

CITATION: Brooks v. Culnan, 2023 ONSC 5415
COURT FILE NO.: CV-19-00613911-0000
DATE: 20230926

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Justin Brooks, Plaintiff

AND:

Irene M. Culnan, Defendant

BEFORE: D.A. Wilson J.

COUNSEL: *Jonathan Burton*, for the Plaintiff

HEARD: In Writing

ENDORSEMENT

[1] This is a motion filed pursuant to Rule 7 seeking approval of proposed settlements on behalf of a party under disability, Justin Brooks, who was involved in a pedestrian/motor vehicle accident on September 14, 2017. As a result of that accident, Justin suffered a number of injuries, including a traumatic brain injury with associated cognitive issues. This motion seeks approval of settlements totaling \$500,000 for the tort and accident benefits claim.

[2] In the solicitor's affidavit, Mr. Burton sets out the reasons he recommends the settlement in the tort action, including the uncertain liability situation and Justin's pre-accident medical conditions. The motion record contains expert reports on the issue of liability as well as on damages. Liability was difficult for the Plaintiff, given that Justin was jaywalking at the intersection of Dufferin and Steeles in Toronto. The Defendant was executing a left hand turn on an advance greenlight when the collision occurred. At the time of the collision, Justin was 23 years of age, and he was not employed. He had significant pre-accident medical conditions, including fetal alcohol syndrome. Given the challenges with liability, as well as the issues concerning damages, in my view, the settlement of the tort action in the sum of \$60,000 inclusive of all claims, interest and costs is reasonable and is in Justin's best interests and I approve it.

[3] Justin was deemed catastrophically impaired within the meaning of the Statutory Accident Benefits Schedule ("SABS"). Mr. Burton has detailed the reasons why he is of the opinion that the proposed resolution of the SABS claims is in Justin's best interests. Counsel has examined the amount of benefits claimed and paid since 2017 and after the catastrophic designation. I concur with the recommendation of counsel that the SABS be settled for the sum of \$440,000. This amount will cover the cost of Justin's treatment into the future. Approval of the settlement quantum is granted.

[4] Mr. Burton has reduced his fees to less than the amount he could charge pursuant to the contingency fee agreement. The fees sought are reasonable and I approve them.

[5] The accident benefits insurer requires that at least \$200,000 of the settlement funds be placed in a structure. I also agree that a significant portion any settlement funds ought to be placed in a structure, given the nature of Justin's impairments, his age and his inability to work. Justin's litigation guardian, Ruby Latty, met with Henderson Structured Settlements and reviewed a number of options for structured settlements.

[6] When reviewing a proposed settlement pursuant to Rule 7 of the *Rules of Civil Procedure*, the Court must review not only the quantum of the settlement, but also the fees sought to be charged by the solicitor as well as the proposed distribution of funds. The Court must consider the net amount to the party under disability and the proposal for its use. In cases where significant sums of money are payable to the party under disability, the Court will consider whether a structured settlement ought to be implemented and if so, how much of the settlement ought to be placed in the structure and on what terms. The terms of the structured settlement varies depending on the age of the party under disability as well as the injuries suffered and the nature of the disabilities.

[7] It is essential that counsel for the Plaintiff include the proposed structure printout as part of motion materials. It is only in this way the Court may examine whether the amount to be placed in the structure and the details of the payments are in the best interests of the party under disability. The proper procedure for counsel to follow when there will be a motion for court approval of a proposed settlement for a party under disability when there will be a structured settlement for part of the money is to fund the structure in escrow; this is often referred to as "locking the structure in". This means that the proposed structure is funded and if it is not approved by the court, it will be collapsed and the money placed into a different structure that is approved by the court.

[8] In *Spicer v. Wawanesa Mutual Insurance Company* 2023 ONSC 3221, RSJ Firestone considered the issue of the proper procedure for counsel to undertake when seeking approval from the Court of a proposed settlement for a party under disability which involves a structured settlement. In that case, the solicitor included information from McKellar Structured Settlements which is helpful to understanding the appropriate process. In the Spicer case, McKellar's confirmed that "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."

[9] I agree with the approach set out in *Spicer, supra*, concerning how counsel are to deal with a proposed settlement that involves the use of a structure.

[10] In addition, there is often a period of time between when counsel agree on the quantum of settlement and when the motion is reviewed by a judge. Prefunding a structured settlement is necessary because it is the only way the insurers can guarantee rates before a judge approves a

settlement. Knowing the full particulars of the structured settlement that the party under disability will receive is essential for the judge reviewing the motion for approval. If the rates were not locked in by pre-funding the structure, it may well be that by the time the judge reviews the motion record, the rates have changed and the same structure can no longer be obtained, which disadvantages the party under disability.

[11] It is also important to note that if the judge does not approve the proposed settlement or the proposed distribution of funds, including the fees sought to be charged by counsel, the amounts being placed in the structure can increase or decrease. When the structure is prefunded, the amount being placed in the structure can be changed according to the directions from the Court, the terms of the structure and the payment schedule can also be amended. If the Court does not approve the use of a structure, it can be collapsed, and the funds will be returned to the defendant, usually an insurer. In the usual course, the prefunded structure is attached as a schedule to the draft judgment that is submitted to the Court as part of the motion record for approval.

[12] In the case before me, the litigation guardian has chosen to place \$325,000 in a structured settlement for Justin's benefit. In my view, that is an appropriate amount to put in a structure. I have reviewed the structured settlement printout which is included in the motion materials. The structure has been prefunded with SunLife and it provides Justin with monthly payments of \$1,363.19 until he reaches the age of 64, a duration of 34 years. These payments are tax-free to Justin and they are guaranteed. In my view, the structure chosen is appropriate and it provides Justin with specific payments on a monthly basis until he reaches the age of 65. They are locked in, directed to him, so there is security of payment, which is important given his cognitive deficits.

[13] The proposed resolution of the tort and SABS claims of Justin, including the proposed structure, is approved as being in his best interests. I have signed the judgment.

D.A. Wilson J.

Date: September 26, 2023