

CITATION: Spicer v. Wawanesa Mutual Insurance Company, 2023 ONSC 3221
COURT FILE NO.: CV-23-00696097-0000
DATE: 20230621

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
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)
)
TIMOTHY SPICER, BY HIS)
LITIGATION GUARDIAN, SCOTT)
SPICER)
)
Applicant) *R. Bogoroch & H. Brown, for the Applicant*
)
- and -)
)
THE WAWANESA MUTUAL)
INSURANCE COMPANY)
)
Respondent)
) **HEARD:** In Writing
)

REASONS FOR DECISION

Firestone R.S.J.

[1] The applicant Timothy Spicer (“Timothy”), by his Litigation Guardian Scott Spicer, brings this Application under rule 7.08(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “Rules”) for Court approval of the proposed full and final settlement of his statutory accident benefits claim. Settlement of the corresponding tort claim was approved by me on September 27, 2022.

[2] For the reasons set out below, the application is granted, and the proposed settlement is approved.

Background

[3] On July 4, 2019, Timothy, who was born on May 18, 1964, was operating a motorcycle when he was struck by a school bus that had turned left across his path. At the time of the collision Timothy was 55 years of age and was a low income-earner. Timothy has not worked since the collision.

[4] As a result of the collision Timothy sustained a severe traumatic brain injury; neurocognitive disorder secondary to traumatic brain injury; bilateral frontal subdural hematoma; left side forehead laceration; orbitofrontal syndrome; left wrist fracture of the distal radius and distal ulna; left knee open fracture of the patella and condyle; right ankle open fracture; T2 spinous fracture; liver laceration; left sacral ala fracture and anisocoria (unequal pupil size).

[5] Following the collision Timothy was transported by ambulance to Sunnybrook Hospital (“Sunnybrook”) and was admitted to the Critical Care Unit. While at Sunnybrook he underwent numerous orthopedic surgeries. He remained at Sunnybrook until September 13, 2019 at which time he was transferred to the Toronto Rehabilitation Institute. He remained there until November 8, 2019. Timothy moved to the Adeline’s Lodge Retirement Home on November 8, 2019 and then on December 14, 2020 to the Millwood Retirement Home, where he currently resides.

[6] On February 20, 2020, Timothy’s accident benefit insurer accepted that Timothy had sustained a Catastrophic Impairment as defined in the *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O.Reg. 34/10 (the “Schedule”). Based on this designation the combined maximum available limit under s. 18(3)(b) of the Schedule for medical, rehabilitation, and attendant care benefits is \$1,000,000.

The Proposed Accident Benefit Settlement

[7] In addition to the statutory accident benefits already paid, the proposed settlement to be paid by the respondent is \$450,000.00. The total paid and payable for medical, rehabilitation and attendant care benefits will be close to the maximum available limit. The advantages of a settlement now outweigh the modest discount. The settlement will permit the management of the available funds to maximize treatment and care. The allocation of the proposed settlement is as follows:

- (a) \$25,000.00 for medical benefits.
- (b) \$25,000.00 for rehabilitation benefits.
- (c) \$40,000.00 for income replacement benefits.
- (d) \$360,000.00 for attendant care benefits.

The respondent agreed to continue to fund medical and rehabilitation treatment and expenses up to March 21, 2023, to a maximum of \$20,000.00, which will be deducted from the \$450,000.00 settlement amount.

[8] The amount of \$430,000.00 is to be distributed as follows:

- (a) \$275,000.00 is to be structured.
- (b) \$73,725.00 is to be paid to Scott Spicer, Power of Attorney for Timothy Spicer for the benefit of Timothy Spicer.

- (c) \$5,000.00 to the Minister of Finance for Ontario Disability Support Program Payments.
- (d) \$76,275.00 to Bogoroch & Associates LLP for their lawyer/client account. This comprises \$67,500.00 for fees and \$8,775.00 for H.S.T. This sum also includes the cost of photocopying, facsimiles, courier and postage not reimbursed by the respondent.

[9] The proposed fee represents a contingency fee of approximately 15%, reduced from the 25% contingency fee set out in the Accident Benefit Contingency Fee Retainer Agreement dated July 17, 2019.

The Requirement for Court Approval

[10] The requirement for court approval derives from the court's *parens patriae* jurisdiction. The purpose of court approval is to protect the best interests of parties under disability. In *Wu Estate v Zurich Insurance Co.* (2006), 268 D.L.R. (4th) 670 (Ont. C.A.), the court states at para.10:

The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves...to be exercised in the 'best interest' of the protected person...for his or her 'benefit' or 'welfare'": *Eve, Re*, 1986 CanLII 36 (SCC), [1986] 2 S.C.R.388 (S.C.C.) at para. 73. The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined": *Tsaoussis (litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257 (Ont.C.A.), at 268. The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability: *Poulin v. Nadon*, 1950 CanLII 121 (ON CA), [1950] O.R. 219 (Ont. C.A.). The purpose of court approval is plainly to protect the party under disability and ensure that his or her legal rights are not compromised or surrendered without proper compensation.

[11] The requirement for court approval is codified in rule 7.08(1). This rule provides that "No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge." The term "proceeding" is defined in rule 1.03 as an action or application.

[12] In *Rivera v. LeBlond*, 2007 CanLII 7396 (Ont. S.C), the court confirms the principle that "[r]ule 7.08(4) and the obligations of the court pursuant to its *parens patriae* jurisdiction require a party seeking approval to submit sufficient evidence to make a meaningful assessment of the reasonability of the proposed settlement of the claims of a person under a disability": at para. 23.

[13] The court goes on to confirm at para. 27 that:

Typically, the applicants will have to provide sufficient evidence to demonstrate that:

- a) an appropriate investigation with respect to liability and damages has been completed.
- b) an appropriate assessment of liability issues has been made;
- c) an appropriate assessment of damages issues has been made; and
- d) the fees and disbursements which the plaintiff's lawyers propose to charge are reasonable in all the circumstances.

[14] When considering whether to approve the proposed settlement, the test is whether the settlement is in the best interests of the person under disability. Approval does not depend on a comparison of what would have been awarded at trial, but rather an assessment of whether the settlement is reasonable and in the party's benefit given the risks of litigation and the desire of the party to settle: Garry D. Watson & Derek McKay, *Holmsted and Watson: Ontario Civil Procedure*, e-looseleaf (Toronto: Thomson Reuters, 2023), at § 22:23. See e.g. *Oliveira v. Tarjay Investments Inc.*, 2006 CanLII 8870 (Ont. C.A.), at para. 4.

[15] Although it is the litigation guardian's duty to be satisfied of the fairness and reasonableness of the lawyer's fees, the court must be satisfied that the fees, along with the rest of the proposed settlement, are for the person under disability's benefit: *Franklin (Litigation guardian of) v. Neinstein & Associates*, [2000] O.J. No. 4192 (Ont. C.A.), at para.8. Where the Children's Lawyer or Public Guardian and Trustee is involved and endorses the settlement, the court should give the recommendation considerable weight absent evidence suggesting any impropriety or lack of skill: *Rivera*, at para. 35.

Material Required for Court Approval

[16] As a general principle, an assessment of whether a proposed settlement is in the best interests of a person under disability requires full and frank disclosure on the merits of a settlement. The court cannot properly exercise its *parens patriae* jurisdiction and make a meaningful and expeditious assessment of the proposed settlement without sufficient evidence on all the material issues, including conflicting evidence: *Virgi v. Lerner & Associates LLP*, [2003] O.J. No. 993 (Ont. S.C.); *Burns Estate v. Falloon*, 2007 CanLII 38558 (Ont. S.C.), at paras. 18-19; *Rivera*, at paras. 23-24; *Wilson (Litigation Guardian of) v. Davies Estate*, 2012 ONSC 5969, at para. 10.

[17] This disclosure principle is codified by the requirements under Rule 7.08(4). The notice of motion or notice of application must include:

- (a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement.

- (b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement.
- (c) Where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and
- (d) A copy of the proposed minutes of settlement.

[18] In the Toronto Region motions and applications for court approval must be brought in accordance with the Best Practice's Guideline and Checklist (the "Guideline") for Rule 7.08 matters. The Guideline is referenced at para. 39 of the *Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region*.

[19] The Guideline confirms counsel's obligation to satisfy the court through the evidence filed on the motion or application that the proposed settlement is reasonable and is in the best interests of the party under disability.

[20] The Guideline provides that motion or application record is to include the following documentation:

1. The pleadings;
2. Sworn affidavit of the litigation guardian;
3. Sworn affidavit of the solicitor;
4. Copy of signed consent if minor is over the age of 16 years;
5. A copy of any applicable contingency fee agreement or other fee arrangement;
6. Executed Minutes of Settlement;
7. Copies of important damages and liability reports;
8. Draft approved Judgment with executed consents; a term of the draft Judgment should be that it is serviced on the Children's Lawyer for minors or the Public Guardian and Trustee for incapable adults.

[21] The Guideline also specifically provides that if the settlement includes a structure, a printout of the structure proposal must be appended to the draft Judgment.

Structured Settlements and the Rule 7 Approval Process

[22] Structured settlements are an investment tool available to persons who have suffered personal injury and losses. A structured settlement can be entered into voluntarily upon settlement of a claim or by order of the court. They are safe and secure and provide for guaranteed tax-free periodic and lump sum payments for life or for a certain period.

[23] In the context of motor vehicle tort actions, sections 6(1) and (2) of *Court Proceedings for Automobile Accidents that Occur on Or After November 1, 1996*, O.Reg. 461/96 specifically mandate that the court order a structure in certain circumstances. These sections provide as follows:

STRUCTURED JUDGMENTS

6(1) The court shall order that an award for pecuniary loss be paid periodically under section 267.10 of the Act if two or more of the following circumstances exist:

1. The award, including prejudgment interest but excluding costs, is for \$100,000 or more.
2. On the date of the order, the plaintiff is less than 18 years of age.
3. The court is satisfied that the plaintiff has no other means to fund his or her future care.
4. The court is satisfied that the plaintiff is not likely to manage the award in a prudent manner.

(2) Subsection (1) does not apply if the court is satisfied that,

- (a) sufficient funds to pay the award periodically are not available under a motor vehicle liability policy; or
- (b) an order to pay the award periodically would have the effect of preventing the plaintiff or another person from obtaining full recovery of a claim arising out of the incident.

[24] In the context of the Rule 7 approval process, whether by way of motion or application, where a structure is proposed, counsel is required take the necessary steps to ensure the court is provided with the particulars of the proposed structure. This is done by way of a structure payment printout (as referenced in the Guideline) to be annexed as a schedule to the draft judgment. The printout sets out the proposed monthly and lump sum payment amounts and other terms for which court approval is sought. This information is required for the court to properly exercise its *parens patriae* jurisdiction and make a proper informed assessment of whether the proposed structure is in the best interests of the party under disability.

[25] Heidi R. Brown in her affidavit sworn May 16, 2023 filed in support of this application in her capacity as solicitor deposes that the proposed structure in the amount of \$275,000 has been funded and can be collapsed if the proposed settlement is not approved by the court. It is further deposed that funding of structured settlements pending court approval has recently been called into question by the court.

[26] It is important to have clarity regarding the acceptable and proper process of securing a structure pending court approval. As will be explained below the placing or funding in escrow of a structure prior to court approval is both appropriate and necessary. This process is not to be equated with implementing a settlement prior to court approval or usurping the court's jurisdiction.

[27] The placing of a structure as a precondition to court approval does not violate Rules 7.08 and 7.09. To the contrary, by doing so counsel is doing exactly what is required for the court to properly consider the proposed structure. There is a difference between taking the necessary pre-approval steps to ensure the court has the necessary information to consider the structure as part of the Rule 7 approval process and implementing a structure before court approval is obtained.

[28] As confirmed in the letter from Colleen A. Weber of McKellar Structured Settlements dated June 1, 2023 ("McKellar"), attached as exhibit "A" to the supplementary affidavit of Heidi R. Brown sworn June 9, 2023, funding a structured settlement in escrow (also referred to as prefunding a structure) is the only acceptable method by which a precise structured settlement payment schedule can be secured with certainty and "locked in" pending court approval. Without such prefunding, the identity of the issuing life insurer(s), the precise payments created by a fixed funding amount, and the cost to provide a fixed periodic payment remain subject to fluctuation.

[29] McKellar goes on to confirm that such funding is necessary because issuing life insurers cannot guarantee rates until the proposed structure is funded (which locks in rates). An issuing life insurer makes corresponding investments to ensure the precise amounts identified can be provided to the plaintiff (or applicant). These precise amounts are the very information the court requires to properly consider the proposed structure. Without locking in the structure the court would not have the certainty it requires regarding the payment stream and other particulars.

[30] Funding in escrow is not the same as implementing a settlement or structure prior to court approval. As McKellar's confirms, structured settlement funds are received by the broker in trust and held just long enough to determine the most favorable placement of funds. Once final brokerage is finalized, the funds are placed in escrow with the life insurance company. Importantly, no structure payments are made until the settlement is approved by the court. Further, pending court approval, funds can be withdrawn or added to the structure, the payment schedule can be amended, or the structure can be collapsed completely.

[31] If the Rule 7 motion or application is not approved by the court, the structured settlement funds are returned in full to the broker in trust, and then immediately upon receipt are forwarded to the insurer/defendant, without penalty or interest. Where the quantum of the proposed settlement is approved by the court, but a change in the amount or format of the structure is requested by the court as a precondition to approval, the structure can be amended.

[32] Regarding the approval application before me the record confirms that the proposed structure has been funded in escrow pending court approval. The rates have been secured by placement of the funds with Sun Life Assurance Company of Canada as reflected in the structure printout attached as Schedule "A" to the draft Judgment.

Conclusion

[33] Counsel is to be commended for the quality of the Rule 7 application materials placed before the court. They have complied with the requirements set forth in the Rules and applicable Guideline. Based on the record before me, the application of the applicable legal principles, and the result achieved, I am satisfied that the proposed fee is fair and reasonable, and that the proposed settlement is in the best interests of Timothy Spicer. The proposed statutory accident benefits settlement is approved. Judgment is to issue in accordance with the original signed by me.

A handwritten signature in cursive script, reading "Stephen Firestone", positioned above a horizontal line.

Firestone R.S.J.

Released: June 21, 2023

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ONTARIO
SUPERIOR COURT OF JUSTICE

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LITIGATION GUARDIAN, SCOTT
SPICER

Applicant

– and –

THE WAWANESA MUTUAL
INSURANCE COMPANY

Respondent

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Firestone R.S.J.

Released: June 21, 2023