

CITATION: Charles (Litigation Guardian of) v. Gore Mutual Insurance Company, 2023 ONSC 7053

COURT FILE NO.: CV-23-00709358-0000

DATE: 20231214

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JAHSIAH-CHANCE CHARLES, by his Litigation Guardian, Shernelle Charles, Applicant

AND:

GORE MUTUAL INSURANCE COMPANY, Respondent

BEFORE: Justice A.P. Ramsay

COUNSEL: *Tania Fleming*, for the Applicant

HEARD: December 13, 2023, In Writing

ENDORSEMENT

[1] This is an application, in writing, commenced by the litigation guardian of the minor applicant, to approve a settlement of all accident benefit claims on a full and final basis under r. 7.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The application is on the consent of the parties. The litigation guardian is the minor’s mother. The materials before me indicate that the applicant was involved in an accident on September 17, 2021. The minor sustained injuries to his ankle, a fractured wrist, and a concussion in the accident.

[2] Paralegals are permitted to provide a myriad of legal services, including representing claimants for certain categories of claims (for example, claims that do not involve catastrophic impairment) against their own automobile insurer for first party statutory accident benefits under the regulation under the *Insurance Act*, R.S.O. 1990, c. I.8. Paralegals may appear as a representative for an insured person at the License Appeal Tribunal (“LAT”), which hears disputes between the insured and the insurer about accident benefits coverage. The LAT has its own Licence Appeal Tribunal Rules (“LAT Rules”). The recent reiteration came into effect on August 21, 2023, with amendments and replacement of the Common Practice and Procedure.

[3] Not all accident benefit disputes make it to the LAT. However, any accident benefit settlement reached which involves a person under disability must be approved by a judge of the Superior Court and is governed by r. 7.08 of the *Rules*. Rule 7.08 sets out the process for approval and lists the materials required for every motion or application for approval.

[4] In this case, an affidavit is provided by Tania Fleming, paralegal, in support of the settlement. Two affidavits are provided by the litigation guardian, one with respect to the tort

action and the other in relation to the application. Ms. Fleming deposes that she negotiated the settlement with the respondent insurer, and an agreement was reached on June 13, 2023, subject to court approval. The settlement is for future medical and rehabilitation benefits (med/rehab) as well as non-earner benefits (NEBs). I am not able to approve the settlement based on the materials filed.

[5] As indicated above, the materials for use on a motion or application to approve a settlement are identified in r. 7.08(4) of the *Rules*. The materials for use on an application are set out in r. 38.09 of the *Rules* and indicates that a factum is required on an application. Two affidavits are mandatory in these proceedings, one from the lawyer representing the party under disability and the other from the litigation guardian. Under the Rule, there is no allowance for any a non-lawyer representative to provide an affidavit in support of a settlement on behalf of a person under disability. Clause (b) of subrule 7.08(4) of the *Rules* indicates that “an affidavit of the lawyer acting for the litigation guardian setting out the lawyer’s position in respect of the proposed settlement” is required. The affidavit before me is from a paralegal, which is contrary to the *Rules*. This may cause some difficulty for a person under a disability represented by paralegal in its dispute with their insurer for accident benefits. However, the requirement of the Rule must be adhered to on a motion or application to approve a settlement.

[6] There are other deficiencies in the materials before me. I will also require the following additional information to be provided prior to the return of the application:

- i. An affidavit by a lawyer, in compliance with the *Rules*, is required.
- ii. A copy of the proposed minutes of settlement must be filed: see clause (d) of subrule 7.08(4) of the *Rules*.
- iii. An explanation is required as to why the affidavit indicates that the minor is not eligible to receive NEBs, but the settlement includes an amount to settle this benefit. When would the applicant be eligible? What is the test? What are the limits under the policy for NEBs?
- iv. Under the heading “Attendant Care”, the affidavit of the paralegal indicates that the minor “was not using attending care benefit as he was receiving personal care supports from his immediately (sic) family”. Some explanation is required as to whether the minor is eligible for this benefit, with reference to the criteria to be met under the SABS, and the test, if any, articulated in the decisions.
- v. The affidavit of the paralegal indicates that the minor sustained “non-minor injuries in the accident”, but there is no explanation as to what constitutes “non-minor injuries”, and the relationship, if any, to the combined maximum coverage for medical rehabilitation and attendant care benefits.
- vi. What are the ongoing impairments for which the minor applicant continues to receive Occupational Therapy and speech language assistance?

- vii. The report of the Social Worker dated September November 30, 2021, indicates that the minor was suffering from headaches and had difficulty engaging in his environment. His mother apparently advised that when school started in September 2021, he was unable to attend due to pain, and after returning to school full-time, he continued to come home one or two days per week. He was noted to have difficulty with attention/concentration, slower processing speed, decreased memory, and difficulty with executive functioning and multitasking. Changes to his psycho-emotional and psychosocial functioning included regression of developmental milestones, social isolation, and low mood. He was unable to participate in activities of daily living as he did previously.
- viii. How is the minor claimant currently performing in school? Supporting academic records should be included.
- ix. The limits for non-CAT claims are almost exhausted. An explanation is required as to why the minor applicant would not be eligible for enhanced benefits, with reference to the eligibility criteria under the *Statutory Accident Benefits Schedule — Effective September 1, 2010*. O. Reg. 34/10, as amended, (the SABS”) and if an application for a catastrophic (CAT) designation has been submitted, the response, if any, from the respondent insurer.
- x. The court requires an explanation as to why the settlement is fair and reasonable and in the best interest of the minor.
- xi. The affidavit of the litigation should set out the material facts and reasons supporting the proposed settlement (subrule 7.08(4)(a)). I would suggest that some evidence is necessary to address the nature and extent of the minor’s injuries and impairment. A bald statement indicating that “(t)he aforementioned minor Plaintiff, suffered damages as a result of a motor vehicle accident that occurred on September 17, 2021 [emphasis added]” does not assist the court in determining whether the settlement is in the best interest of the minor applicant. I note that the application is relation to statutory accident benefits under the SABS and not a tort action for damages. In my view, the litigation guardian is perhaps in the best position to indicate why the minor is still receiving occupational therapy and language services, and any ongoing impairment, if any, and functional difficulties noted in the reports filed, and indicate what, if any, ongoing treatment he is still receiving. The litigation guardian must also provide an explanation as to why she supports the settlement, and some indication that she knew what the amount of the proposed settlement. It is not clear from her affidavit what statement of account she has reviewed and is consenting to.
- xii. The statement of claim for the tort action included in the materials has not been issued. What is the status of the tort claim?
- xiii. Dockets or a computer-generated printout of work completed on the file is required, as well as a more fulsome explanation as to what work was completed in this matter.

[7] An affidavit of a lawyer and any supplementary materials must be filed in accordance with the *Rules of Civil Procedure* and the Practice Direction for r. 7 motions and must also be uploaded to CaseLines at the time of confirmation of the return of the application.

[8] The motion is adjourned to January 8, 2024, to be heard in writing. A confirmation of the application is required.

The application will be automatically dismissed, as abandoned, if no confirmation is submitted at the appropriate time.

[9] I remain seized.



A.P. Ramsay J.

Date: December 14, 2023