

Preventing Life Sentences by Legal Representation

Contingency Fee Reforms – Law Society of Ontario
Submission by Canadian Centre for Excellence in Injury Justice
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Tiffany:¹ 20 years old college student – multiple skull fractures in car accident with catastrophic brain injury – not at fault – permanent facial disfigurement – requires permanent 24/7 supervision and lifelong pain management – aggressive behaviour – suicidal risks – abuses alcohol to control pain – criminal charges for assaulting police and others – permanently disabled from working – Settlement averted:² \$450,000 (or approximately \$9,000 a year for life)

Donald Marshall, Jr.:³ 17 years old at time of stabbing death of acquaintance Sandy Seale in 1971 in Sydney, Nova Scotia – wrongly convicted of murder and sentenced to life imprisonment – spent nearly 11 years in prison – released in 1982 and acquitted in 1983 – an inquiry and a royal commission determined legal representation was a material cause of wrongful conviction among many others causes

1. Silent Life Sentences

Wrongful injury settlements may impact lives and families no less than wrongful convictions and incarcerations. In a catastrophic case, a wrongful settlement may practically impose a life sentence of *avoidable* physical and mental suffering and excessive safety risks as a result of grossly inadequate compensation for care and support.

Victims of wrongful convictions in the criminal justice system *know* they did not commit the crimes and can further pursue their rights and justice, as Donald Marshall Jr., David Milgaard, Steven Truscott among others did. These men were able to vacate their life sentences by their own voices, amplified by the media and reverberated by inquiries and royal commissions.

Same cannot be said for victims of life sentences in the injury justice system who suffer in near complete silence, rarely ever knowing that they had been victimized. No inquiries, no royal commissions, and no apparent traction anywhere in Canada. They are overlooked, misunderstood, voiceless and defenceless when their legal representatives or the civil justice system failed them. Their catastrophic plight deserves attention and strong proactive prevention.

¹ Not her real name but her true story. Further public information may be provided on request.

² Settlement was narrowly averted as discussed under “Final Words.”

³ A precedent to others including Milgaard, Morin and Truscott. Details from on-line non-legal sources.

2. An important opportunity to inform the public

From our review of the draft *Standard Contingency Fee Agreement* and *Know Your Rights Guide for the Public*, we submit from the perspective of injury law and practice, that they ought to explain (1) the availability of “free” specialist legal care; (2) the importance of specialist legal care in serious and catastrophic cases; and (3) how to objectively compare the *quality* of legal services (to go along with comparing prices) and find an experienced and professional lawyer (or the “right” lawyer).⁴

The closest the draft documents came to discuss quality was under in a heading titled “3. *Comparing legal services and fees*”⁵ but there was no discussion on how to compare legal services other than referring to firms’ websites.

Aspects of the above three elements are discussed next, followed by our proposals before concluding.

3. Seriously injured Ontarians have “universal” specialist legal care

When Ontarians face serious injuries, they largely do not know that there is such a thing as *certified specialist* legal care, and that the specialized care is as “free” as any ordinary legal care.

Specialist certification in the legal profession is a relatively recent development as compared to that in the medical profession where knowledge of its existence is practically universal among Ontario families. Public knowledge of specialist certification in the legal profession appears to be limited, thereby impairing their access to specialized legal care when they need it the most.

Furthermore, there is a pervasive public impression that all lawyers are expensive and charge for every minute of time spent, including first consultations. Additional public sophistication is required to know that in injury cases, the practice of offering free initial consultations and no upfront fees among injury lawyers is universal.⁶ A very large segment of the public does not know that they can afford specialized legal care. The significant extent of this ignorance is reflected by the prominence of advertising slogans such as “No Win No Fee”, “Don’t Pay Until You Win”, “Free Consultation” and the like. Such slogans are perceived to be so attractive to the uninformed public such that many leading injury firms have also adopted some similar variations in their marketing.

Being uninformed, seriously injured persons may be impressed that *any* lawyer who does not charge for initial consultations or upfront fees represents a “good deal” to be had, or a kind, compassionate hence good lawyer to be retained, without further comparison for true quality. For thousands of Ontarians each year who face serious injuries, they are still left to their own

⁴ Paralegals are not permitted to independently represent catastrophic claimants and to bring court actions.

⁵ For example, see p. 44 of 59 of the draft package of proposed documents:
<http://www.lso.ca/uploadedFiles/Contingency-Fee-Reforms-Consultation.pdf>.

⁶ There is no known plaintiff injury lawyer who requires upfront fees or charges for a first consultation.

misinformation in navigating an increasingly confusing legal marketplace, many with a lifetime of challenges hanging in the balance.

4. Finding the right lawyer is critical for the catastrophically injured

Why would the public compare quality of legal services when they believe that any real estate lawyer can routinely transfer title when they buy a house? It therefore makes sense to focus only on comparing the prices or fees given the main result or quality is routinely about the same in every case.

The above belief appears to make reasonable public sense in simple residential real estate transactions, but it is seriously mistaken when applied to personal injury law, and especially to serious and catastrophic injury cases. In injury law, there is no inevitable routine result for a serious or catastrophic case as the range of results obtained by one lawyer to another can be quite wide, even in the order of many multiples and more. A settlement for \$300,000 by one lawyer can vary frequently and significantly, lower or higher in the hands of another.

We believe that there is little to no dispute that having the right lawyers is the most important factor for achieving the most money in the pockets of injured persons, and the highest satisfaction for them as a result of fewer errors and omissions. Not only we believe that this is self-evident, it is amply supported by reported incidents in the caselaw, as well as personal experiences of many rational and candid litigators.

For Tiffany and Marcoccia, whose cases are further discussed later in our submission, there is likely no dispute. The right lawyers routinely improve on the work of mediocre lawyers in the reported caselaw, but we are not aware of any reported incident the other way around. These two cases are also fine examples of how the right lawyers cost the victims *less* than the mediocre lawyers, a topic we discuss next.

5. The right lawyer costs less than the mediocre lawyer

We believe seriously injured persons will find that the right lawyers generally charge *the same or even lower* percentage rates than mediocre lawyers.

It appears to us that the right lawyers frequently charge lower percentage rates because they service more serious cases which have higher fee margins but want to remain competitive with lower rates. The mediocre ones generally use higher percentage rates because they tend to serve smaller cases with lower fee margins but use the same default higher rates when a seriously injured person happens to come to them. Our beliefs are consistent with the percentages we observed in practice and as revealed in reported applications for court approval of legal fees charged to persons under incapacity, and in reported assessments of solicitor-client accounts.

The full costs of legal representation are, however, not measured by the percentage rates or the amounts of fees charged. It is generally best measured by the amount of money remaining in the pockets of injured persons. As discussed earlier, the right lawyers generally secure significantly

higher settlements and verdicts than the mediocre ones. After deducting the same percentage rates, the right lawyers generally cost less because more money ultimately finds its way to the pockets of injured persons. The cases of Tiffany and Marcoccia are clear examples of the right lawyers putting a *great* deal more money in the victims' pockets than mediocre lawyers, as further details of their cases are expanded later in our submission.

6. How to find the right lawyer *objectively*

As discussed earlier, the right lawyer for a seriously or catastrophically injured person is a lawyer with the highest levels of experience and professionalism. To be helpful to the public, indicators of the highest levels of experience and professionalism to be compared should be objective, and readily verifiable.

There are two such important objective indicators.

(i) Certified Specialist designation by the Law Society

The first is obvious, the specialist certification by the Law Society. For certification, the Law Society has examined a lawyer's levels of experience for their leading involvement in the field, and highest levels of professionalism via the records of client complaints and malpractice claims against them, among other things.

(ii) Amount of the highest contested verdict achieved

The second objective indicator is less obvious but is even more important than specialist certification for *catastrophically* injured victims. It requires an informed understanding of the personal injury litigation practice and landscape to appreciate that it is not a boastful exercise but a service to the public as an important objective indicator for comparing quality of legal services. It is the record of winning contested verdicts, best exemplified by the amount of the highest contested verdict achieved by a lawyer.

This indicator is particularly relevant to catastrophically injured persons because their claims are the most complex and challenging of all claims to be conducted before triers of fact. Victims ought to compare actual *hearing* experiences by comparing the winning results obtained. The significantly higher the amounts of winning contested verdicts, generally the significantly higher degrees of complexity successfully undertaken by the lawyer.

In Tiffany's case, the insurer set the final offer at \$450,000 and her lawyer folded. He apparently had no prior winning contested injury verdicts. A subsequent lawyer took her case to a contested verdict, winning her critical claim for 24/7 supervisory care. This subsequent lawyer had won multiple contested verdicts before taking on Tiffany's case. In *Marcoccia*,⁷ the insurer set the final offer at \$2 million and yet it was rejected. The jury returned a verdict in excess of \$10 million. Marcoccia's lawyer had won multiple contested verdicts before trying his case.

⁷ *Marcoccia v. Ford Credit Canada Limited*, 2007 CanLII 51528.

In Ontario, actions settle in more than 99% of the time, and a plaintiff injury lawyer will have taken *less* than two⁸ cases on average in a *career* to verdicts, where cases include substantive arbitrations at the Financial Services Commission of Ontario.⁹ A large majority of injury lawyers will not have contested one substantive hearing to a verdict in their lifetime. How can they be ready, willing and able to competently conduct a catastrophic case to verdict where necessary to protect the best interests of the client if they have no prior hearing experience? Simply put, it is next to impossible in this field. For the protection of the catastrophically injured, they ought to compare winning contested verdicts as part of an informed comparison of the quality of legal services.

A winning contested verdict is also not a label that is susceptible to being bought or sold for a fee and marketed to uninformed victims. A lawyer may pay \$4,000¹⁰ each year to be listed as “Best Lawyers”, for example, but a winning contested verdict can only be forged through resolute and skillful dedication to the client’s best interests over the lawyer’s interests to settle in order to protect sure fees and sure recovery of large, out of pocket disbursements. All contested verdicts, including jury verdicts, carry public citations and are demonstrably verifiable by way of public orders and judgments issued. They are objective and usefully comparable as an important indicator of experience and professionalism for the consumer.

Settlement amounts on the other hand carry little value in objectively estimating experience and professionalism. The same lawyer who conceded at \$450,000 for Tiffany may easily obtain a \$2.5 million settlement for a young quadriplegic victim (where damages are *easily* and significantly more than \$8 million). Similarly for amounts of winning verdicts in *uncontested*, default, or summary proceedings, or where a lawyer was not lead counsel.

7. Competitive confusion in the marketplace

Ordinarily, the consumer has relatively little¹¹ contact with the personal injury field. However, when they unfortunately need representation, the marketplace for the seriously and catastrophically injured is confusing and treacherous, especially since they rarely ever had any experience in dealing with it before.

Across all advertising platforms, the task of comparing quality of legal services by a seriously injured person is made difficult by the indiscriminate claims by an overwhelming number of firms and lawyers of the highest levels of expertise and monetary results regardless of how recent their calls to the bar may be, or their non-existent record of winning contested verdicts. In their competitive confusion, little regard is given to comply with the rule against claiming

⁸ This is our estimate from partial superior court statistics and observations, excluding Small Claims Court, and based on approximately 1,500 lawyers practicing plaintiff injury law in Ontario. Indeed, it appears to be *much* closer to one substantive verdict per plaintiff career rather than two. This is also readily agreed to anecdotally by experienced plaintiff lawyers, and can be further supported by informal observations of the number of verdicts obtained by members of any small sample of local injury firms.

⁹ Before the change in jurisdiction in 2016 when the License Appeal Tribunal started to conduct cases.

¹⁰ An estimate from the amount of \$3,700 charged per year in about 2012.

¹¹ About 0.5% of Ontarians are injured in auto accidents per year (or about 60,000 annually).

“expertise” or being “specialized” unless the lawyer is a certified specialist.¹² Little regard is also given to the rule requiring a disclaimer where alleged past results are marketed.¹³

Many firms and lawyers further seek a competitive edge through the use of a confusing multitude of labels from third-party such as top, super, great, #1, best, lawyer of the year, of the city, of the decade, top 500, top 100, multi-million dollar lawyer etc. ...

While competitive confusion may be a creative sport for many, the confusion materially impairs the ability of a seriously injured victim to compare quality of legal services. The confusion therefore victimizes those most in need of the most competent representation.

8. The need for self-enforcement

Enforcement dollars can hardly keep up with the sport of competitive confusion on a multitudes of advertising platforms. We need new enforcement mechanisms which deter violations and promotes clear information to empower the public to make an informed choice on legal representation while minimizing enforcement costs to the regulator. We need enforcement mechanisms which provide timely, direct, and prominent response to distortions.

We propose to build on the mechanism of self-enforcement that has already been advanced by the Law Society: *mandatory disclosure on firms’ websites*. We need their own marketing materials to disclose the objective levels of experience and professionalism that they lack or have achieved by disclosing (1) the status of specialist certification, and (2) their largest amounts of winning contested verdicts on behalf of injured persons.

There are two main types of confusing marketing claims, namely claims about *expertise* and qualification, and claims about *amounts* of money won by a licensee. Confusion in claims about expertise is addressed by required disclosure relating to certified specialist certification. Confusion in claims about amounts of money won is addressed by required disclosure relating to the highest amounts of contested verdicts actually won.

The above proposal promptly counteracts confusing claims to the contrary as soon as the public access the firm’s website or the individual licensee’s background webpage. A claim of high expertise or being a #1 lawyer would be better understood and compared by the public if the licensee is not certified as a specialist by the regulator according to his or her own webpage. A claim of having the successful ability to secure millions of dollars in settlements may be better understood and compared by the public if \$0 is the highest winning contested verdict obtained the lawyer or indeed by all lawyers at a “top” firm.

¹² Rule 4.3-1, commentary 2.

¹³ Rule 4.2-1, commentary 2(a).

9. Summary of Proposals

1. To consider a version of the following draft to be included on the first page of the *Know Your Rights Guide*:

Comparing quality of legal services is very important:

When you are seriously or catastrophically injured, you should know that finding and hiring the right lawyer is **important** for the success of your case and your satisfaction. The right lawyer should be highly experienced, professional and dedicated. You should carefully read the following guidance to assist you to find the right lawyer.

You should know that in Ontario, **nearly all** personal injury lawyers offer a **free** initial consultation. And if they agree to accept your case, nearly all injury lawyers will **not** charge you any upfront fees before you received money for your compensation.

In Ontario, the Law Society of Ontario awards the designation of **Certified Specialist** to only a limited number of lawyers. Lawyers who are Law Society Certified Specialists have the experience and credentials to meet your legal needs. They are recognized and experienced lawyers who have met the highest standards of competence and professionalism in their fields of practice.

Nearly all Certified Specialists who practice personal injury law also offer a **free** initial consultation and will **not** charge you any upfront fees before you received compensation. To find out if there is a Certified Specialist practicing at an injury firm, you may check their website as they are required to state the names of all Certified Specialists practicing at the firm. To find out if a lawyer is a Certified Specialist, you may also check the lawyer's background on the injury firm's website. The lawyer is required to state whether or not he or she is a Law Society Certified Specialist. The Law Society also maintains a list of all Certified Specialists on its website and can be accessed at [...].

Another important factor for your success and satisfaction is whether or not your lawyer or paralegal had actually won a contested verdict in an injury case. This is a winning order awarded in an actual contested case in favour of an injured person represented by the lawyer or paralegal. An injury firm's website is required to state the amount of the highest contested verdict a lawyer or a paralegal practicing at the firm has won on behalf of injured persons. Where there is no prior winning contested verdict, the amount is shown as "\$0".

2. In the standard CFA, Part 1. "KNOW YOUR RIGHTS" be revised to read:

"BEFORE signing this agreement, a lawyer or paralegal must first explain to you the information on the first page of the Know Your Rights document provided. You should next carefully read the Know Your Rights document. You should then carefully read this agreement."

3. The home page of an injury firm’s website be required to clearly state, visible on the initial appearance of the home page:

“Disclosure as required by the Law Society of Ontario:

[Include if applicable: 1. The Certified Specialist(s) who practice(s) plaintiff personal injury law at this firm is (are): [List names and areas of certification].]

[Include if applicable: 1. There is no lawyer practicing at this firm who is a Certified Specialist as registered with the Law Society of Ontario.]

2. \$ [State amount rounded to the nearest thousand exclusive of costs of the highest winning contested verdict. State 0 if no contested verdict won.] is the amount of the highest contested verdict won on behalf of an injured client by a lawyer or paralegal practicing this firm: [List Name of only lead lawyer, Citation of case if applicable]. Future results are not guaranteed. Litigation outcomes vary depending on the facts of each case.

4. The webpage which describes the background or qualification of a licensee at a firm be required to state, at the beginning of the description:

“Disclosure as required by the Law Society of Ontario:

1. [Insert name of licensee] [is/is not] a Certified Specialist as registered with the Law Society of Ontario.

2. \$ [State amount rounded to the nearest thousand exclusive of costs of the highest winning contested verdict. State 0 if no contested verdict won.] is the amount of the highest contested verdict won as lead counsel on behalf of an injured person by this [lawyer/paralegal]: [citation of case if applicable]. Future results are not guaranteed. Litigation outcomes vary depending on the facts of each case.

Commentary

Item 2:

It is important to require the licensee to explain the first page of the *Guide* to the client. Many clients have their retainers signed while they still are in hospitals, or in acute phases after the most serious injuries. Many are in serious physical pain. Their lives are upside down and have too many broken things on their minds, with little time for anything else including reading long legal documents.

It is precisely those who are most seriously injured that may be victimized most seriously by incompetent legal representation, and unscrupulous legal professionals. Those most vulnerable ought to be given the few minutes it takes to go over the first page by a licensee, to ensure attention is given to some of the most critical information for the critically injured.

Items 3 and 4:

Items 3 and 4 are to separate the misleading claims from objective and important indicators of true experience and professionalism.

The confusing marketplace reinforces the need to elevate the *absence* of specialist certification onto a firm's home webpage, *and* onto an individual licensee's background webpage to ensure public attention. It is important that the public *readily* know who does not possess the specialist certification in order to expeditiously compare both quality and prices. Similarly, the confusing marketplace reinforces the need to elevate the *absence* of winning contested verdicts onto the webpages. Without this required disclosure, creative confusion continues to easily mask the lack of this important objective indicator and impair the consumer's ability to compare.

10. Final Words

Access to justice in injury law has its own unique and serious challenges. In family justice, a serious problem is the ability to pay for legal services. In injury justice, seriously injured persons have the ability to pay from their misfortune but face serious challenges in finding the right lawyers. Particularly for the catastrophically injured, the legal marketplace is treacherous when they search for able representation with lifelong consequences at stake.

One of the greatest regrets a catastrophically injured victim may have is not finding competent representation. Tiffany was nearly one of those with irreversible regrets. By a stroke of luck, her "flashes of reason" struck at the right time. At the conclusion of a pre-trial conference, she rejected her lawyer's recommendation to accept the final offer of \$450,000 from the defendants. She consulted another lawyer who helped to adjourn the trial but not without a stern rebuke and costs ordered against her one day before the scheduled trial.

Her case was re-worked. Based on the same injuries and impairments, and after 10 tortuous years of avoidable suffering including increased suicidal risks and being sexually assaulted while living alone without supervisory care, an arbitrator ordered that she be entitled to 24/7 attendant care benefits and further determined that she had suffered unfairly without full supervision for the past 10 years. Weeks before her new trial was to begin, the defendants agreed to fund the permanent 24/7 supervisory care that she deserves.

In her final words before the arbitrator, she expresses hope for others in the future, that no one else should have to go through what she went through after a serious accident. As we now strive to guide the vulnerable in their darkness, may their hopes be our guide, and the prevention of life sentences by legal representation our light.

Canadian Centre for Excellence in Injury Justice

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