

AUGUST 2016



Mediating a minor's personal-injury claim

A look at the differences between a minor and an adult in both the law and the mediation process

By Cynthia Pasternak

It is no surprise that California requires a greater degree of care be exercised towards children than to adults. The degree of care increases for those less mature and unable to comprehend danger. Minor children under 18 years of age who sustain injury have a right to compensation for pain and suffering, permanent injury, disfigurement or disability in the same manner and amounts as adults. In addition, a parent who pays medical bills for the child has an independent right to compensation.

Minors who cause accidents are subject to different standards of care than adults. There are no specific ages at which a child is considered either without capacity or fully accountable. The question of capacity is left to the trier-of-fact. However, children age four years and under are almost universally held not liable for accidents or contributory negligence. They are considered too young to foresee danger. A minor who is old enough to know right from wrong can be held liable for intentional injuries as, for example, if the child intentionally trips and causes injury to another child. Older children may be negligent if they behave below a standard of care as children of similar age, intelligence and experience. When a minor engages in adult activity, such as driving a car or flying a plane, the child is held to the same standard as an adult. On the other hand, parents or legal guardians are generally held liable for failing to exercise proper control over the minor child, whether the minor is a plaintiff (for purposes of contributory fault) or a defendant.

When minor children are defendants in an action, they are typically represented by an insurance carrier. Consequently, it is unusual to see a minor in mediation unless the child is older and there is an allegation of intentional conduct, not covered by insurance.

Mediation provides an excellent opportunity to resolve disputes prior to undertaking more formal procedures like arbitration or trial. Particularly with minor children who may be frightened and/or whose testimony may be unpredictable in a courtroom setting, a

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mediation handled correctly can offer the best result. Besides, even if the matter does not resolve, mediation gives the attorney another chance to see how the child handles pressure and to better prepare the child for future proceedings.

While many of the concepts discussed here may apply when the minor is a defendant, this article will focus on the more usual circumstance of the minor as plaintiff in a personal-injury action.

When to mediate

As in cases with adults, it is often advisable to undertake early mediation once the defense has obtained sufficient basic information about liability and damages. Putting conflicts behind the parties is always comforting and minimizes risk and unnecessary expense. Nevertheless, in cases involving minors, it is unnecessary and imprudent to prematurely pursue resolution.

The principal reasons for delaying resolution are two-fold. First, while minors tend to heal faster than adults, they may be unable to communicate all of their physical complaints to their physicians. Thus, the full extent of a minor's injuries may be undeterminable for an extended period of time and it may be more difficult for the physician to render an accurate prognosis of reasonable and necessary future medical care.

Second, there is no need to rush settlement for a minor plaintiff. Rather than the typical two-year California statute of limitations from the date of injury against a private party, for minor children the statute is tolled until the child reaches his or her 18th birthday. Injuries to the minor before birth must be brought within six years of the injury. In the case of medical malpractice, actions for minors under the age of six must be filed within three years of the date of injury or before the child's eighth birthday, whichever period is greater. Where the child is older than six, the standard adult malpractice statutes of limitation apply, which include extension of the statute until the plaintiff discovers, or should have discovered the injury.

Preparation for mediation of a minor's claim

To maximize a mediation involving a minor child, one of the most important issues is selecting the right mediator. As in every case, the mediator should be knowledgeable and trustworthy. Also, to be effective, a mediator should be friendly and approachable so as to make the child and the parent or legal guardian comfortable with the process. Setting the minor and his representative at ease encourages greater party participation, cooperation and facilitates discussion and ultimate resolution of the case. Of course, any interaction the mediator has with the minor child should be with the consent of counsel and the child's representative.

Although there is no legal requirement that the minor child attend mediation, it is generally wise to do so. The most effective mediations are those where the parties are prepared to present all of their evidence to the mediator. This obviously includes participation by the principal party, even if that party is a minor. Once at mediation, the plaintiff attorney and mediator can decide how to most persuasively present evidence to opposing parties.

Minor or unborn children do not have the capacity to represent themselves in a legal action or proceeding. The court requires appointment of a guardian ad litem for the limited purpose of defending or prosecuting the minor's claims to ensure that his interests are protected and that the settlement is in his or her best interests. Therefore, where the legal rights involved are those of a minor, the real decision-maker at mediation is the guardian ad litem.

The guardian ad litem may be anyone over eighteen who is nominated and approved by the court. Usually, the guardian ad litem is a parent of the injured child. It may even be a parent who was injured in the same accident as long as that parent's interests are not adverse to the minor, the potential conflict is disclosed and the court approves the appointment. In some cases, as where the parent potentially has significant contributory fault or is unavailable, another close family member, friend or, on rare occasions, an independent third party selected by the court may be appointed.

The statute requires appointment of the guardian ad litem prior to issuance of the summons (Code Civ. Proc., § 373, subd. (a).) The usual practice is to submit an ex parte application when filing the complaint. However, since the time for filing the application is not jurisdictional, appointment after commencement of the action cures the defect. It is possible that a parent may appear at mediation to represent the minor without having first been formally appointed as guardian ad litem. This presents a risk that a court may later refuse the appointment due to a perceived conflict of interest or determination of improper motives. If there is such a problem, the settlement process may be complicated or delayed, but an alternate guardian ad litem will be appointed.

I mediated a case in which a woman was seriously injured when she was crushed by a wooden structure. Her husband had been in the truck, witnessed the incident and had his own claim. The couple were jointly represented by counsel. After several hours of mediation, their cases were close to resolving. I then discovered that two grandchildren had been in the truck and witnessed the accident, though neither had pursued any injury claim. Although they were minors and had years to bring lawsuits, the defense attorney legitimately refused to settle the named plaintiffs' claims unless the grandchildren's possible claims were likewise resolved. I requested that the grandparents contact the minor children's parents to discuss the problem. The defense agreed to pay the children nominal sums, we obtained a fax signature of one parent on a memorandum of understanding and the

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case resolved without pre-appointment of a guardian ad litem.

Another potential participant at mediation of a minor's claim is a structured settlement representative. Most personal injury cases are settled with lump sum payments by the defendant (or the defendant's insurance carrier.) Particularly when a plaintiff suffers a serious and permanent catastrophic injury, an alternative form of compensation is through a structured settlement. In structured settlements involving a minor, a portion of the settlement is usually paid in a lump sum to the plaintiff attorney for fees and costs and to reimburse medical and other specified expenses. With regard to the balance, a defendant's insurer funds an annuity policy for the plaintiff, with regular payments made over the course of several years or for the rest of the plaintiff's life.

Once mediation settlement negotiations begin, the defense may have its structured settlement representative generate hypothetical proposals for the mediator to present to the plaintiff. There are many advantages to a structured settlement for both parties. Funds received from an annuity are tax-free as long as the plaintiff does not control them. Also, a structured settlement frequently costs insurance companies much less than what it would cost them to pay a lump sum settlement. If you are considering a structured settlement, you should contact your own structured settlement expert prior to mediation to make your own assessment of the advantages and disadvantages to your client.

Commencing the mediation

At the beginning of mediation, a good mediator spends some time in private caucus chatting directly with the child. I ask about things that interest the child, and try to set the child at ease before getting into specific questions. I speak in simple, age appropriate language and encourage the child's participation. If a pre-teen or younger child has not brought a toy, I offer paper and pencils to keep them busy. I let the child's representative know that there are a variety of healthy and not-so-healthy snacks available. I remind the parties to ask for a break at any time.

While it is neither necessary nor enforceable, I like to ask the child to sign the confidentiality agreement the same as I require of all other participants. In my experience, it makes the minor feel important, engaged in the proceedings and they almost always enjoy doing so. In fact, after one successful mediation experience, the minor child wrote me a letter, thanked me for helping her, let me know that she was using my techniques with her friends and family, and that she decided she wanted to become a mediator when she grew up.

In another case, the minor child who was approximately eight years old, had sustained a serious brain injury and could barely scribble his name. I pointed this out to plaintiff's counsel and obtained consent to show it to defense counsel who had previously questioned the severity of the child's injuries.

For older children who comprehend what has happened, I urge counsel and the minor's representative to include them to the extent comfortable for parent, child and counsel. A sweet, innocent and well-spoken child is one of the best witnesses you can have. In one case, the injured minor was a small boy about six years old who was not only adorable, but trusting, cooperative and poised. I asked the plaintiff attorney what she thought about introducing the child to opposing counsel. She heartily agreed, so I inquired of the room full of defense attorneys and representatives if they wanted to meet the child. A few defense counsel did not want to see the child at all, but the majority were enthusiastic as long as it was not a lengthy, formal presentation. I assured everyone that I would bring the boy in myself and that the interaction would be limited to a quick introduction and a few questions regarding school and his favorite subjects. I returned hand-in-hand with the minor child, helped him on to the over-sized conference room chair with his little legs jutting straight out, resting about half-way over the seat cushion. Everyone smiled and one attorney asked the boy the pre-screened questions. His responses were sincere and endearing. There was little doubt that meeting him led to an expedited and very favorable resolution.

Settlement of a minor's personal-injury claim

Probably the most difficult cases to resolve at mediation are those of deceased or severely injured minor plaintiffs. This is primarily due to the intense emotions of parents. In those cases, most parents believe that there is no monetary sum that will ever adequately compensate such losses. For the best chance of resolving these claims, it is essential that they are mediated after the deep emotional wounds have started healing.

Once a settlement is reached, it is within the power of a guardian ad litem to compromise the claim of unascertained, unknown, or unborn persons (Code Civ. Proc., § 373.5.) To assure adequacy and fairness to the minor, compromise is only valid upon the filing of a petition to approve settlement of the disputed claim. Notwithstanding, as in any mediation, settlement terms should be tentatively reached and formally documented by competent parties.

The petition may request further orders authorizing and directing that reasonable expenses, costs and attorney's fees approved by the court are paid from the compromise, settlement or judgment made on behalf of the minor. Payment of medical or other expenses, including reimbursement to a parent or guardian, is authorized by statute (Prob. Code, § 3601, subd. (b).)

With respect to the balance of the funds, frequently the court orders that the balance is deposited in an insured, interest-bearing account in a California

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financial institution (i.e., blocked account) until the minor reaches 18 years of age. For larger residual sums, an alternative is to have the balance invested in a single-premium deferred annuity (i.e., structured settlement), under conditions which the court determines are in the best interests of the minor and subject to withdrawal only with court approval.

The court may also make other orders for the balance of the settlement proceeds. These include management by an appointed guardian, creation of a special needs trust (Prob. Code, § 3604), payment of all or part of smaller sums in the minor's best interests (*Id.,* § 361, subd. (d) under $20,000) or to the minor's parent (*Id.,* § 361, subd. (e) under $5,000) and, under specific circumstances, to the county treasurer (*Id.,* § 3611, subd. (h).)

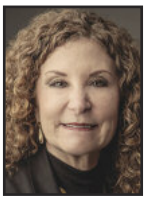
The venue for filing the petition is the same court in which a lawsuit is filed. (Code Civ. Proc., § 372.) If no lawsuit has been filed, the petition may be filed in the county where the minor resides or where the venue of the lawsuit would be proper. (Prob. Code, § 3500, subd. (b).)

The minor and the person compromising the claim on his or her behalf must attend the hearing unless the court, for good cause, dispenses with a personal appearance. (Cal. Rules of Ct., rule 7.952(a).) Good cause may be found if the judge believes that, based upon the medical evidence and other factors, appearance of the minor child is unnecessary. However, it is best for the injured minor and the child's parents to attend the hearing so the judge can meet the minor to ask questions about the child's injuries, current medical condition and to satisfy the judge about the adequacy of the settlement amount.

Once the money or other property has been paid or delivered, the guardian ad litem may execute a full release and satisfaction. If all or part of money is to be deposited in an insured account in a California financial institution or in a single-premium deferred annuity, the release and satisfaction is not effective for any purpose until all funds have been deposited as directed by the court's order.

Conclusion

Minor children may be compensated to the same extent as adults for injuries caused by the conduct of others. However, the child's age and inexperience adds unique complexities to these cases to assure that the child receives fair compensation, the money is wisely invested and that the child has limited access to the funds until the child reaches majority. Under most circumstances, these complexities may be successfully addressed at mediation through the use of a skilled mediator, the guiding hand of an understanding attorney, and commencement at the appropriate time when medical issues and family emotions have stabilized. Then, with court formalization as protection, all parties may be assured that the best interests of the minor have been served.


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