Candice Klein
CHANG | KLEIN LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2021

Protecting our future

FROM CASE ANALYSIS TO DEPOSITIONS, SPECIAL CONSIDERATIONS WHEN REPRESENTING CHILDREN

"Because when it comes to my offspring I will fight with the fangs of a wolf and the claws of a dragon. And no one, or nothing will stop me from protecting them."
~ Jordan Sarah Weatherhead

When I tell people what I do for a living and what kind of cases I handle, I often receive a response of something like, "Wow, it must be so hard to deal with all of that negativity every day." As personal-injury lawyers representing plaintiffs, we help clients through some of the most difficult challenges they may ever face. We see how victims' lives are shattered in a matter of seconds. When those victims are children, the stakes are even higher and the pain is that much more profound. As a mother, when I evaluate cases, I can't help envisioning how I would feel if it was my son who was injured or had suffered abuse at the hands of another. My mama-bear instinct compels me to want to aggressively protect every child. That is why representing children holds such a special place in my heart and gives me the energy to take on their devastating cases.

Litigating a claim on behalf of a child can be very different than that of an adult. At the most basic level, there are distinct procedural requirements when suing on behalf of a child such as a difference in the timing in which a lawsuit must be filed. In most situations, a personal-injury claim must be filed within two years of the date of the incident. However, when a child is injured, the two-year time limit to file a lawsuit doesn't start to run until the child reaches the age of 18. Additionally, since a minor does not have the legal capacity to make decisions, a minor must have a guardian or guardian ad litem appointed to represent his or her interests.

Picking the right guardian ad litem ("GAL") is very important. Not only do some jurisdictions have their own

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2021

requirements and restrictions, but the GAL will also stand in for the minor from responding to discovery to accepting or rejecting a settlement offer. Sometimes the choice is obvious, but whenever choosing, it is critical to ensure the GAL is reliable and responsive as you will be working with them extensively. This includes talking with them to assess how your minor client is doing and what their needs are, getting the correct releases to access medical records or even arranging for a child to see an expert. An absentee or non-responsive GAL can lead to disaster for you and your minor client. Once you have your GAL selected, it is very important to express to them and any other parent or guardian that your role and duty is to represent the child's interests alone (assuming they are not also plaintiffs), and that distribution of any recovery will be subject to court approval.

Court must approve settlements – no exceptions

The court must approve any minor's settlement agreement, with no exceptions, and no matter the amount of the settlement. Sometimes it is difficult for a parent who is bringing a claim on behalf of their child to understand that they are not the ones who are entitled to compensation or even control of their child's settlement funds. From the outset it must be made clear that because the child is the one who sustained the injuries, they are to obtain the benefit of any settlement funds.

As a general rule, funds paid for injuries sustained by a minor child are for the exclusive benefit of the child. I have often had clients ask me if they can purchase a home or vehicle with their child's settlement monies. This is obviously not something a court would likely authorize. Selecting the best way to distribute a minor's recovery funds can be a complex decision depending on the minor's needs and the parents and GAL's input and is best saved for an article of its own. For purposes here, it is important that the GAL and parent understand the general protections in place to ensure that every child receives the benefit of any settlement at the outset of a case to protect against any surprise and unhappy parents at the close of your case.

There are other special considerations that any attorney representing a child who has suffered an injury, whether physical or mental, should contemplate prior to filing a lawsuit.

Duty of care owed to children

From the time they wake up in the morning to the time they go to bed, children are exposed to a plethora of circumstances and conditions that could lead to injury. Kids don't perceive danger in the same manner that adults are expected to, therefore, California courts have held that in dealing with a young child, defendants must exercise greater caution than in dealing with an adult. "A greater degree of care is generally owed to children because of their lack of capacity to appreciate risks and to avoid danger." (*McDaniel v. Sunset Manor Co.* (1990) 220 Cal.App.3d 1, 7, *citing Casas v. Maulhardt Buick, Inc.* (1968) 258 Cal.App.2d 692, 697-700.) In *Hilyar v. Union Ice Co.* (1955) 45 Cal.2d 30, the court reversed a nonsuit in a five-and-a-half-year-old boy's action for injuries against the driver of an ice truck which struck the boy, even though the driver did not see the child and had warned children to stay away from the truck. The court stated that since the driver should have known that small children customarily played in the area in which his truck was parked, a question of fact arose as to whether he took reasonable precautions to protect the children under the circumstances.

Claim analysis differs for a child

When determining if your minor client has a claim, the analysis may be different than if an adult had suffered an injury under the same or similar fact pattern. Under California premises-liability law, property owners and occupants have a duty of care to maintain their property in a reasonably safe condition and to warn guests and visitors of hidden dangers that may not be open and obvious. Under previous state law in California, attractive nuisance dictated that property owners had a special duty of care to keep their property safe for children. California has not recognized the attractive-nuisance doctrine since 1970, and state law now actually imposes a broader duty of care on real property owners. Children are afforded special protections under the law, in part because children cannot foresee consequences as well as adults. CACI No. 412 *Duty of Care Owed Children* establishes that adults "must anticipate the ordinary behavior of children. An adult must be more careful when dealing with children than with other adults."

For instance, when a child is injured at a hotel, the negligence and reasonable care analysis is altered to account for the child's youth. When a child is accepted as a guest, the inexperience and the natural tendencies of such a child must be considered by the hotel. The hotel must consider whether its premises, though safe enough for an adult, present any reasonably avoidable dangers to the child guest. A hotel owes a greater degree of care to children because of their lack of capacity to appreciate risks and avoid danger. It must protect the young and heedless from themselves and guard them against perils that are reasonably foreseeable. (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 24, 27.)

Even with their parents only steps away, a child can fall out of a window, drown in a pool, or get hit by a car. When a child is injured while under the supervision of their parents, not only does it cause everlasting grief and guilt for the parent, it provides an argument for the defense to avoid liability by shifting the focus of the blame to the parent for their own negligence in failing to protect their child from harm. However, it must be remembered that the duty of parents to watch over their small child is to be viewed in light of all the demands made at the time upon them. Courts have agreed that it is reasonable to expect that a parent will take his or her eyes off a

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2021

child for brief periods to attend to other matters. (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 31.)

Standard of care for minors

Most people predominantly agree that young children should not be treated the same as adults when it comes to legal responsibility. For the same reasons that children are afforded special protection and considerations, they similarly are not held accountable for their actions. Children are held to a different standard of care than adults. An act which constitutes negligence on the part of an adult does not necessarily constitute negligence when committed by a child of limited judgment, discretion and experience. CACI 402 *Standard of Care for Minors* specifically states that "… Children are not held to the same standards of behavior as adults. A child is required to use the amount of care that a reasonably careful child of the same age, intelligence, knowledge, and experience would use in that same situation."

Children under the age of five are incapable of contributory negligence as a matter of law. (*Christian v. Goodwin* (1961) 188 Cal.App.2d 650.) Courts have consistently found that children under the age of five are *incapable* of negligent acts such as failing to exercise reasonable care. In *People v Berry* (1991) 1 Cal.App.4th 778, the defendant's dog killed a young child. The defendant dog owner was charged with keeping a mischievous animal that caused death. The defense was that there was no proof that the child acted with due care. The court held that no such proof was required where the child is a minor under age five, because children that young are not legally capable of acting with reasonable care toward a dog.

Knowing and understanding your client includes understanding trauma and its impact on your client. When children experience trauma, the impact can have lasting and negative effects that can influence their daily functioning and stay with them for their entire life. There are many different types of traumatic experiences, such as physical abuse, sexual abuse, serious accidents, parental death/grief, and medical procedures and/or conditions. It can be argued that in addition to suffering trauma as a result of someone else's wrongful conduct, that if a young child is put through a deposition, it will more likely than not cause her additional distress and emotional damage. Further, even if she were deposed, a young child can be easily led, seek to please the questioner with her responses and cannot tell the difference between a lie, a story she made up and the truth. Clearly, deposing a small child could be oppressive and cause her emotional damage.

While in most cases, the defense is entitled to depose the plaintiff, there is a heightened concern that deposing a child may cause them additional mental distress if they are required to testify about underlying traumatic events. Being questioned by a complete stranger about such personal events is an added stressor. Evidence Code section 700 says, "Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." As such, while there is no age limit for the taking of a deposition, the court may still balance all the factors and issue a protective order restricting or barring the deposition of any person.

Protective order for minor's deposition

A protective order can be issued to protect any party, deponent, or other person from unwarranted annoyance, embarrassment, oppression, or undue burden or expense. (Code Civ. Proc., § 2025.420, subd. (b).) A form of discovery is oppressive if the ultimate effect of the discovery burden is excessive compared to how useful the information will be to the discovering party. (*West Pico Furniture Co. v. Superior Ct.* (1961) 56 Cal.2d 407,417; *Mead Reinsurance Co. v. Superior Ct.* (1986) 188 Cal.App.3d 313, 320-21.) To issue the protective order, plaintiffs must establish good cause. (See Code Civ. Proc., § 2025.420, subd. (b).) To do so, the movant must show specific facts that establish the grounds for relief. (*Goodman v. Citizens Life & Cas. Ins.* (1967) 253 Cal.App.2d 807, 819 [discussing former Code Civ. Proc., § 2019]; *Greyhound Corp. v. Superior Ct.* (1961) 56 Cal.2d 355, 388 [good-cause showing must satisfy court that protective order can be granted without "abuse of the inherent rights of the adversary" to requested discovery].) A protective order can be issued when the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. (Code Civ. Proc., § 2019.030, subds. (a)(1), (b).) A protective order can also be issued when the burden, expense, or intrusiveness of the discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.020, subd. (a).) A protective order can bar a deposition completely or be used to put in place any reasonable restrictions, such as time restrictions, choosing a child-friendly location, limiting the questioning to one questioner and even limiting the topics for questioning.

In many cases, testimony regarding liability and the child's damages is easily available from other, more convenient and less burdensome sources, such as parents, guardians and treating physicians. As to liability for the incident itself, other sources may be more accurate such as if the incident was captured on video or investigated by a government agency. The intrusiveness and damage to a child in compelling their deposition can certainly be argued to outweigh any admissible evidence that could be discovered from a deposition.

Practical examples

In a case involving the sexual assault of a minor, we were successful in obtaining a protective order to prohibit the minor plaintiff's deposition. We vehemently argued that our client was a unique individual who could not safely be

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2021

deposed. We attached to the motion a declaration from her treating psychiatrist who set forth her diagnosis of the plaintiff, her treatment of her and her experiences with the client and her responses to stressful situations in support of her statement that the plaintiff would more likely than not suffer severe repercussions should she be deposed. Her declaration stated that should the plaintiff be exposed to the rigors of a deposition, she would more likely than not suffer a psychotic break, become catatonic and self-injurious or worse. She additionally stated that for the plaintiff, the stress and shame of having to recount the details surrounding her rape could make her suicidal. Our motion further argued that the plaintiff would not be testifying at the time of trial. Her damages would be proven and shown through family testimony, treating-physician testimony and expert testimony, all of which had or would be made available to defense.

In another case, we had a four-year-old client who suffered severe injuries when she fell 10 feet below a track while she and her mother were boarding a rollercoaster. She suffered from post-traumatic stress disorder (PTSD) as a result of the fall and was actively seeking psychotherapy with her parents. As to liability, the incident itself was captured on video and investigated by the State of California Department of Industrial Relations, Division of Occupational Safety and Health, Amusement Ride Section. The investigator was also deposed by the parties.

We were successful in bringing a motion for a protective order to limit time for questioning, the type of questions the defense would be able to ask her and to control the environment in which she was deposed. Per our request, the court ordered that the deposition take place at her therapist's office, with her parents and therapist in attendance. The court also required the defense to dress in a casual manner, only permitted one attorney to ask questions and we sat on the floor in order not to cause undue stress to this little girl.

Defendants do not have a fundamental right to confront and cross-examine their accuser in a civil matter. While there is no age limit for the taking of a deposition, the court may still balance all the factors and issue a protective order restricting or barring the deposition of any person. Judges are parents, grandparents, uncles, and aunts. They are part of a society that reveres children and a legal system that ensures protections for children. While a court may not bar a deposition completely, it is worth it to bring a motion for a protective order requesting alternatives to protect a young or vulnerable minor from further distress and harassment. Be creative in the conditions you ask for. Each child is different and with our ever-changing world and the technology with it, the ways you can propose to reasonably adjust your depositions to best suit your vulnerable child client are endless.

Making a difference

It is an honor as an attorney to represent a child and to help make a real difference in the quality of their life. Just as we require from defendants, attorneys representing children must also use heightened care when entrusted with a child's case. While we always advocate for our clients, a child cannot always speak up for themselves, so it is even more vital that we speak up for them. Luckily there are many tools that you can use to best serve your client while protecting them from the hardships of litigation that an adult plaintiff must face. With this responsibility comes great reward as you are representing our most vulnerable citizens and aiding in securing a recovery that will help them for the rest of their lives.

Candice Klein is a founding partner of Chang | Klein LLP. *Her practice emphasizes cases involving wrongful death, catastrophic personal injury, sexual assault and childhood sexual abuse.*