Focus PERSONAL INJURY

Loose ends can wipe out comprehensive settlements

Darcy Merkur

Failure to obtain court approval of the settlement of a minor's modest *Family Law Act* claim as part of a comprehensive personal injury settlement can result in the nullification of the entire settlement, according to Justice Gregory Mulligan of the Ontario Superior Court of Justice in his April 28 decision in *Downing v. Reynolds* [2014] O.J. No. 1897.

In *Downing*, an injured mother signed a full and final tort release in both her personal capacity and as litigation guardian for her minor children claiming under Ontario's *Family Law Act*. The minor children were not involved in the accident in any way, but at least one child, Sharlene, attended on scene after the accident and witnessed her mother being extricated from the vehicle.

Because the claim involved minor plaintiffs, the settlement was mandated to be court approved in accordance with Rule 7.08 of the Rules of Civil Procedure. However, court approval, while contemplated in the settlement, was never sought by plaintiffs' counsel in relation to the minors' claims.

Moreover, despite undertaking to defence counsel to obtain court approval before disbursing the settlement funds, plaintiffs' counsel proceeded to disburse the majority of the settlement funds.

Long after the settlement was reached, new plaintiff's counsel, retained to act for the minor claimant Sharlene Downing, moved to set aside the comprehensive tort settlement, arguing that her injuries and damages, as a witness to her mother's extrication, were more serious than anticipated at the time of the original settlement, and that accordingly, the settlement, which was never formally court-approved, should be set aside.

Neither the full and final signed release, nor any of the correspondence between plaintiffs' counsel and defence counsel provided a breakdown of the settlement as between each of the claimants, although affidavit evidence was filed at the motion indicating that the pre-trial judge and plaintiffs' counsel had suggested that a net amount of $25,000 should be allocated to the minor Sharlene.

At the motion, Justice Mulligan considered whether to try to sever the infant settlement from the global settlement, but he ultimately declined to do so. Justice Mulligan felt that severing the infant settlement was not a suitable option in these circumstances, given that all of the formal settlement documents between the parties failed to allocate the funds between the claimants and given that the comments by the pre-trial judge were not binding.

Instead, Justice Mulligan decided that the appropriate remedy was to set aside the entire, all-inclusive $700,000 settlement. Because the previous plaintiff's counsel was not a party to the motion, Justice Mulligan declined to address the request by defence counsel to have the funds repaid by the plaintiff's previous counsel.

Where court approval is required for resolution of the claims of some of the plaintiffs, plaintiffs' counsel would be wise to break down the settlement by claimant in any final-settlement documents so that the claims can potentially be severed if court approval is not granted.

The *Downing* case highlights the importance of counsel addressing all loose ends before closing a file and before disbursing settlement funds, including the importance of defence counsel ensuring that promised judgments are obtained by plaintiff's counsel in a timely way.

At the same time, the *Downing* case may be a symptom of our labour-intensive court approval process. While we all understand the importance and need for court approval, namely to protect and ensure fairness to those under disability, a simplified process is needed to address modest resolutions involving minors and others under disability.

The time involved and the cost associated with obtaining court approval all too often offends the proportionality principles that have become a cornerstone of our new Rules of Civil Procedure.

For example, in *Downing*, the pre-trial judge, Justice Guy DiTomaso, offered to review any motion for court approval of the minors' claims —and in circumstances where there is an involved and familiar pre-trial judge it is unfortunate that there is no readily available and common means, such as a quick *viva voce* hearing, to properly secure court approval without the need to file comprehensive fresh court approval materials.

Hopefully, new rules can be explored that will better balance the cost of obtaining court approval with the quantum of the claim.

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