

SUPREME COURT OF NOVA SCOTIA

Citation: Saulnier v. Tynski,
2009 NSSC 262

Date: 20090812

Docket: SAR171158

Registry: Digby

Between:

Jacob Lloyd Saulnier, Beverly Saulnier and Kenneth Saulnier

Plaintiffs

v.

Gregory Francis Tynski, Charles Brown, Valley Regional Hospital and Western
Regional Health Board

Defendant

Judge: The Honourable Justice Patrick J. Duncan

Heard: March 25, 2009, in Digby, Nova Scotia

Oral Decision: March 25, 2009

Counsel: Raymond Wagner, for the Plaintiffs
Thomas Donovan, Q.C., for Gregory Tynski
James Chipman, Q.C., for Western Valley Health Board
Fonia Imrie, for the Public Trustee

By the Court:

[1] This is a motion of an infant plaintiff by his Litigation Guardian seeking an order for approval of a settlement reached by the plaintiff with the defendants, Tynski and the Western Regional Health Board. It stems from a claim that the infant suffered serious and permanently disabling birthing injuries including spastic quadrapariatic and choreoathetic cerebral palsy.

[2] The motion is brought in accordance with the provisions of **Nova Scotia Civil Procedure Rules (1972)** 36.13, 36.14 and 36.15. In support of the motion the plaintiffs have made substantial filings with the court including affidavits of the co-plaintiffs and parents of the infant. I am presented, as well, with the affidavits of counsel for the plaintiffs, Raymond Wagner. Various documents necessary to comply with **Civil Procedure Rule 36** have been filed. A book of authorities, including case law, relevant to the settlement of this matter has also been presented. I have reviewed all of these materials and I find that the requirements of **Civil Procedure Rule 36**, with respect to filings, have been satisfied.

[3] The materials have been supplemented by representations of counsel today, including those on behalf of the Public Trustee, who has presented here as a friend of the court, speaking to issues of concern to the Public Trustee with respect to the impact of certain parts of the proposal on the ultimate funds left available to the infant.

[4] In particular, the concern was, as enunciated by Mr. Wagner and by Ms. Imrie, as to whether Mr. Wagner may have been in a conflict of interest as between the infant plaintiff and the parents as to certain aspects of the proposed settlement. I appreciate the involvement of the Public Trustee. It has been helpful in my consideration of these matters.

[5] Attached as exhibits to the affidavit of Mr. Wagner are copies of the opinions offered by various experts in the conduct of the litigation. They provide a comprehensive picture of the injuries sustained by the infant and the manner in which they are thought to have been occasioned. The reports speak to the impact of the injuries on the intellectual, physical, financial and social lifestyle of the infant. Material available addresses both the current needs and the anticipated future needs of this child, and those needs are substantial.

[6] The parents have also suffered an impact from the injuries, which have generated a need for an extraordinary commitment to the care of their son. Their anticipated life with their first-born child has not materialized as a parent would hope. Normal family life for them has been supplanted by challenges of types that only parents in their situation could comprehend. Their marriage was affected - it broke down - an event that I am advised is unfortunately common in such situations. That speaks to the stresses that the care of a child in this situation can generate.

[7] As I read the materials, I understood that this infant's mother had been in the workforce, gainfully employed, and has had to withdraw from the workforce for the purpose of providing for her son.

[8] As this infant has grown, his disabilities and his physical size have made it more difficult to manage his care, so that special equipment has become necessary, or is necessary. There is information before me to suggest that assistance that had previously been provided by a grandmother to the infant is no longer available by reason of the size of this young boy and his disability. It has affected the ability of individuals to contribute to his care.

[9] So it is apparent to me that the primary resource for this child, as has been from the moment of his birth until now and for the foreseeable future, is going to continue to be with his parents. Money cannot adequately compensate what these parents lost nor replace the love and support that they show for their son.

[10] In Tab E to the affidavit of Mr. Wagner, at page 17 of the submission to the mediator, the following was taken from the Cost of Care Report prepared by Lisa Saunders Green.

Caregiving is a normal component of parenting a young child but it is recognized that the caregiving role takes on 'an entirely different significance' when the child is disabled. It has been described as an enormous responsibility. The literature reports that children with Cerebral palsy 'might experience severe restrictions in participation in day-to-day activities' and that they require a 'significantly greater level of personal care' than non-disabled children. Parents of children with disabilities are believed to face intense time and caregiving demands in their attempts to provide care to their children and it is noted that the care demands do not decline with the advancing age of the disabled child.

Jacob's parents were asked to complete a log of the amount of assistance provided to Jacob on a "typical" week day and a "typical" weekend day. These logs were reviewed and totaled, based upon care provided. They currently provide an "extraordinary" amount of physical care to him, compared to the average expectation of care required by an eight-year-old child.

[11] I am going to omit some references cited. Continuing with a quote from the report:

In a typical school day, physical (“extraordinary”) care provided by Jacob's parents is estimated to total 4.0 hours. On a weekend or non-school day, example holidays and vacations from school, is estimated to total 5.0 hours. Note that these are “average figures” and particularly the weekend total would be highly dependent on the nature of activities in which Jacob engaged. In addition to these totals, it is recognized in the literature that a “heavy time commitment” is required from caregivers to ensure therapy goals (for example, a fine motor skills program) are achieved and maintained. Jacob's parents reported that they currently do not follow a “home program” with Jacob, which would likely require additional time. For this multitude of reasons, the recommendation is made to provide compensation for the amount of extraordinary care that is provided.

[12] It has been demonstrated to my satisfaction that in order to fulfill their future obligations to their son they are going to require assistance to address their son's special needs.

[13] The settlement that has been presented to the Court today was achieved following a successful mediation. It must be assessed on the totality of the proposal and not parsed out into its constituent parts in the absence of compelling reasons.

[14] It consists of two components, the first being the commitment of approximately 56 percent of the total settlement of \$4.5-million achieved to a structured settlement, the terms of which are included in the material before the Court. It will ensure a periodic payment for the infant throughout his life in an amount that should contribute substantially to maintaining him. Those periodic payments will be administered to his benefit by the Public Trustee. I note, as well, Mr. Wagner's comments today that explain some of the rationale for the manner in which it was structured so that it would guarantee indexing when he attains the age of majority.

[15] The second component requires that the balance of the funds be paid over to the Public Trustee with a request from this Court that the Trustee be authorized to release certain sums of money immediately to address expenses incurred by the plaintiffs in the litigation, as well as for the acquisition of special needs equipment and to ensure that appropriate housing and transportation is available to the infant.

[16] There is a third component to this settlement and that is whether there should be a sum of money payable to each of the parents to recognize their extraordinary contribution and loss of consortium. The balance of funds remaining after these accounts are paid would be administered by the Public Trustee under the terms set out

in the order. As I noted to counsel in submissions, it is not my function to grant approval of the parents' award, but rather, to assess whether it is appropriate to approve the infant settlement, knowing what amount is proposed to be paid to the parents from the global amount of the award.

[17] I have reviewed the terms of settlement to satisfy myself that they are reasonable and in the best interests of the infant. Some of these same considerations are relevant to an assessment as to whether the account submitted by counsel for the plaintiff should be approved. I will turn to that a little bit later.

[18] I am satisfied that the amount of money made available and the manner in which it is to be allocated under the terms of settlement serves the best interest of the infant.

[19] The parents' extraordinary dedication to their son's care will continue into the future - of that I have no doubt. The amount claimed at mediation for this head of damages was \$352,155. In addition, a total claim of \$100,000 payable to the parents for the loss of consortium was advanced. The amount proposed to be paid to the parents, in the total sum of \$125,000 each, represents approximately 55 percent of the

total claimed at mediation. I have satisfied myself that that amount is reasonable and still allows a substantial award to care for the infant plaintiff.

[20] The defendants did not allocate, only settled globally, but are not surprised by the claim that has been advanced. The Public Trustee says that it is not otherwise contemplated in Nova Scotia law and that, in any event, this sum is too high and that it risks the pool of funds available to the infant for extraordinary expenses. I acknowledge the concerns and I recognize them to be reasonable concerns.

[21] Dealing with the first issue, it is my recollection that in the case of *Michael Renault by his Litigation Guardian Susan Renault*, Justice Moir in September 2002, approved an infant settlement where the defendant was the Municipality of East Hants. Unfortunately it is not a published decision. I am unable to put my hands on it but I do have some recollection of that matter. It is my recollection that there was a significant component allocated to the parents. The heads of damages at this point, I can't tell you, but I know that it was independent of the amount that was set out specifically for the child.

[22] So while it is always taking a risk when going by one's memory, I am prepared to say that there has been, by my understanding, in this province some precedent for such an allocation. As to the amount being allocated, again I have satisfied myself that taken as part of the overall settlement of \$4.5-million, that it is not an unreasonable amount.

[23] I should say that in that *Renault* matter, there was a brain-injured infant plaintiff. The injury was caused, as I recall, by a faulty installation of a deck on an apartment building and the child fell and also had very significant injuries, such as indicated in this case.

[24] As to the split of the monies as between the parents in this case - in the absence of a 100 percent compensation for the claim that they had advanced initially, and given that they have achieved an agreement as between themselves that they should split it equally, it is not for me to reallocate. The differential I am told is approximately 60/40, that is in the overall scale of things a marginal difference. So the amounts of \$125,000 each are satisfactory to me.

[25] With respect to funding for the purchase of two vans, one for each parent, again, I think the Public Trustee makes a very good point, and I have expressed in the course of discussion of this matter with Mr. Wagner, in particular, my concerns about it because of the issue of the vehicles wearing out and there not being sufficient funds to replace them at a time when they are necessary.

[26] Having said that, I accept that these parents have already undergone a lot of stress and that they probably will continue to do so in trying to provide for their son, and that the settlement should do what it can accomplish in terms of trying to minimize the additional stressors. They live in rural communities and maintain separate schedules for pick up and drop off of their son. To that end, I have concluded that two vans are appropriate, if that is what they feel they need. However, I would say that the Public Trustee, and I'm really saying what the Public Trustee would know anyway, that you have a fair bit of discretion in how you deal with this. It seems to me that it would be appropriate for the parents to be required to keep logs and allocate according to personal use versus use for the infant. That ensures that if the vans are being used for extensive personal purposes that there is some means of ensuring that

this infant is compensated for that and assists in ensuring that a new replacement van is available, because the funds are being built up to compensate for that.

[27] So how that works out is left to the Public Trustee at the end of the day but it is my reaction to the submissions that I have heard today. It is the best that I think could be accomplished to try to assist this infant in ensuring his transportation needs.

[28] Let me say that this obviously was a very complex medical malpractice claim. It, by virtue of the information that I have been presented with, was ably prosecuted and defended. Counsel acting for each of the parties are well-known to the Court as being senior and highly competent litigation lawyers with extensive experience in claims such as this.

[29] It has been just over 12 years since the birth of this infant. It has been approximately nine years since counsel for the plaintiffs, Mr. Wagner, was first contacted to act on behalf of the plaintiffs.

[30] I neglected to deal with the renovation issue. I will come back to that now. The question was posed as to how to deal with security for the monies that are put into Mr. Saulnier's house. It seems to me that I am ...

MR. WAGNER: If I may interrupt you, we have come to terms that the way we have it in the order is fine and that it will be addressed in terms of the ongoing negotiations between the Public Trustee and Mr. Saulnier. I don't know if that helps any.

[31] Actually that is reflective of what I was going to suggest - that I am available, as you know, or the Court is available for direction, but I am glad to hear that you have been able to sort that out.

[32] Returning then to my comments. In his pre-trial memorandum Mr. Wagner outlined the contingencies that existed in this case. I will address those.

[33] Contingency of Overall Success - Liability and damages were contested. In my review of the materials I noted the exchange of expert reports for the plaintiff and the defendants, which opinions showed that qualified people could disagree on each of these issues.

[34] In this type of litigation the risk of failure includes no compensation would be payable together with the risk of incurring an adverse cost award. There is ample case law to demonstrate that such risks of failure are real.

[35] Contingency of a Partial Result - The same opinions that I have just referred to could easily have resulted in an amount awarded that is less than the amount set out in the settlement terms.

[36] Contingencies of Disbursements - Disbursements for the conduct of the litigation were substantial without having to go through the trial, which was scheduled to take over two months. The parents are people of modest means, and so disbursements were being borne throughout the litigation by counsel for the plaintiffs at counsel's own risk. A two-month trial would have increased those disbursements significantly.

[37] A Contingency of the Amount Recovered - Counsel has put forward the suggestion that there is value to associate with the administrative costs, which under

the terms of the structured settlement reduce the amount of cost to the infant, the role of Public Trustee, and I note that the Public Trustee will be compensated. But at the end of the day it is an aspect of the overall review of the reasonableness and appropriateness of the settlement.

[38] The decision to settle or to go to trial is always a challenging one for a party to the litigation. In a case such as this, where the litigation guardian is called upon for the decision, it could be quite monumental. Failure can leave an infant without adequate maintenance for a lifetime. The potential for the assessment of costs, which in a case such as this, would no doubt have been substantial, further adds to the complexity of the decision.

[39] I accept that the decision to enter into this settlement is a reasonable one having regard to the range of outcomes that were available.

[40] With respect to the legal account, I am prepared to approve it as submitted by plaintiff's counsel. His firm committed its' financial resources, its' time and expertise, without compensation for almost nine years, while facing the potential for no return

on those commitments. He undertook this task in the face of a very skilled opposition to all of the issues essential to the result.

[41] The amount claimed is based on a Contingency Fee Agreement, which I have reviewed. I have also reviewed the time sheets. Contingency Fee Agreements encourage the maximization of recovery and serve as a valuable tool for the vast majority of citizens who lack adequate resources to access justice and to maximize the legitimate potential of their case. This case is a good example of that reality.

[42] I extend my congratulations to counsel and to your respective clients, both in the manner in which this litigation was prosecuted - I certainly have a sense of it from having reviewed the materials that have been presented to me - and ultimately, as well, in terms of how a resolution was achieved.

[43] I recognize it is a difficult decision, as well, for the defendants to decide whether to defend or settle. It is apparent that the defendants had excellent representation throughout.

[44] Finally, I thank all of the parties for addressing this matter in a timely manner. While it may seem like the least of all of the issues that you were confronted with over the past number of years, the fact is that the members of the public, who would have otherwise been called to jury duty in a difficult and lengthy case, have been saved from that, and that other public resources necessary to the conduct of the trial were not expended, and with sufficient time in advance that it was able to be reallocated to other court needs.

Order accordingly.