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OBTAINING COURT APPROVAL OF A SETTLEMENT UNDER RULE 7.08: WHAT YOU NEED TO KNOW

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I. INTRODUCTION

Settlement of personal injury claims on behalf of persons under disability has engendered confusion and uncertainty for personal injury lawyers. Counsel for the Plaintiff often negotiates what she is of the view is an excellent result on behalf of her client, however, when the settlement documentation required by Rule 7.08 of the *Rules of Civil Procedure*[1] is submitted to the Court for approval, said approval is not always forthcoming. Court approval may be denied for several reasons which include:

a) the Court is of the view that the quantum of the settlement is insufficient;
b) the Court is concerned that there is insufficient evidence before it to approve the quantum of the settlement;
c) the Court disagrees with counsel's analysis of liability, damages or litigation risk in determining the quantum of the settlement;
d) the Court disapproves of the manner in which the settlement proceeds are to be paid to the person under disability (ie. inadequate structured settlement, risky management plan being

[1] R.R.O. 1990, Reg. 194.

advanced as opposed to a structured settlement, or the absence of a guardian of property or other authorized person to accept payments on behalf of the person under disability).

In most cases, the Court simply requests, by way of endorsement, additional information from counsel before approval can be forthcoming. Alternatively, the above issues can be resolved with the assistance of the Children's Lawyer or Public Guardian and Trustee, if the Court requests a report under Rule 7.08(5) of the *Rules of Civil Procedure*.[2]

Most perplexing for Plaintiffs' counsel, however, is when the Court does not approve the settlement solely on account of the quantum of fees the solicitor is proposing to charge.

This paper will address the current state of the law on the issue of solicitors' fees in the context of settlements on behalf of persons under disability, and thereafter will set out practical strategies while drafting the requisite lawyer's affidavit, to effectively and persuasively state the case for the solicitor's proposed fees.

II. CONTINGENCY FEE AGREEMENTS PERMITTED

Amendments to the *Solicitors Act*[3] were made in 2002 to permit contingency fee arrangements. Section 5 of Regulation 195/04 states that court approval is required for any contingency fee agreement entered into by a litigation guardian acting for a person under disability. Section 5 of Regulation 195/04 reads as follows:

> **5.** (1) A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,
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> (a) apply to a judge for approval of the agreement before the agreement is finalized; or

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[2] *Ibid.*

[3] R.S.O. 1990, c. S.15

> (b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure.[4]

The Law Society of Upper Canada amended its Rules of Professional Conduct in October 2002 to allow lawyers to enter into contingency fee agreements. The commentary under Rule 2.08(3) sets out the factors which should be considered when determining the appropriate percentage for the contingency fee and reads as follows:

> In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which agreement under the Solicitors Act must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

Given the foregoing, a body of law has since developed as to the factors to be considered by the Court when determining the reasonableness of the fee proposed by counsel for the Plaintiff under disability.

III. CASE LAW OVERVIEW

[4] O. Reg. 195/04, s. 5 (1).

In the case of *Marcoccia (Litigation Guardian of) v. Gill,*[5] Mr. Justice Wilkins held that the retainer agreement between the minor Plaintiff's litigation guardians and their lawyer was not a contingency agreement. As most agreements of this kind, the agreement essentially provided for the lawyer's fee not to exceed 15% of the recovery, over and above the partial indemnity costs paid by the other side. Although the agreement also specified hourly rates chargeable by the lawyers and other firm members, along with an acknowledgment that fees would be based on time spent, complexity of the issues, the results achieved and the financial risk assumed by the lawyer in taking on the case, Justice Wilkins nonetheless held that the retainer agreement was not a contingency agreement, not valid nor binding, and the Court need not be bound by same. Although the Court approved the total amount of the settlement, Justice Wilkins denied the 15% solicitor-client fee, over and above the partial indemnity costs, proposed by Plaintiff's counsel.

The father of the person under disability opposed the fees proposed by the solicitor and consented to by the Public Guardian and Trustee in the case of *Morris v. Sparling.*[6] Mr. Justice Robert Smith held that although a contingency fee agreement is not binding on the Court, considerable weight ought to be given to it as

> it was the basis of the understanding on which the solicitor agreed to act and by whose actions a favourable settlement has been obtained. The solicitor would certainly not be free to disregard the agreement and charge on an hourly basis if this was to his or her benefit."[7]

Justice Smith further noted that by taking cases on a contingency basis, lawyers assume the financial risk of running the litigation for often many years without remuneration, in order to promote access

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[5](2007), 154 A.C.W.S. (3d) 67, [2007] O.J. No. 12 (S.C.J.)

[6] [2007] O.J.No. 3497 (Ont. S.C.J.)

[7] *Ibid*, at paras 13-14

to justice for those who cannot otherwise afford it. Under section 5 of Ontario Regulation 195/04 of the *Solicitors Act*, a solicitor could either apply to a judge for approval of the contingency fee agreement (for a person under a disability) either before the agreement is finalized or alternatively, it may be included as part of the motion for Court approval under Rule 7.08.

In *Beaulieu (Litigation Guardian of) v.Conseil scolaire de district catholique du Nouvel-On*tario[8] Justice Meehan reduced the fee proposed by the solicitor. The Court held that the contingency fee agreement did not bind the Court, and was not fair and reasonable citing reasons that the matter was resolved quickly, an action had not yet been commenced, the risk assumed by the solicitor was not substantial (in that the liability was not overly complicated) and the disbursements were low.

[8][2007] O.J. No. 2951 (Sup. Ct.)

Madam Justice Spies was confronted with the same type of agreement as the one considered by Mr. Justice Wilkins in *Marcoccia (Litigation Guardian of) v. Gill*, in *Lau (Litigation Guardian of) v. Bloomfield.*[9] Although she considered that the litigation guardian had signed the agreement and approved of the proposed fee (15% over and above the partial indemnity costs), Justice Spies nonetheless reduced the proposed fee in the tort case because the dockets reflected unnecessary duplication of time between the tort and accident benefits files, the tort action was not complex and within the expertise of counsel, and the amount at issue was modest.

The Court followed *Marcoccia (Litigation Guardian of) v. Gill* in the medical malpractice case of *Re Cogan.*[10] It was held that "any amount claimed by the solicitor as a premium above the agreed hourly rate, requires the approval of a judge."[11] The case was settled for $12,543,750.00 in damages. The contingency fee agreement provided for fees in the amount of 33 ½ % of the total recovery for damages and costs. Justice Smith considered if the contingency agreement was obtained in a fair way by the minor Plaintiff's litigation guardian in the sense that she and her spouse were financially knowledgeable, being chartered accountants, and would understand how the legal fees would be calculated. Further, they were offered independent legal advice before signing the agreement. Justice Smith further considered the following:

- the financial risk assumed by counsel in a complex medical malpractice action;
- the complexity of the issues;
- the length of time counsel had carriage of the case;
- the fact that counsel funded substantial disbursements without being paid;

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[9] [2007] O.J. No 3200 (S.C.J.)

[10] 2007 CanLii 50281 (ON S. C.), (2007) 88 O.R. (3d) 38

[11] *Ibid,* at para. 33.

- the excellent result obtained;
- the fact that settlement was on the eve of trial; and
- the fact that costs paid by the Defendant were included in the contingency percentage.

Justice Smith concluded that the fee proposed by the solicitor was obtained fairly and was reasonable.

Most recently, in the case of *J. Arthur Cogan, Q.C.*[12] the solicitor, brought a motion to approve a contingency fee to be charged to a minor for legal services rendered to the minor and her litigation guardian in a compromised baby medical malpractice case. The action was settled at a mediation following the completion of examinations for discovery, for damages, interest and costs in the total sum of $8.5 million dollars. The portion of the settlement attributable to party and party costs was $800,000. In reasons released on February 17, 2010, Mr. Justice Hackland approved the overall settlement, but considered the proposed solicitor's fees. The proposed fee, in accordance with a contingency agreement, was 33 1/3% of the total recovery in the settlement, which fees amounted to $2,833,050. In addition, disbursements in the amount of $65,177.52 and G.S.T. in the amount of $45,000.00 were also claimed.

Justice Hackland considered the factors outlined by Justice Smith in *Re Cogan,*[13] and agreed with Justice Smith's view "that the terms of a contingency agreement and the circumstances in which it was entered into are relevant considerations, in addition to the factors identified by the Law Society, in establishing an appropriate fee."[14] Nevertheless, Justice Hackland went on to state that

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[12] 2010 CanLii ONSC 915

[13] *Supra*, note 8.

[14] *Supra* note 10, at para 22.

> each case is unique and it is a matter for the discretion of the court as to whether the interests of the minor are best served by allowing the fee provided for in the contingency agreement, or some calculated reduction of such fee or by awarding a premium over docketed time.[15]

Justice Hackland noted that the Mr. Cogan had taken the case over from another solicitor who had done little to develop the case and that the minor Plaintiff's parents were of limited financial means.

He then considered the criteria identified in Rule 2.08 (3) of the Law Society's Rules of Professional Conduct as they relate to the claimed contingency fee being :

- **the financial risk assumed by the lawyer** - held to be significant in this case;

- **the likelihood of success and complexity of the case** - determined by the Court to be of low to medium risk given the strength of the expert reports;

- **results achieved** - held by the Court to be excellent in all respects; and

On the fourth factor, being **who received the award of costs,** the Court held that the contingency agreement was ambiguous as to whether the costs which form part of this settlement are subject to the claimed contingency fee of 33 1/3%. It was further noted that subsection 28.1 (8) (a) of the *Solicitors Act*[16] requires that both the solicitor and client must "jointly apply" to approve this portion of the costs being included in the contingency fee "because of exceptional circumstances".

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[15] *Ibid.*

[16] *Supra,* note 1.

Justice Hackland concluded that there was no extraordinary risk in the case, nor any exceptional circumstance to warrant the solicitor taking any portion of the party and party costs as part of the contingency fee. "The excellent and timely result achieved in this case by the solicitor is adequately compensated for in the contingency fee itself."[17]

Justice Hackland endorsed the need for the solicitor to provide the court with dockets or time records, and estimated the solicitor's actual time because dockets were not kept. The fee was reduced from the proposed amount of $2,833,050 to $1,840.625 plus disbursements and G.S.T. as claimed.

IV. THE LAWYER'S AFFIDAVIT

The case law demonstrates that the Court will not be bound by contingency and retainer agreements. As such, a well-written affidavit that addresses all the substantive issues clearly and analytically, will permit the judge to understand the case's particular nuances and complexities. It is the unique circumstances of each case which ultimately impact and in most cases, justify, the fees a solicitor proposes to charge. The following are some practical strategies to maximize the written advocacy required in the Rule 7.08 lawyer's affidavit to get your settlement and legal fees approved by the Court.

1. FEES

As set out in the overview of the case law above, the affidavit must explain the basis for the fees being claimed. Copies of the retainer agreement and settlement direction from the instructing client (litigation guardian) should be attached as exhibits to the affidavit. The affidavit should state how that the proposed fees are in keeping with the retainer agreement signed at the onset by the litigation guardian. Although the Court is not bound by the agreement, it is a useful guideline, in particular, if the proposed fee is less than what is set out in the retainer agreement.

[17] Supra, note 10 at para 31

The judge is required to scrutinize the reasonableness of the fees as a function of the Court's exercise of its *parens patriae* jurisdiction. In the fees section of the affidavit, the following should be clearly articulated:

- unusually complex issues that were apparent at the onset of the litigation or that unexpectedly arose during the case to justify hours spent;

- the degree of risk assumed in your decision to take on the case at the onset;

- extraordinary research requirements on points of law;

- who worked on the file including years of call for lawyers and level of experience of law clerks, together with a summary of the hours each spent working on the file;

- any extraordinary difficulties or hurdles faced in the litigation including complex motions;

- a summary of the nature of the work performed by every member of the firm who worked on the file including hours spent on each stage of the litigation: drafting pleadings, affidavit of documents, drafting and arguing contested/uncontested motions, preparing for and attending on examinations for discovery, mediations, pre-trials, settlement meetings and client meetings;

- a list of assessable disbursements and medical report costs.

Many of the above-noted factors were set out in the case law above and in particular, by Mr. Justice

Hackland in the case of *J. Arthur Cogan, Q.C.*[18] and by Madam Justice Spies in the case of *Lau (Litigation Guardian of) v. Bloomfield*[19]. Both Justice Hackland and Justice Spies held that the dockets reflecting the time spent by each member of the firm must also be included. This is good practice. If the matter is referred by the Court to either the Children's Lawyer or the Public Guardian and Trustee to prepare a report in accordance with Rule 7.08 (5) of the *Rules of Civil Procedure*, dockets will be requested as a matter of course.

2. PRIMACY AND RECENCY

People tend to remember most the things they heard or read first and last. The most important points should be set out in the beginning and end of the solicitor's affidavit. Herein lies your opportunity to persuade the Court why your settlement is in the best interests of the Plaintiff under disability for whom you act.

3. SEQUENCING AND EFFECTIVE USE OF HEADINGS

As a corollary to primacy and recency, the sequencing of the affidavit is critical. In the first few paragraphs, set out an overview of the nature of the action. Thereafter, summarize the settlement. If it is an all-inclusive settlement, set out how it has been allocated and by whom. Thereafter, concisely summarize your rationale for recommending the settlement and why, in your opinion, it is in the best interests of the Plaintiff under disability. Generally, the proposed fees should be set out at the beginning of the affidavit. Later on, a separate section should address the rationale for the proposed fees.

4. LIABILITY

[18] *Supra*, Note 10.

[19] [2007] O.J. No. 3200 (S.C.J.) at paras.35-36.

Set out the details of the liability issues faced and the stage of the litigation at which you are settling. The liability issues, if any, must be set out in a forthright manner to advise the Court of the litigation risk, which of course has a direct bearing on the settlement figure you are recommending. Describe your efforts to ascertain that a thorough liability investigation into the issue of liability was undertaken . Copies of expert reports for all parties should be included. Quote from the salient portions of the reports and the parties' discovery evidence of the parties that forms the basis of your opinion of litigation risk.

5. DAMAGES

A section of your affidavit will deal with the Plaintiff's injuries, prognosis and treatment accorded. If threshold is an issue in a motor vehicle accident case, you must disclose your analysis in your affidavit to further illustrate the litigation risk and weigh the merits of the proposed settlement.

Copies of all relevant medical reports, including defence reports, should be included and commented upon. Do not include copious hospital records and clinical notes and records. Extract the relevant reports and documents such as emergency room records, ambulance call reports, medical imaging reports, discharge summaries etc. Include reports that are as close to the date of settlement as possible so as to avoid a finding by the Court that there is insufficient evidence upon which to determine if the Plaintiff has reached maximum medical recovery.

Set out separate sections for injuries, prognosis, treatment accorded, loss of income and future care costs. If the injuries have impacted on the academic performance of a child, copies of the school records, Individual Education Plans and assessments should also be attached as exhibits to the solicitor's affidavit. Include copies of all economic loss reports and Future Care Costs reports.

It is also helpful to the Court to provide case law to justify an award for general damages, or indeed to

support the claim for other heads of damages being claimed.

6. FAMILY LAW ACT CLAIMS AND ALL-INCLUSIVE OFFERS TO SETTLE

Although the Court is not required to approve the claims of adults under the *Family Law Act,* often an amount has been allocated to these claims out of an all-inclusive settlement offer. The affidavit must set out the all-inclusive figure, and the proposed allocation for the claims of the various Plaintiffs, pre-judgment interest, partial indemnity costs and disbursements.

If there are multiple Plaintiffs, the partial indemnity costs and disbursements should also be allocated proportionately in the document governing the settlement, ie. the Minutes of Settlement and/or correspondence between counsel for the parties confirming settlement. These documents must be included in the affidavit material as evidence of the settlement itself. The Court frowns upon the Plaintiffs' counsel who takes it upon herself to apportion and allocate an all-inclusive settlement.

The principle of disclosing the apportionment of settlement funds to persons not under a disability is confirmed by Madam Justice Thorburn in *Rivera v. LeBlond*[20] to ensure that any potential for conflict of interest as between the Plaintiffs is addressed.

7. STRUCTURED SETTLEMENTS

Simply put, a structured settlement provides a Plaintiff under disability with a guaranteed stream of income on a tax-free basis affording the Plaintiff under disability with financial security and predictability. The terms of the structure should be set out in your affidavit including:

- the date it begins to pay out
- the amount being structured and the amounts and frequency of the pay outs

[20] (2007) 44 C.P.C. (6th) 180, 156 A.C.W.S. (3d) at para. 30-31.

- to whom the payments are made (in the case of minors, to the Accountant of the Superior Court or Guardian of Property under the *Children's Law Reform Act*[21]; in the case of adults, to a Statutory Guardian of Property under the *Substitute Decisions Act*[22])
- indexing, if any
- lump sum payments, if any
- guarantee period
- life expectancy considerations
- particulars of other structured settlements in place (ie. if accident benefits case was settled on basis of a structure and you are seeing approval of the tort case)
- advantages of the structure that has been selected and supporting evidence that the Plaintiff's short and long-term needs have been reasonably predicted and considered.

8. PAYMENT INTO COURT

If any portion of the settlement not being structured is to be paid into Court (ie, to the Accountant of the Superior Court of Justice to the credit of the person under disability), the rationale for keeping these funds out of the structure should be set out clearly. For example, funds are often paid into Court so they can be accessed during a child's minority if unforeseen circumstances occur.

If there is no guardian of property appointed, then the entire amount of the settlement must be paid into Court. An application for guardianship under the *Children's Law Reform Act* in the case of minors, or under the *Substitute Decisions Act* in the case of adults under a disability are made on notice to the Children's Lawyer and Public Guardian and Trustee respectively.

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[21] R.S.O. 1990, c. C.12 as amended.

[22] S.O. 1992, c. 30, as amended.

9. CONCURRENT LEGAL PROCEEDINGS AND/OR ENTITLEMENT TO COLLATERAL BENEFITS

The affidavit should mention ongoing litigation if there is a prospect for further financial compensation for the Plaintiff in the future. For example, if it is the tort case for which approval of the Court is being sought, set out any accident benefits still being paid and for which category of damages. If the accident benefits case has already been settled, the terms of the settlement should be particularized.

Similarly, if long-term disability or Canada Pension Plan disability benefits are being received by the Plaintiff or are the subject of pending litigation, particulars should be disclosed so the Court has a complete picture of the Plaintiff's financial circumstances.

10. ASSESSABLE DISBURSEMENTS

A list of assessable disbursements should be included in the material.

V. CONCLUSION

A precedent affidavit is included with this paper to illustrate the points set out above. Ultimately, the quantum of the settlement itself must be supported by the particular facts of each case and the legal principles that underly those facts. The quantum of the proposed fee, however, must be consistent with the instructing client's initial instructions, but more importantly, as dictated by the case law, must fairly represent the financial risk assumed by the lawyer in taking on the case, the degree of difficulty presented by the issues of the case, and the results achieved.