

CITATION: Gidda v. Intact Insurance Company, 2023 ONSC 2799
COURT FILE NO.: CV-21-00672314-0000
DATE: 20230512

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MEHTAB SINGH GIDDA, an adult under disability, as represented by his
Litigation Guardian, Sukhdev Gidda, Applicant

AND:

INTACT INSURANCE COMPANY, Respondent

BEFORE: Justice A. Ramsay

COUNSEL: Jeffrey Neinstein, for the Applicant

No one for the Respondent

HEARD: In Writing

ENDORSEMENT

A. Nature of the Motion

[1] This is an application, on the consent of the parties, under r. 7.08 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (“*the Rules*”), for court approval of a full and final settlement of statutory accident benefit claims reached on behalf of an adult person under disability, Mr. Mehtab Singh Gidda (“Mr. Gidda”), by his mother Sukhdev Gidda in her capacity as litigation guardian. The firm of Neinstein LLP seeks approval of their legal fees on the basis of a Contingency Fee Agreement entered into by the litigation guardian.

[2] The matter was before me in writing and was subject to several previous endorsements and case conferences, the last conference on April 28, 2023. In my endorsement dated February 4, 2022, I enumerated a number of deficiencies and gaps in information which have now been provided by counsel for the applicant, Jeffrey Neinstein (“Mr. Neinstein”).

[3] The settlement of Mr. Gidda’s accident benefits for the sum of \$735,000 all-inclusive should be approved as well as the new proposed structure on the terms below. It was not readily apparent on the materials originally filed why the court should approve the settlement as being fair and reasonable and in the best interest of Mr. Gidda. He sustained such serious injuries in a motor vehicle accident on January 13, 2018, that he was deemed to have met the definition for catastrophic impairment (“CAT”) under the *Statutory Accident Benefits Schedule – Effective*

September 1, 2010, O. Reg. 34/10 (“the SABS”), as amended, made under the *Insurance Act*, R.S.O. 1990, c. I.8. As such, he had available limits of one million dollars for coverage for medical rehabilitation and attendant care, weekly disability benefits in the form of income replacement benefits to age 65, ramped down thereafter, and other expenses in the form of housekeeping and home maintenance, up to a maximum of \$100 a week, for life.

B. *Background*

[4] Mr. Gidda is currently 33 years old. He obtained a Bachelor of Science degree from York University. At the time of the accident, he was working full-time as a production technician with Apotex. He was living with his parents and was reportedly responsible for managing the finances. He also participated in housekeeping and home maintenance chores.

[5] His life changed on January 13, 2018, when he was rear ended by another vehicle. After exiting his vehicle to speak to the other driver he was struck by a transport truck. At the scene, his Glasgow coma score was an eight. Following the accident, Mr. Gidda was diagnosed with a severe traumatic brain injury with multi-compartment subdural and subarachnoid hemorrhage, cerebral edema and axonal shearing, requiring a decompression craniotomy and craniectomy to evacuate a large hematoma. He also sustained multiple orthopedic injuries. Mr. Gidda was admitted to Sunnybrook Hospital where he remained in ICU for four weeks before being transferred to an ICU at William Osler Health System where he remained in a coma. He remained an inpatient until September 7, 2018. Throughout his hospital stay, Mr. Gidda was nonresponsive and dependent on others for all aspects of his care. His family pursued alternative management in India for a time before he was transferred back to Canada. Mr. Gidda continues to be non-verbal, and bed ridden. He continues to require 24-hour care and continues to be fed through PEG tubes.

[6] An application was submitted to his automobile liability insurer to access statutory accident benefits available under the policy. In this case, there is no indication that optional coverage was purchased thereby increasing the standard limits. An individual who meets the CAT designation has available limits of \$1,000,000 for combined medical rehabilitation and attendant care benefits. The insured has available coverage for housekeeping benefit at a rate of \$100 per week but must meet the definition for incurred expenses. On the materials before me, Mr. Gidda is entitled to weekly income replacement benefits (IRBs) up to a maximum of \$400 per week.

[7] By order dated September 14, 2021, McGee J. declared that Mehtab Singh Gidda was incapable of managing his property and appointed his father, Sukhdev Singh Gidda, as a guardian of property.

[8] Although Mr. Neinstein indicates in his affidavit that the settlement represents 100 per cent of the remaining limits for medical rehabilitation plus attendant, this appears to be merely a form of summing up that effectively that is what the settlement amounts. In reality, the settlement encompasses all potential claims for past and future statutory accident benefit coverage available to Mr. Gidda. In fact, the settlement represents the entire balance of his medical/rehabilitation and attendant care benefits limits, as well as a modest amount for other expenses (housekeeping) and

a small amount for income replacement benefits. The settlement disclosure notice indicates the following breakdown:

Income replacement benefits	\$15,000
Medical benefits	\$312,000
Rehabilitation benefits	\$288,000
Attendant care benefits	\$59,000
Housekeeping benefit	\$51,000
Visitation	\$10,000

[9] Of the one-million-dollar limit available for med/rehab and attendant care, by the time of the application, Mr. Gidda had been paid \$246,288.70 leaving a remaining \$753,711.30. On the materials before me, an advance payment of \$25,000 was made to the litigation guardian after the settlement but there has been no accounting for the funds. There should be.

[10] On the materials before me, I am satisfied that the settlement is fair and reasonable and in the best interest of Mr. Gidda, for the reasons that follow.

a) Income Replacement Benefits (IRBs)

[11] Pursuant to s. 5 of the *SABS*, within 104 weeks after an accident, an insurer is required to pay an insured person who was employed at the time of the accident and sustains an impairment as a result of an accident, an income replacement benefit if, as a result of the accident, the insured person suffers a substantial inability to perform the essential tasks of their employment. Benefits are payable beyond the 104-week mark if the person sustains a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience. There is no dispute that Mr. Gida sustained catastrophic injuries and requires around the clock care.

[12] Mr. Gidda was earning a base salary of \$38,862.58 a year. On a review of the materials, Mr. Gidda is entitled to \$400 a week for IRBs. He was entitled to receive an income continuation policy, which includes coverage for long term disability benefits (LTDs) through SunLife, until age 65. Aside from the amount of \$15,000 proposed to resolve the claim for IRBs, no weekly disability benefit has been paid to date by the insurer.

[13] Statutory accident benefits are supplementary to other available benefits and accident benefit carrier may deduct collateral benefits from other sources. At the time of the application, Mr. Gidda was receiving LTDs of \$2,121.00, and based on the updated management plan, is receiving \$24,500. An application has been submitted for Canada Disability Benefits however, I agree with Mr. Neinstein that even if accepted, these benefits would not impact Mr. Gidda's IRBs since the LTD carrier is able to deduct them first. From the evidence, Mr. Gidda's weekly IRB entitlement is wiped out by the LTDs he is currently receiving and will continue to receive until age 65. The respondent insurer's position is that Mr. Gidda would not be entitled to receive any IRB payments after age 65 due to his significantly reduced life expectancy.

[14] I am satisfied though that the proposed settlement for this claim is fair and reasonable.

b) Medical/Rehabilitation and Attendant Care Benefits

[15] At the time of the settlement, Mr. Gidda was using \$2,200 a month for med/rehab benefits. This low burn rate was because his family also elected to explore alternative course of treatments.

[16] As for the attendant care benefits, \$59,000 is allocated to this benefit. There is no dispute that Mr. Gidda's monthly attendant care needs exceed the maximum CAT limits of \$6,000.00 a month. However, Mr. Gidda must satisfy the insurer that the "incurred" test has been met, as defined by the *SABS* and decisions from the License Appeals Tribunal ("LAT") and the court which have provided some clarity.

[17] Pursuant to s. 19 of the *SABS*, an insurer must pay for all reasonable and necessary expenses incurred by, or on behalf of an insured person, as a result of an accident for services provided by an aide or attendant. Benefits are available for life for individuals who have sustained catastrophic impairment up to a maximum of \$6,000 a month and up to the combined 1,000,000 limits. Section 3(7)(e) of the *SABS* provides additional guidelines by defining when an expense has been "incurred" to mean "the insured person has received the goods or services to which the expense relates" and that "the insured person has paid the expense, has promised to pay or is otherwise legally obligated to pay the expense." The person providing the service must have done so in the course of their occupation or profession or the individual must establish an economic loss as a result of providing the service.

[18] Section 3(7)(e) of the *SABS* reads as follows:

For the purposes of this Regulation, ...

(e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless, ...

(iii) the person who provided the goods or services,

(A) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or

(B) sustained an economic loss as a result of providing the goods or services to the insured person; ...

[19] In this supplementary affidavit, Mr. Neinstein indicates that the majority of care was provided by Mr. Gidda's family who refused the assistance of third-party health professionals. The majority of his care was provided by his mother who was not employed at the time of the accident. Mr. Neinstein indicates in the new materials that Mr. Gidda's father was involved in an unrelated accident and has not sustained an economic loss. It is evident from the modest amount (approximately \$11,731.54) paid thus far by the respondent insurer on account of attendant care benefits, that Mr. Gidda's parents are the ones who primarily provide these services. As such, it

would be difficult establish the test for “incurred” expense under the *SABS* if neither can establish lost wages to provide services to their son. In the result, given the history so far, I am satisfied that Mr. Gidda’s mother will continue to care for her son and that there is no indication that she is likely to engage the services of professional service providers in the near future, or at all. That may well change, but I am also mindful of the limits available.

[20] I am therefore satisfied that the amount allocated to settle the attendant care benefits is fair and reasonable.

c) Housekeeping expense

[21] Pursuant to s. 23 of the *SABS*, an insurer must pay up to \$100.00 per week for reasonable and necessary additional expenses incurred by or on behalf of an insured person for housekeeping and home maintenance services because of the of an accident if the person sustains a catastrophic impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident. Benefits are available for life. There is no dispute that Mr. Gidda would presumptively be eligible to receive this benefit for life. However, I am satisfied that the proposed settlement of this benefit for \$51,000 is fair and reasonable for several reasons.

[22] First, the applicant must again meet the test for “incurred” in s. 3(7)(e) of the *SABS*. Second, to date only \$2,118.91 has been paid on account of housekeeping to date. Third, I have considered the settlement, for this benefit, in the context of the amount paid to date, the test to be met, Mr. Gidda’s life expectancy, and the increased amount made available to Mr. Gidda by structuring the settlement.

d) The Structure

[23] This is not a proceeding for damages as undated by s. 116 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“*CJA*”), but both sides have agreed to structure part of the accident benefit settlement. Section 116 of the *CJA* permits the court to order a structure in certain circumstances. The relevant section reads:

116 (1) In a proceeding where damages are claimed for personal injuries or under Part V of the Family Law Act for loss resulting from the injury to or death of a person, the court, (a) if all affected parties consent, may order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just; and

(b) if the plaintiff requests that an amount be included in the award to offset any liability for income tax on income from the investment of the award, shall order the defendant to pay all or part of the award periodically on such terms as the court considers just.

[24] There is no claim for damages or dispute, but merely a settlement of Mr. Gidda’s accident benefits. Both parties have consented to part of the settlement being structured.

[25] I declined to approve the initial proposed structure as it was not clear to me that the structure was in the best interest of Mr. Gidda. The initial structure was for a base premium of \$600,000 plus \$4,536.22 for the cost of a "7-year Revisionary Guarantee paid for by and for the of Intact Insurance Company". There was no explanation as to what was meant by that condition nor was there an explanation as to how that structure, which contemplated a payout over 64 years, with a monthly payment of \$1,968.79, increasing each year only by 2.00%, compounded, and only attaining \$3,000 monthly mark when Mr. Gidda reached 54-years-old would meet Mr. Gidda's attendant care needs and other needs. I also had grave concerns about the lifetime payments under the structure projected to age 95. Given the catastrophic injuries sustained by Mr. Gidda counsel was directed to address Mr. Gidda's life expectancy and any impairment rating obtained from any life company and the impact of those factors on the settlement and the structure.

[26] I am satisfied with the new structure which contemplates the same base premium being placed with McKellar Structured Settlements as being more responsive to meeting some of Mr. Gidda's needs as it now takes into account Mr. Gidda's significantly reduced life expectancy and starts with a monthly payment of \$3,574.98 and is also indexed on an annual basis over the term of the structure. I am mindful that Mr. Gidda, despite his catastrophic impairment, must still meet the test for certain benefits to flow, but the proposed structure appears to have a struck a balance having regard to the funds available and his life expectancy. And, while the annual payments will not meet Mr. Gidda's future needs, I understand that the tort claim is ongoing. Counsel for the applicants indicate that the tort defendant has third-party liability limits in the amount of \$1,000,000.00. On the evidence before me, the tort defendant was convicted under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, for failing to drive in a marked lane. The materials also indicate that there is a claim against the provincial government for failing to maintain the highway in a safe condition.

[27] In the result, having regard to the factors above, the proposed stream of payments is practicable having regard to all the circumstances of the case.

e) Updated Management Plan

[28] An updated management plan was approved by the Public Guardian and Trustee on February 21, 2023, prior to court approval of the settlement. The plan must be amended to include the additional amounts below. There are unexplained differences in the student loan figures and a significant reduction.

f) Legal Fees

[29] Mr. Neinstein indicates that under the retainer agreement, Neinstein LLP would be entitled to a payment of 25% of the accident benefits settlement. He states that under the terms of the Contingency Fee Retainer Agreement (CFA), "the Applicant's lawyers would be entitled to a legal fee in the amount of \$183,750.00 plus applicable taxes and disbursements, for settlement of the Accident Benefits claim", but indicates that the firm is prepared to reduce its fee to 10% of the settlement, that is \$73,500 plus HST of \$9,555, or a total of \$83,055.

[30] The only CFA before the court relates to the firm's retainer to pursue damages, that is a tort claim. The agreement states, in part, that the client was retaining the firm "to act as your lawyers to advance a potential claim (the "Claim") for damages that you have sustained.....". The agreement also states: "Our Law Firm has **not** agreed to give you legal advice or perform legal services for you relating to any other matter" (emphasis in the original). The examples in the agreement are made with the purpose of showing the client how fees are to be calculated relate only to a tort claim. I therefore decline to enforce the CFA in the context of the accident benefit settlement.

[31] The nature of accident benefits is to permit the insured to deal with the insurer directly to pursue their claims. Significant amendments in 2016 removed the ability of successful parties to recover legal fees in disputes for statutory accident benefits. Under the current system, awards of costs are made by the LAT, which hears disputes about benefits, in instances where a party's behaviour has been unreasonable, frivolous, vexatious, or the party has acted in bad faith. Together, these provide all the more reason for lawyers to make it clear to clients what the firm is being retained to do, especially if such work extends beyond actual legal work, and in all cases, to make clear to the clients that any amount for legal fees and disbursements can only come from any settlement of the claims. There is no such agreement before me. To the contrary, the CFA indicates the firm was only retained to pursue a tort claim.

[32] However, while the CFA indicates the firm's retainer was limited to tort, there is some evidence before the court that the firm negotiated the accident benefit settlement including the agreement to have part of the settlement structured. Generally, legal fees in similar circumstances have been assessed on a *quantum meruit* basis. In this case, I have received computer generated dockets emailed to the court which include tort and accident benefits merged together. Much of the service provide relates to the tort file. There is no total figure set out. Aside from the items with some description as to the work undertaken, many of the entries do not permit me to determine what steps were taken to pursue benefits for Mr. Gidda, and why those steps were taken.

[33] As for the affidavit evidence, it too suffers from the same deficiencies as it lacks details of the nature of the work undertaken on behalf of the applicant in pursuing his accident benefit claim. It is also not clear from the evidence what treatment plans were denied, aside from the medEvac plane treatment plan. The only other legal work referred to in the affidavit relates to settlement negotiations. While I accept that the firm may have been involved in arranging health care teams and providing support for the family, there is no evidence before me that the insurer denied benefits nor that any benefit had to be disputed under the *Insurance Act* and the *SABS* through the dispute resolution process at the LAT. In his supplementary affidavit, Mr. Neinstein conceded in fact that there were minimal insurer examinations required to be completed through the administration of the claim.

[34] In this case, Mr. Gidda would have been deemed catastrophic from the time the accident occurred. It is therefore not clear why a law firm would be involved in assisting the applicants with receiving their benefits. The insurer is statutorily required to provide a package to the applicant (and any family member apply for benefits on his behalf) and because of the consumer protection objective of the legislation, is obliged to disclose what benefits are available, a description of those

benefits, the period of time the benefits are available, and provide the requisite forms for accessing those benefits.

[35] This court has found that a lower percentage for should be awarded for costs in accident benefit settlements: *Karwal v. Karwal*, 2017 ONSC 5485, 72 C.C.L.I. (5th) 95; *Treleaven v. Kilgour*, 2021 ONSC 646, 11 C.C.L.I. (6th) 15; *St. Jean v. Armstrong*, 2015 ONSC 13, aff'd, 2017 ONCA 145, 136 O.R. (3d) 257. This court has also acknowledged that the work involved in accident benefit cases is different than for tort cases. Justice Trimble set out the rationale for this approach in *Treleaven*, at para. 81, stating:

The philosophy behind setting this range in AB files is that the no-fault benefits are “no fault”; that is, a claimant’s entitlement is determined by the wording of the statute, regulations, and the policy. Once entitlement is established, the benefits flow. Further, the AB scheme in the Province of Ontario contains its own dispute resolution process which is designed to minimize costs when compared to the more expensive option of litigation. The AB scheme is designed to efficiently and effectively pay all allowable claims at minimum cost and provides for a relatively speedy, low-cost dispute resolution processes (internal citation omitted).

[36] The accident benefit scheme is set up in such a manner as to permit insured persons or their families to apply for and receive benefits from their automobile insurers. As Wilkins J. explained in *Adler (Litigation guardian of) v. State Farm* (2008), 92 O.R. (3d) 266 (S.C.) at para. 33:

Generally speaking, there is not a great deal of legal work required to process and collect all of the benefits to which an injured person is honestly entitled. Some claims for accident benefits may be of such a nature or quality as to require the significant application of time and effort in the adversarial process. In the case at bar, however, Michal Adler’s injuries were obvious and serious – his Glasgow Coma scale at the site was at the level of 3. He suffered a traumatic brain injury, a fracture to his pelvis, a fractured femur, a fractured tibia and fibula, a ruptured bladder, an aortic tear, a bilateral pneumothorax/hemothorax, a tracheostomy, he further required the insertion of a G2 tube and the surgical closure of his abdominal wall. In addition, it was the conclusion of Dr. Bernard Schacter that he had sustained a catastrophic injury and would require 24 hour a day care and supervision throughout his lifetime.

[37] In this case, there was not a great deal of legal work carried by the lawyers. There was no dispute about liability (entitlement to benefits), causation (Mr. Gidda sustained catastrophic impairment in the accident and was deemed to be catastrophic) and the potential limits available to him (the CAT limits were available to him).

[38] In the result, a fair and reasonable amount, based on all the evidence, is 5% of the settlement plus HST, or \$36,750.00 plus \$4,777.50 for a total of \$41,527.50.

[39] There being no disbursements list before the court, there shall be no disbursements claimable with respect to the accident benefit settlement.

Disposition:

[40] In the result, I make the following orders:

- i. The settlement of \$735,000 on behalf of Mr. Gidda is approved.
- ii. The payment of \$600,000 to be paid into the revised structure quote taking into account Mr. Gidda's life expectancy is approved.
- iii. Legal fees of Neinstein LLP in the amount of \$36,750.00 plus HST of \$4,777.50 is approved.
- iv. An updated management plan must be filed with the court within 10 days of the date of this order and must reflect the additional \$93,472.50 of unstructured funds. Paragraph 3 of the order of McGee J. remains in force pending approval of an updated management plan.
- v. The guardian of property must provide an accounting of \$25,000.00 advance payment in the updated management plan, with any supporting documents.
- vi. The timeline set out in paragraph 5 of the order of McGee J. dated September 14, 2021, remains in force, and the guardian of property shall submit an amended management plan to the Public Guardian and Trustee for review and approval pursuant to section 32(11) of the Substitute Decisions Act, 1992 within 3 months of this order approving the accident benefit settlement.
- vii. The guardian of property shall pass accounts from time to time, and, at a minimum, every three years, unless otherwise varied by the court.
- viii. While I will not direct that any security be posted at this time, this is subject to review, and the need for security may be considered in the future.

Justice A. Ramsay

Date: May 12, 2023