolves. The fee is based on a percentage of the recovery obtained by the lawyer. The standard contingency fee in Michigan is 33 1/3% of the settlement or judgment amount. If there is no recovery, then no attorney fee is owed. This fee encompasses all of the work performed by the attorney throughout the case and there should be

no "extras." Under Michigan law, the parents of the injured child must enter into a written fee agreement with the attorney that sets out all of the terms of the agreement.

The costs associated with a claim are a different matter. The term "costs" refers to those expenses that are incurred while investigating the claim and, if necessary, prosecuting it in court. Examples of typical costs include expert fees, court costs, deposition fees, and record expenses. This allows the client to hire an attorney without ever having to pay out of pocket. Most experienced and reputable accident attorneys will agree to advance costs in a case.

WHAT A GOOD LAWYER WILL DO FOR YOU

Many people do not know what an experienced lawyer can do in these types of cases. Here is a list of the types of services that the child injury lawyers at our law firm provide to our clients.

- Educate and teach parents about the litigation process.
- Gather written records and documents to support the claim, including medical records, school records, police report, etc.
- Perform investigation of the child's claim, including gathering witness statements, photographs, diagrams, and physical evidence.

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- Read and analyze applicable insurance policies that may apply (e.g., auto, homeowners, health) to see what coverage is available to pay for the child's damages, like medical, hospital, and wage loss benefits.
- Meet and confer with the child's medical doctors and other healthcare providers to fully understand the child's condition.
- File necessary claim forms with the at-fault governmental agency.
- Contact the insurance company about the claim and conduct periodic discussions with the carrier about the case so that appropriate reserves are set aside to settle it.
- Conduct negotiations with the insurance adjuster in an effort to settle the claim, either prior to litigation or trial.
- If a lawsuit will be filed, prepare and draft the summons and complaint to file in court.
- Perform an investigation to locate the defendant so that personal service of the summons and complaint can be achieved.
- Arrange for personal service of the summons and complaint on the defendant as required by law.
- Prepare and draft written questions for information from the other side (called *interrogatories and requests for production*).
- Prepare the parents and/or child for deposition.
- Prepare for and conduct the deposition of the

- defendant and other lay witnesses.
- Discuss and/or meet the child's teachers to assist in understanding the effect of the child's injuries and need for educational resources.
 - Meet with the child's physicians to prepare for their own deposition when requested by the defense attorney.
 - Prepare to take the deposition of the defendant's experts, including medical experts.
 - Prepare the parents and child for the child's medical examination by the defendant's medical experts.
 - Answer questions and produce information and records requested by the other side.
 - Review and analyze the child's medical records and billings.
 - Hire other necessary experts to support or prove the claim, including other physicians, economists, engineers, vocational experts, etc.
 - Review and analyze expert reports about the case, including those addressing liability, injuries, and damages.
 - File the necessary documents in court as required by the judge, including witness lists, trial readiness, settlement conferences, etc.
 - Prepare the parents, child and other witnesses for trial.
 - Create and prepare exhibits for trial.
 - Organize records and other documentary evidence intended to be introduced at trial.

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- Prepare for medication and or arbitration by organizing records and other documents for submission to the mediator or arbitrator.
- Research and write briefs and file motions to keep out or let in certain evidence at trial.
- Perform or participate in mock trials or focus groups to prepare for trial.
- Try the case over the course of several days before a judge or jury.
- Analyze verdict and research any issues that occurred at trial.
- Write briefs or motions following the verdict to obtain post-trial relief, including motions for attorney fees, or to overturn the verdict.
- Draft and prepare the petition asking the court to approve the minor child's settlement.
- Attend the court hearing regarding the approval of the minor child's settlement.

This is a general list of various tasks that the lawyer may need to complete in any given case. There may be additional tasks, depending on the facts of the case and the child's needs. This list will, at least, give the reader some idea of the type of work that may be necessary to successfully pursue a legal claim on behalf of the injured child.

CONCLUSION

I hope that you find this book to be a valuable resource of information regarding the rights of injured children in Michigan. As a parent or guardian of an injured child, you most likely have a number of additional questions and concerns about the laws and the legal process for pursuing claims in Michigan. I encourage to contact me at anytime in my office and I will gladly speak to you discuss these issues.

In addition, I encourage you to request any of the other consumer law books that my firm makes available to the public for free. These books provide additional and more detailed information on a number of legal topics. We believe that it is our duty as lawyers to provide this important legal information to accident and injury victims in the State of Michigan at no charge. If you know of anyone else who would benefit any of our legal books, please tell them that they can also request them for free.

Finally, please visit our website:

www.MichiganChildInjuryLawyer.com for important legal updates and news relating to child injury and accident cases in Michigan.

Lawrence J. Buckfire

OUR OTHER LEGAL BOOKS

We have written several other legal books on a variety of topics for Michigan consumers.

“The Ultimate Guide To Injury Cases in Michigan”

“The Ultimate Michigan Car Accident Handbook”

“The Ultimate Michigan Medical Malpractice Handbook”

“The Ultimate Michigan Dog Bite & Animal Attack Handbook”

“The Ultimate Michigan Motorcycle Accident Handbook”

“The Truth About Lawyer Advertising”

You can request these books for free by calling our office at (800) 606-1717 or by visiting our website at www.BuckfireLaw.com. For questions about a specific case, you should call our office to speak with one of our experienced lawyers.



www.BuckfireLaw.com

We are a Michigan law firm that counsels injury victims and their families. By handling a small number of select cases, we offer high-quality personalized service to our clients, using experienced attorneys, not paralegals.

We provide free legal books and information to the public and we maintain a superior Web site with frequently refreshed content that includes downloadable, no-cost legal forms and educational videos.

We value our reputation for integrity and skill and enjoy an outstanding track record of success.

