

CITATION: Hughes v. Peterborough Regional Health Centre, 2024 ONSC 4957
PETERBOROUGH COURT FILE NO.: CV-13-00000273
DATE: 20240909

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
)
NATHANIEL HUGHES, by his Litigation) Richard C. Halpern and Jan Marin, for the
Guardian ADAM HUGHES,) Plaintiffs
ADAM HUGHES, personally, and DAWN)
HUGHES)
)
Plaintiffs)
)
- and -)
)
PETERBOROUGH REGIONAL HEALTH) Wendy Whelan and Matthew Umbrio, for
CENTRE, DR. MICHAEL BOYER, DR.) the Defendant, Peterborough Regional
RICHARD WHITE and DR. IAIN) Health Centre
JAMIESON)
)
Defendants) Anne E. Spafford and Nada Nicola-
) Howorth, for the Defendants Dr. Michael
) Boyer, Dr. Richard White and Dre. Iain
) Jamieson
)
)
) HEARD: September 6, 2024, in writing

2024 ONSC 4957 (CanLII)

DECISION ON RULE 7.08 MOTION

SUTHERLAND J.:

Introduction

- [1] The plaintiffs bring a motion seeking approval of the settlement of a claim for the person under disability, Nathaniel Hughes (Nathaniel) and approval of the Judgment. The plaintiffs also seek a dismissal of the action and cross-claims.
- [2] In support of this motion, the plaintiffs have filed an extensive and detailed affidavit from Richard C. Halpern, Adam Hughes, and Nathaniel, along with the consent of the parties and an executed Minutes of Settlement.

- [3] For the reasons that follow, the relief sought is granted and the proposed settlement is approved.

Background

- [4] This is a complicated medical malpractice case brought on behalf of the plaintiff, Nathaniel, and his parents, Adam and Dawn Hughes, involving the treatment of Nathaniel at the Peterborough Regional Health Centre (“PRHC”) more than 17 years ago when he was 16 days old. Nathaniel is now 17 years of age.
- [5] The care at issue was concerning the delivery of Nathaniel on December 4, 2006 by caesarean section and the care following the delivery from December 20, 2006. Nathaniel was delivered without complication and discharged four days later. On December 20, 2006, 16 days later, he was suffering from nasal congestion, cough and poor feeding. His parents took him to the PRHC and Nathaniel was admitted on December 21, 2006.
- [6] The Statement of Claim was issued by the Plaintiffs’ prior counsel on March 23, 2010. The Plaintiffs in this case include Nathaniel, who sues by his Litigation Guardian, Adam Hughes, and his parents Dawn and Adam Hughes personally. Nathaniel’s parents advance claims under the *Family Law Act* for their pecuniary and non-pecuniary losses as a result of the injuries sustained by Nathaniel.
- [7] The Defendants are the PRHC, Dr. Michael Boyer (“Dr. Boyer”) and Dr. Iain Jamieson (“Dr. Jamieson”), paediatricians who provided medical care to Nathaniel during his admission at PRHC between December 21st to 24th, 2006.
- [8] The Defendant, Dr. Richard White (“Dr. White”) is a physician who had privileges at the PRHC and was Nathaniel’s attending and admitting physician. The claims against Dr. White have been dismissed.
- [9] The medical evidence indicates that Nathaniel suffers from hypoxic-ischemic encephalopathy, resulting from the care he received during a hospital admission due to Respiratory Syncytial Virus (“RSV”), when he was two weeks old. Nathaniel’s injury has resulted in cognitive delays, intellectual impairments, psychological impairments and behavioural concerns.
- [10] A detailed description of the factual events, the care received and the medical issues and injuries arising from the care of Nathaniel are contained in the affidavit of Mr. Halpern, and I do not intend to describe that care or injuries claimed in much detail here.

Standard of Care and Causation

- [11] As mentioned above, this is a complicated medical case. The breach of the standard of care alleged and the causation of those breaches are not risk proof. There were two theories of injury raised by the defendants, that if accepted, would defeat the plaintiffs’ claims. Further, on causation through evidence advanced through neuroradiologist, is that the injuries claimed from the breach of the standard of care did not result in a serious brain injury or one that is sufficient to explain Nathaniel’s challenges.

[12] Again, if any of these theories or evidentiary explanations are accepted, the plaintiffs' claims would be defeated.

[13] If those theories are not accepted, the claims of the plaintiffs would be successful and there would be a significant claim in damages for which the defendants, or most of them, would be responsible.

The Proposed Settlement

[14] From the judicial mediation, the parties settled the action for the sum of 4.5 million dollars.

[15] The settlement is broken down as follows:

All claims including pre-judgment interest, \$3,825,000.00

Plus partial indemnity costs and HST, \$ 375,000.00

Plus Disbursements and HST, \$ 300,000.00

Total amount of offer \$4,500,000.00

LESS:

Gluckstein Personal Injury Lawyers Legal Fees \$1,160,250.00 HST on legal fees \$150,832.50 Disbursements and HST, \$ 239,800.49

OHIP Subrogated Interest, \$ 21,754.18

Protected Account of Michelle Cohen, \$ 135,573.42¹

Protected Account of Hands2Feet, \$ 2,048.00²

Account of Jerome Morse, \$ 175,733.41³

BALANCE TO PLAINTIFFS \$ 2,614,008.00

[16] The balance to the plaintiffs to be disbursed as follows:

Nathaniel's Claims (inclusive of interest)

Total Damages for Nathaniel, \$2,614,008.00

Amount placed in annuity for Nathaniel, \$2,400,000.00

¹ Outstanding account for Speech Language assessment with no interest.

² Outstanding account for occupational therapy.

³ This account is protected per the Order of Justice Wilson dated June 29, 2017.

Balance of funds for Nathaniel paid into court, \$ 14,008.00.

Remaining Adult Plaintiff Claims (inclusive of interest)

Dawn's Claims, \$ 100,000.00

Adam's Claims, \$ 100,000.00

[17] The annuity would be placed in a lifetime guaranteed structured settlement with a proposed yield of \$62,638.08 in just the first year, tax-free. The structure is indexed at 2% per year. Every five years Nathaniel will receive a lump sum payment of \$25,000.00 starting on June 10, 2029. The annual income generated is projected to last for the lifetime of Nathaniel, with a significant annual tax-free income as described in the McKellar Structured Settlement final payout summary.

Court Approval

[18] The requirement of court approval is codified in rule 7.08 of the *Rules of Civil Procedure*.

[19] Rule 7.08 reads:

Approval of Settlement

Settlement Requires Judge's Approval

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (1).

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (2).

Exception

(2.1) This rule does not apply to a settlement or judgment respecting the appointment under the *Substitute Decisions Act, 1992* of a guardian of property or guardian of the person. O. Reg. 281/16, s. 3 (1).

Where no Proceeding Commenced

(3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application. R.R.O. 1990, Reg. 194, r. 7.08 (3).

Material Required for Approval

(4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;

(c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement. R.R.O. 1990, Reg. 194, r. 7.08 (4); O. Reg. 69/95, s. 18; O. Reg. 575/07, s. 10.

(4.1) If there is no litigation guardian and the settlement that is the subject of the motion or application is in respect of a matter under the *Substitute Decisions Act, 1992* to which this rule applies, the affidavit referred to in clause (4) (a) shall be provided by the moving party or applicant (as the case may be), and the affidavit referred to in clause (4) (b) shall be provided by his or her lawyer. O. Reg. 281/16, s. 3 (1).

[20] R.S.J. Firestone in *Spicer v. Wawanesa*⁴ describes that the requirement of court approval is founded in the court's *parens patriae* jurisdiction in protecting the best interest of the parties under disability. R.S.J. Firestone quotes the Ontario Court of Appeal in *Wu Estate v. Zurich Insurance Co.*, 2006 CanLII 16344 (ON CA):

The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves...to be exercised in the 'best interest' of the protected person...for his or her 'benefit' or 'welfare'": *Eve, Re*, 1986 CanLII 36 (SCC), [1986] 2 S.C.R. 388 (S.C.C.) at para. 73. The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined": *Tsaoussis*

⁴ 2023 ONSC 3221

(*litigation Guardian of*) *v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257 (Ont.C.A.), at 268. The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability: *Poulin v. Nadon*, 1950 CanLII 121 (ON CA), [1950] O.R. 219 (Ont. C.A.). The purpose of court approval is plainly to protect the party under disability and ensure that his or her legal rights are not compromised or surrendered without proper compensation.⁵

[21] R.S.J. Firestone further explains the function of the court in considering the proposed settlement. At paras. 14 and 15, R.S.J. Firestone explains:

[14] When considering whether to approve the proposed settlement, the test is whether the settlement is in the best interests of the person under disability. Approval does not depend on a comparison of what would have been awarded at trial, but rather an assessment of whether the settlement is reasonable and in the party's benefit given the risks of litigation and the desire of the party to settle: Garry D. Watson & Derek McKay, *Holmsted and Watson: Ontario Civil Procedure*, e-looseleaf (Toronto: Thomson Reuters, 2023), at § 22:23. See e.g. *Oliveira v. Tarjay Investments Inc.*, 2006 CanLII 8870 (Ont. C.A.), at para. 4.

[15] Although it is the litigation guardian's duty to be satisfied of the fairness and reasonableness of the lawyer's fees, the court must be satisfied that the fees, along with the rest of the proposed settlement, are for the person under disability's benefit: *Franklin (Litigation guardian of) v. Neinstein & Associates*, [2000] O.J. No. 4192 (Ont. C.A.), at para.8. Where the Children's Lawyer or Public Guardian and Trustee is involved and endorses the settlement, the court should give the recommendation considerable weight absent evidence suggesting any impropriety or lack of skill: *Rivera*, at para. 35.

[22] Rule 7.08 (4) set outs the evidence required by the court in considering whether a proposed settlement should be approved. The evidence provided should be a full and frank disclosure of the merits of the settlement. It is trite to observe that without comprehensive and concise evidence explaining the merits of the settlement, the risks involved in the proceeding and how this settlement is in the best interest of the party under disability, the court will not be able to make a meaningful and expeditious assessment of the settlement proposed. Such a lack of comprehensive and concise evidence will not permit the court to make such an assessment and would only delay the finalization of the settlement and delay in the parties who deserve receipt of the compensation agreed upon quickly. Hence, it is incumbent on counsel to provide the court with the necessary meaningful evidence to make an expeditious assessment of the proposed settlement.

⁵ *Supra*, note 4, para. 10.

Analysis of Approval of the Proposed Settlement

- [23] The evidence provided by the plaintiffs was comprehensive, concise and meaningful. The evidence provided satisfied the requirements of rule 7.08(4) and were a frank disclosure of the risks included in the litigation and the reason why the settlements proposed were in the best interest of Nathaniel.
- [24] As previously explained, the affidavit of Mr. Halpern clearly and concisely described the history of the litigation, the injuries sustained, the consequences to Nathaniel, along with the different pathways of both the plaintiffs and defendants to success.
- [25] The structured settlement plan and the summary provided by McKellar Structured Settlements set out the lifetime annual benefit to Nathaniel. The affidavits of both Nathaniel and his father, Adam Hughes, deposed the financial realities of the family and their perspective of the settlement. Both deposed that given the length of time of the proceeding along with the amount and structure of the proposed settlement, each are agreeable to the settlement. Nathaniel stated he as reviewed the proposed settlement and is in agreement with it. Adam Hughes stated similarly that he has reviewed the proposed settlement and agrees the settlement is in the best interest of Nathaniel.
- [26] Having carefully reviewed the evidence presented and with my participation in the mediation, I am satisfied that the settlement of 4.5 million dollars is in the best interest of Nathaniel. The litigation was complicated and was with significant risk on both sides. The amount agreed upon is a reasonable and fair assessment of damages. The structured settlement as presented leaves Nathaniel with a sizeable yearly tax-free income that will accrue for this remainder of his life.
- [27] I will now turn the disbursements to be paid from the settlement and the legal fees requested.
- [28] Again, both Nathaniel and his father deposed that they have reviewed the disbursements and fees requested and agree with the allocation and the amounts.
- [29] In my function, I do take these statements from Nathaniel and his father into consideration as a factor, but such statements are not determinative of the issue. The court must still assess the amounts requested and determine if the amounts requested are directly related to the litigation and are fair and reasonable in the circumstances.
- [30] I am cognizant that a contingency agreement has been entered into and that part of the settlement included an allocation of \$375, 000 inclusive of HST towards legal fees and \$300,000 inclusive of HST towards disbursements. I am also cognizant of the Order of Justice Wilson.
- [31] Taking a hard look at the fees and disbursements and the disbursements requested, it appears that the contingency fee rate, taking into consideration the fees allocated in the proposed settlement, is around 24%.

[32] The litigation was complex. The issues were complex. Success was not certain. I thus find that the legal fees requested are fair and reasonable in the circumstances.

[33] Considering the disbursement, having reviewed the disbursements, they all appear to be directly related to the litigation and are reasonable given the complexity and issues in the litigation.

[34] Accordingly, I approve the legal fees and disbursements requested.

Conclusion

[35] I wish to commend all counsel in their participation and their motivation to cooperate and settle at the mediation. I also wish to commend counsel for the thoroughness of the material filed. The materials were comprehensive and concise which assisted the court greatly in assessing the best interest of Nathaniel in the proposed settlement.

[36] The proposed settlement is approved. The draft Judgment per the settlement and the draft Order dismissing the actions have been signed.

[37] If counsel require anything else, you can contact my judicial assistant for a civil case conference.

Justice P.W. Sutherland

Released: September 9, 2024

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ADAM HUGHES, ADAM HUGHES, personally, and
DAWN HUGHES

Plaintiffs

– and –

PETERBOROUGH REGIONAL HEALTH CENTRE,
DR. MICHAEL BOYER, DR. RICHARD WHITE and
DR. IAIN JAMIESON

Defendants

DECISION ON RULE 7 MOTION

Justice P.W. Sutherland

Released: September 9, 2024