

One-on-One with **Darcy Merkur**

PARTNER, THOMSON ROGERS PERSONAL INJURY LAWYERS
AND PRACTICAL LAW CANADA ADVISORY BOARD MEMBER

Darcy Merkur has combined his passion for business and the law to build a reputation as one of the most innovative personal injury lawyers in the country.

Numerous lawyers already rely on his *Ontario Personal Injury Damages Calculator* software to ballpark the value of client claims, and many more will soon reap the benefits of Merkur's legal wisdom as he joins the advisory board of Practical Law Canada's new personal injury litigation offering.

Merkur has spent his entire 15-year legal career at the Toronto firm Thomson Rogers, where he is now a partner, spanning a turbulent period in the personal injury field. He was recently honoured by his colleagues in the Ontario Trial Lawyers Association with the Dean Edgell Award for legal writing and leadership activities, and with more upheaval on the horizon, personal injury lawyers will continue to look to this inventive thinker for guidance. Here, Merkur tells us his story, and shares some of the secrets to a successful personal injury practice.

How has your career evolved to this point? I always sort of expected to be a businessman of some sort, and I was initially registered to do a joint MBA-law degree, but I eventually elected to stay in law only. I was attracted to litigation for the same reason many people are: I like to be on my feet, I like arguing, I like debating, I like trying to see both sides of an argument, and I like strategizing.

When I was in law school, I was in a program working for a criminal lawyer, and sat in on a murder trial, but in the course of that, I realized it was not the kind of lifestyle that I had envisioned. I ended up going into the personal injury world on the plaintiff side because it felt more like the good side of the equation, where I could help people in need.

How is your practice divided now? I work almost exclusively for accident victims, but I've also had a lot of experience dealing with mass wrongs.

I have dealt with class actions involving historic sexual and physical abuse, and lawsuits where there has been a harm done on a community of people. Where you have a lot of people who are victims of the same alleged perpetrator, there are a lot of benefits to proceeding as a group.

What element of your work do you find most challenging? Dealing with client needs: our clients have suffered life changing injuries that have a profound impact on every aspect of their life. They have hour-to-hour, minute-to-minute needs that are pressing and require your attention at all hours of the day and night. It's hard to be everywhere at once and manage your own personal life as well. Their problems seem more serious than your day-to-day problems too, so it's hard to say, "well, I'm playing soccer with my kid, I can't talk to you right now," when this person can't get out of their apartment because the elevator broke, and they're wheelchair bound. You need to have a team of people you can rely

on, so that you can still manage your personal life, while at the same time being on call.

How has the personal injury sector changed since you started out working in it? Advertising has changed the way in which a personal injury lawyer can become heard of, and that's had a major impact on the way the firms market, and the way we get files. There have been a number of insurance changes along the way too, but those have not had the profound impacts on the industry that one might have expected. There is still a lot of need for lawyers, despite cuts in insurance benefits and policy limits and all the rest of it. But the marketing aspect has really been an industry changer.

Are there any changes on the horizon that you think will significantly affect personal injury practice? The one issue that looms right now is whether or not law societies are going to let law firms go public. That's been developing across the world, in Australia and England, and in the event that does come to Canada, it could have a major impact on the magnitude of personal injury firms. I would expect a consolidation of the industry to some extent, with someone taking a clear market lead using capital behind them to overrun the industry.

What do you think is currently the biggest challenge facing personal injury lawyers? With a contingency-type fee structure, it's not just about getting clients, it's about getting high-quality clients. There's increased competition, but not a lot of objective criteria out there



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to distinguish one lawyer from the next. Many lawyers are promoting themselves as industry leaders without necessarily having those credentials, so it's a big challenge to persuade the public at large about your own credentials in the face of mass advertising.

What matters stand out to you as the most significant during your career?

Last year I was retained by a catastrophically injured 40-year-old man who I could relate to very strongly. He had a good job, he was a family man, and he was innocently driving home to pick up his children after work one day when another driver, completely at fault, went into him. Thankfully there was no significant brain injury, so he still had all his faculties, and could express his love and affection for his children, but at the same time, he won't be able to walk again. It really resonated

with me, so I took it upon myself to move heaven and earth to achieve a settlement for the full amount of the policy as soon as humanly possible so that my quadriplegic client could purchase a new house for his family, and live with the high quality of life that he was used to, without having to move into some temporary or unsuitable home. I spent countless hours on the phone getting the file to the attention of the right supervisors at the insurance company, so that they were in a position to recognize the gravity of the situation, and this nice family could get on with their life as best they could under the circumstances.

What is your greatest accomplishment?

I was involved in the residential school class action for many years, which will always have a special place in my heart. We helped thousands of survivors who

suffered physical and sexual abuse access compensation from the Government of Canada. Since then, my career has changed to primarily individual personal injury cases, and the ones that are the most meaningful to me are where the funds were really well used to make the person and their family have a better life.

What do you think a lawyer needs to do to attract and impress clients?

It's about knowing your area of law so well that you can give advice to clients with a high degree of confidence. A client's first question tends to be: "How much am I going to get, and how long will it take?" We don't guarantee results, but we can measure probabilities about how long a matter might take to proceed and what amount the claim could be worth. The more expertise you have, the more accurate your estimate

gets. I learned early on that before I can tell a client that their case is worth a certain amount of money, I need to have a very impressive understanding of why that is the case.

I designed the *Ontario Personal Injuries Damages Calculator* so that I can quantify with precision, various scenarios associated with injuries and the impact they have on a client. You can map it out with them in great detail, in a simplified manner, and they can have a better handle on what their expectations should be.

Communicating legally complicated matters in a simple way is one of the most important talents for a good personal injury lawyer, especially when you're dealing with brain injured clients, whose comprehension is not necessarily always what it used to be. When it's clear to a client that you are able to understand the legal concepts, but you're also able to explain it in a way that they can understand, that's what really impresses them.

What are the most common mistakes lawyers in practice make? Lawyers who are good at math don't often become personal injury lawyers, because they've all gone into business and corporate law. So the plaintiffs' personal injury world is riddled with people who are good communicators, and like helping people, but struggle with the math.

By far the most common, significant error both plaintiffs' and defence lawyers in this industry make, has to do with the sequence of deductibility of benefits where liability is in issue. If you don't have an understanding of how that sequence works, a plaintiff lawyer can often think their case is worth millions of dollars, when in fact, because their client is largely responsible for the accident, and they are entitled to, and have received benefits, their case isn't even worth \$100,000, let alone \$1 million.

You've got to understand how the math works, because personal injury litigation, at the end of the day, is about getting money for people. That's what they need to support themselves and

to provide the care they need to have a better life.

What one piece of advice would you offer junior practitioners? My philosophy is always double check everything. Consult with people, but don't always take as a fact what a senior lawyer tells you is a fact. The law has changed so many times that often the grey-haired lawyers around the office are citing law and entitlements that no longer apply. Go into the next lawyer's office and get the answer, certainly. But then double check it.

What is one key strategy in managing client expectations? Where lawyers tend to fall down with client expectations is when it comes to the duration of a matter. People start a lawsuit, and they think it's going to take six months. Most of my cases settle two or three years after the accident, but your client needs to be ready for the five-year war to accomplish a satisfactory resolution within two or three years.

I always try to get clients to understand what is a realistic duration, and why. Get everything in writing, and explain to them why it takes so long: it's not that you're doing a bad job for them, but there is a backlog of arbitrations, and there's nothing that can be done to expedite it. In the meantime, explain what else you're trying to accomplish, which might be an advance payment request, an interim payment, or some other solutions.

What is the biggest shock you have received during a trial? Whenever you're dealing with a jury, it's a shock, because they are fairly unfettered in what they can do on liability and damages. We've been fortunate to have some very wonderful jury results that were much better than we expected, which is good, but I know a lot of colleagues who've had the exact opposite experience.

What do you think makes the difference between a being a good plaintiff personal injury lawyer and a great plaintiff personal injury lawyer? To me, a great personal injury lawyer is one who makes sure that a person's

life is taken care of post-settlement, even though it's a bit outside your scope. We help people get money, and what they do with their money is their own choice, but you still need to steer the ship and give them good advice about what to do with their money. Helping arrange a structured settlement, where the money is paid over time, is one example, because it's something that has to be negotiated with the insurer.

No lawyer wants to get that call five years after a multi-million-dollar settlement from a client who has had a brain injury, saying: "I pissed away my settlement money." You want the Christmas card five years later saying: "Thank you for helping me with my money. My structure continues to go up in value, and I can pay my bills and have a great quality of life."

If you were not a lawyer, what would you wish to be? I would have been a businessman. I like innovation. That's what drew me to developing my software. I love seeing things getting easier, so if I wasn't a lawyer, I think I'd be developing products or be involved with companies that innovate and make things easier for people.

What do you do when you are not being a lawyer? Like a lot of personal injury lawyers, I'm very active from a health perspective, at the gym and exercising. Being a litigator, you need that high stamina. When you have a trial, you're on your feet all day; you're briefing witnesses in the morning; and at night you're barely sleeping. I'm also involved with causes helping out the brain injury community, trying to raise awareness so people are a little more compassionate when they see people behaving strangely on the subway, or forgetting things.

What attracted you to be a member of the advisory board of Practical Law Canada? I think that lawyers need more checklists and resources, and this is a great opportunity for me to be associated with a product that provides them, and allows them to rely on the advice and direction of people with more experience.