



for the Plaintiffs seeks approval of fees calculated on a contingency fee basis, at 15% on a lump sum settlement of an accident benefit, and at 25% of the settlement of a tort action.

[2] The accident benefit was for a lump sum of \$208,551.00. This sum was used to purchase and renovate a home for Christopher. He will continue to draw on the available reserves for medical/rehabilitation benefits and attendant care benefits estimated at \$122,595.81 and \$659,015.92 until these run out in 2018 and 2023 respectively.

[3] The tort action settled after two weeks of trial. Liability and damages were hotly contested. The settlement was based on a notional discount of 50% of the estimated value of the Plaintiffs' claims given the liability and litigation risks inherent in the action. The parties agreed that the sum of \$9,000,000.00 would be paid to the plaintiffs, inclusive of interest, costs, and damages. In addition, the plaintiffs would keep \$970, 266, their pro-rata share of the amounts paid into court by the insurer for the Estate of Isabelle Robitaille, the driver of the vehicle in which Christopher was a passenger when it collided with that of Guy Laberge. The plaintiffs would also keep the balance of the accident benefits that they had received. Of this settlement, \$500,000.00 was attributed to costs.

[4] I approved these settlements by order dated November 4, 2013. In my endorsement, I indicated that the approval of counsel's fees and disbursements and of the general allocation of the settlement proceeds was still outstanding.

[5] In this motion, I must consider whether to approve counsel's fees in accordance with a contingency fee agreement. At the same time, I shall consider whether to approve allocation of part of the settlement funds to the proposed Christopher Soullière Family Trust.

#### The Contingency Fee Agreement

[6] Counsel for the plaintiffs and Christopher's litigation guardian, Martin Soullière, entered into a contingency fee agreement on March 26, 2009. The agreement provides for a 30% contingency fee for the tort action and a 15% contingency fee for the settlement of accident benefits. In order to facilitate settlement, counsel agrees to adjust the percentage in the tort claim to 25%, but maintains that 15% would apply to the SAB settlement. The agreement further

stipulates that the clients are responsible for paying for disbursements. Despite this, counsel largely funded the disbursements, as the plaintiffs could not afford to do so.

[7] The contingency fee agreement did not specify that the contingency fee percentage would be applied to the settlement net of the Defendants' contribution to legal fees which, by s. 28.1 of the *Solicitor's Act*, belongs to the client except in exceptional circumstances. In this case, counsel does not seek to apply the contingency fee percentage to the \$500,000.00 attributed to costs in the tort settlement, notwithstanding the silence of the contingency agreement on this issue.

Amount Sought

[8] Counsel is seeking contingency fees in the amount of \$2,398,849.15 plus applicable taxes, which represent 15% of the accident benefits and 25% of the tort settlement, less the \$500,000.00 attributed to costs. Counsel spent an estimated 1,446.7 hours on the file to the date of this motion, for a value of \$407,336.55 before taxes. The contingency fees, therefore, result in a payment of approximately \$1,991,512.60 over and above the value of the docketed fees, after taxes are considered.

[9] In addition, counsel has sought an order for the payment of disbursements, plus applicable taxes. On January 15, 2014, I made an order awarding counsel the sum of \$187,558.22, inclusive of taxes, for disbursements incurred in these proceedings, and the sum of \$105,178.11 for trial expenses. Since then, counsel has incurred an additional disbursement in the amount of \$1,144.12 inclusive of taxes.

[10] On January 31, 2014, counsel sent a draft order to the court which includes an order for \$165,969.42 plus applicable taxes for disbursements. The \$165,969.42 sought has already been addressed by my previous order and will not be included in any payment based on these Reasons.

[11] The total amount currently sought, excluding the \$165,969.42 already accounted for, but including the legal fees, the most recent and outstanding disbursement, and taxes, is \$2,666,338.05.

Christopher's Future Care Needs

[12] Christopher suffered catastrophic injuries as a result of the car accident. The expert reports indicate that he will require significant assistance for the remainder of his life, including 24-hour attendant care. While his parents are currently providing attendant care, eventually they will no longer be able to do so, and he will need to pay for attendant care at market rates. It is estimated that this will occur by 2018.

[13] Marielle Desjardins, a life care planner, in her affidavit of January 14, 2014, has estimated that Christopher's current monthly costs are \$2,561.51. By 2018, his monthly costs will be \$15,267.33. In addition, there will be one-time payments throughout his life, resulting in an estimated cost of \$2,000.00 from the accident benefits, and \$416,430.97 in other one-time costs payable from the tort action. According to Ms. Desjardins' calculations, the accident benefits will provide adequate funds to meet Christopher's medical/rehabilitation needs until approximately 2018, and to meet his attendant care needs until 2023. The structured settlement dated September 30, 2013, funded by a \$7,000,000 allocation from the settlement proceeds, will provide adequate funds to meet Christopher's future care needs once the accident benefits are exhausted.

[14] Ms. Desjardins' calculations, however, did not account for the conclusions that were reached by the Plaintiffs' expert, Dr. Peter Coyte. Dr. Coyte's report discusses the rising costs of health care in Canada. Dr. Coyte anticipates that Christopher's future care costs will increase at a rate that is 1.1% greater in absolute terms than the underlying inflation rate. The Consumer Price Index inflation rate for 2012 was 1.4%. Even if the inflation rate remains constant, the increase in future care costs for Christopher will be 2.5% annually. The structure funded for Christopher only provides for 2% indexing annually commencing in 2018.

[15] I requested input from the Public Guardian and Trustee (PGT) on the issue of whether Christopher would have sufficient funds to meet his future care needs if the legal fees are paid in accordance with the contingency fees requested. In a report dated January 29, 2014, the PGT reviewed the contents of this Motion Record and the reports filed, including Ms. Desjardins' report and Dr. Coyte's report, and concluded that Christopher's needs for attendant care and

medical and rehabilitation expenses would be adequate to give effect to the essential services he needs, after payment of the contingency fees sought by counsel, and after deducting amounts for disbursements and trial expenses addressed by my order of January 15, 2014.

[16] The PGT relied on the advice of the Plaintiffs' experts to determine the necessary stream of income required to maintain the needs of an individual in Christopher's circumstances. In this case, Ms. Desjardins has predicted that the settlement will be sufficient to meet Christopher's needs. The PGT could find no fault with her projections.

[17] Christopher's litigation guardian, Martin Soullière, deposed that he has no concerns that the plaintiffs have adequate funds to meet Christopher's future needs based on the settlement funds less the contingency fees proposed. Further, he has reviewed the calculations concerning the legal fees and is content with those calculations.

#### The Christopher Soullière Family Trust Agreement

[18] In his affidavit dated December 30, 2013, Martin Soullière deposed that he signed the "Christopher Soullière Family Trust Agreement," creating a trust for Christopher's funds. The trust has been created in the spirit of the "Henson Trust." The effect of a Henson trust is to remove the assets of the trust from the control of the beneficiary, so that the assets cannot form part of the "income" or "assets" of the person for the purposes of qualifying for benefits under the *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. C-25, Sched. B.

[19] In addition to providing input on the contingency fees sought, the PGT has recommended that I not approve the Christopher Soullière Family Trust Agreement. In the PGT's submission, the trust agreement is void. Christopher's litigation guardian is required to comply with the *Substitute Decisions Act, 1992*, S.O. 1992, c. C-30. According to the *Act*, litigation guardians have no authority to settle a discretionary trust with the settlement funds. Furthermore, the trust purports to distribute the income after Christopher's death. A guardian of property cannot make a will or testamentary disposition for the incapable person (*Substitute Decisions Act*, s. 31).

[20] The applicants have not to date responded to the PGT's submissions on this point.

[21] Despite this, on January 31, 2014, the applicants forwarded a draft judgment for my signature, which includes orders that funds be irrevocably directed to the Christopher Soullière Family Trust.

### **Issues and the Law**

[22] There are two issues before the court:

- a. Whether to approve the contingency fees; and
- b. Whether to approve the allocation of settlement funds to the Christopher Soullière Family Trust

### The Approval of the Contingency Fees

[23] The test for whether to approve a contingency fee agreement was set out by the Court of Appeal for Ontario in *Raphael Partners v. Lam*, (2002) 61 O.R. (3d) 417, and endorsed more recently in *Henricks-Hunter v. 814888 Ontario Inc. (Phoenix Concert Theatre)*, 2012 ONCA 496.

[24] First, the court must assess the fairness of the agreement as of the date it was entered into. Second, the court must assess the reasonableness of the agreement as of the date of the hearing. A contingency fee agreement can only be disregarded when the court determines that it is either unfair or unreasonable.

[25] In this case, counsel obtained court approval of the contingency fee agreement by the order of Warkentin J. dated September 2, 2011. In this case, while the agreement did not expressly provide that costs awarded and payable by the Defendants belong to the client, Martin Soullière has deposed that the subject regulation pursuant to the *Solicitor's Act* attached to the agreement provided that this was the case. Therefore, the fairness of the agreement is not in issue: *Henricks-Hunter* at para. 16. The sole issue is the reasonableness of the agreement as it applies today.

[26] The test for whether the agreement is reasonable requires the court to consider:

1. The time expended by the solicitor
2. The legal complexity of the matter at issue
3. The results achieved
4. The risk assumed by the solicitor

[27] While the contingency fees sought amount to over five times the time expended by counsel plus disbursements and taxes, this alone would not render the fees unreasonable in the appropriate case: *Henricks-Hunter* at para. 14; *J. Arthur Cogan Q.C.*, 2010 ONSC 915 at para. 35. In my judgment, so long as the factors set out in Rule 2.08 of the Law Society's Rules of Professional Conduct as considered by the Court of Appeal in *Raphael* are appropriately balanced against the need for the subject contingency fee agreement to promote access to justice without undue compromise of the best interests and needs of the party under disability, fees ought to be approved.

[28] In this case, there is little doubt that consideration of the other *Raphael* factors favours payment of the fees sought by counsel. First, proof of liability in the tort action was complicated by reason of the death of Isabelle Robitaille, who drove the vehicle in which Christopher was a passenger, as well as Christopher's cognitive impairments arising from his brain injury. The outcome was dependent on numerous competing expert opinions, due to Christopher's retrograde amnesia as to events leading up to the accident, and the lack of any evidence from the deceased, coupled with the claims against the named municipality for design and disrepair of the highway and failure to utilize certain traffic signs to modify driver behaviour approaching the scene of the accident. The legal complexity of the case was significant.

[29] The results in this case were undoubtedly enhanced by counsel's willingness to prepare for and pursue a costly trial to its mid-point, with all its attendant risks on liability.

[30] For the purposes of settlement discussions at a mid-trial conference, counsel assessed the Plaintiffs' damages at \$15, 500, 000. A recovery of \$9, 000, 000 including prejudgment interest, and a \$500,000 contribution towards costs, amounts to an excellent result when the pre-trial judge encouraged resolution based on a 50% risk factor.

[31] The risk assumed by counsel was on the high end given the liability and litigation risks. A poor result at trial would have limited payment of fees to a percentage of the Plaintiffs' *pro rata* share of the Robitaille policy limits paid into court and accident benefits, and would undoubtedly have resulted in payment of disbursements and a fraction of fees.

[32] I have little doubt that, absent counsel's willingness to accept the risks, the social objective of providing access to justice for injured children and parties under disability of limited financial means would not have been met.

[33] Finally, I am satisfied by the content of the supplementary affidavits of Marielle Desjardins and Martin Soullière coupled with the input of the PGT that Christopher's future needs for medical/rehabilitation expenditures, and essential services including attendant care will be reasonably met by the payments generated by the structured settlement.

[34] I should add that, had I not been so assured by the supplementary record, I would not have hesitated to consider some further reduction of counsel's fees over and above that flowing from counsel's willingness to reduce the contingency fee percentage from 30% to 25% in the tort settlement. In addition, I might well have been prepared to consider a reduction of fees generated by the settlement of accident benefits where there are no risks, much less risks even approaching those faced in tort litigation.

[35] However, I well appreciate that when tempered against the high risks often faced in tort litigation, a relative windfall in the settlement of accident benefits may promote access to justice. All that will turn on the application of the *Raphael* factors on the facts of each case, the size of the accident benefits settlement and associated fees payable under the contingency fee agreement, as balanced against the best interests of the party under disability, including the promotion of access to justice.

#### Approval of the Christopher Soullière Family Trust Agreement

[36] The PGT has submitted that this trust agreement is void. The trust has the effect of divesting the settlement funds from Christopher to the trust. The litigation guardian must comply with the *Substitute Decisions Act*. He does not have authority to settle a discretionary trust with

the settlement funds. Furthermore, he does not have authority to make a will or testamentary disposition for the incapable person: *Substitute Decisions Act*, s. 31.

[37] The applicants have not addressed the PGT's submissions in relation to the Trust.

[38] Therefore, any fresh order delivered by counsel for my consideration should, subject to counsel's further submissions, include a declaration that the Trust Agreement dated November 14, 2013, is of no force and effect, and should adjust the figures for fees payment by amounts previously approved by my order of January 15, 2014.

[39] Any other trust agreement proposed by counsel should be served upon the PGT for comment along with any other order addressing management of payment of any settlement proceeds to Christopher Soullière.

[40] I would request that counsel furnish a copy of these Reasons and any related order to the PGT as requested by that office.

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Madam Justice Toscano Roccamo

**Released:** February 5, 2014

**CITATION:** Soullière v. Robitaille, 2014 ONSC 851  
**COURT FILE NO.:** 09-44499  
**DATE:** 20140205

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

CHRISTOPHER SOULLIÈRE by his Litigation  
Guardian MARTIN SOULLIÈRE, MARCELLE  
ROBITAILLE, RENE SOULLIÈRE, and ELIZABETH  
SOULLIÈRE, CHANTAL LEFEBVRE

Plaintiffs

– and –

THE ESTATE OF ISABELLE ROBITAILLE and GUY  
LABERGE, EAST HAWKESBURY TOWNSHIP and  
THE CORPORATION OF THE UNITED COUNTIES  
OF PRESCOTT AND RUSSELL, HER MAJESTY  
THE QUEEN IN RIGHT OF ONTARIO

Defendants

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**REASONS FOR DECISION**

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Madam Justice Toscano Rocco

**Released:** February 5, 2014