

The Litigator

OTLA Ontario Trial Lawyers
Association

September 2014



FINANCIAL SAFETY NETS

Advance payments
The Tort and
LTD Interface
Consequential
Damages

ONTARIO DISABILITY SUPPORT PLAN, & ONTARIO WORKS & OTHER SYSTEMS; what to consider if your client is accessing services, how it will affect your client and how to structure a settlement

When

entering into settlement discussions, it can be tempting for plaintiff's counsel to simply calculate the value of the client's claim, add in additional funds for pre-judgment interest and legal costs, and come up with an all-inclusive number for settlement. But, beware!

In circumstances where your client accesses social services, such as the Ontario Disability Support Program ("ODSP") or Ontario Works ("OW"), this "quick math" could be doing your client a grave disservice. Both these programs, as well as other social services, prescribe certain income and asset limits for those applying for, or receiving, benefits.¹ Therefore, a court award or out-of-court

settlement can have a critical impact on your client's ability to continue accessing social service benefits *and* may trigger a clawback on monies already paid to your client under those schemes.

Approvals and Clawbacks and Future Disentitlements, Oh My!

Income Restrictions

When an individual receiving ODSP or OW benefits earns "non-exempt" income, an automatic clawback of previously paid benefits is triggered.² For example, if a person had received \$50,000.00 in ODSP or OW benefits to date, but then received \$5,000.00 in non-exempt income, she would have to repay the \$5,000.00 to the relevant

Ministry, by way of a deduction from future benefits, essentially cancelling out any net gain. There are similar income restrictions in other programs, such as Employment Insurance.³ Notably, because benefits are required to be repaid by the recipient, a tort defendant should not receive a credit for benefits already received by the plaintiff, since there will be no double recovery.⁴

Thankfully, both ODSP and OW prescribe income "exemptions" for the following categories (among others):

- awards for pain and suffering as a result of an injury to, or the death of, a member of the benefit unit;⁵
- expenses actually or reasonably incurred or to be incurred as a result of injury to, or death of, a member of

On behalf of the Cl



a court award or out-of-court settlement can have a critical impact on your client's ability to continue accessing social service benefits and may trigger a clawback on monies already paid to your client under those schemes or in future entitlements to benefits

- the benefit unit; and
- loss of care, guidance and companionship due to an injury to, or the death of, a family member under the *Family Law Act* (the “FLA”).⁶

The income exemption limit for the above categories is \$100,000.00 for ODSP and \$25,000.00 for OW.⁷ Notably, income and asset exemptions are applied to the *net* amount of an award payable to the recipient, after deducting the recipient’s legal fees and associated taxes and disbursements; however, the schemes’ respective income exemption limits *include* any amount awarded (or agreed upon) for pre-judgment interest.⁸ It is also worth noting that, although there are various exemptions for voluntary payments or gifts to a benefits recipient,⁹ those exemptions cannot be applied to court awards or out-of-court settlements, which are viewed as non-voluntary.¹⁰

Importantly, in determining what portion of a settlement relates to pain and suffering, OW directive 4.6 provides:

“...If an award is made without specific reference to the heads of damage, it is necessary for the applicant/recipient, spouse and/ or dependent to provide written verification from the lawyer or insurance company of the amounts sought for each head of damage in their original claim.

The proportion of the original claim that was made for pain and suffering can then be applied to the total amount of the award actually made. Where no other heads of damage were sought for loss of earnings, other income or employment, the whole amount of

the award can be attributed to pain and suffering and expenses.”

Therefore, the framing of your client’s claim for damages in the originating process can play a crucial role in determining what portion of the *settlement* will be attributed to pain and suffering by the Ministry (and, therefore, what amount will need to be repaid by the recipient, if any). This statement also provides good reason to clearly delineate, in the settlement documentation, specific heads of damages, and the amount being allocated to each category.

Finally, both ODSP and OW provide income exemptions for payments made *pursuant to a court order* for specific disability related expenses.¹¹ But, if counsel intend to rely on those exemptions, it is advisable to ensure the order (which could be a settlement approval order in relation to a person under disability) clearly sets out the award being allocated to each (approved) disability expense.

Asset Limits

It is also critically important for plaintiff’s counsel to consider the effect of a settlement on a client’s *future* entitlement to benefits, which, in many cases, represents the client’s sole source of income. In assessing a recipient’s ongoing entitlement to benefits, both income and assets are reviewed.¹² Any amount beyond (a) the income exemption, or (b) the recipient’s non-exempt asset limit,¹³ could trigger a re-evaluation of the recipient’s eligibility of benefits under either ODSP or OW (or other similar programs). Both ODSP and OW provide asset exemptions directly correlated to their income exemption limits (in relation to pain and suffering and *FLA* awards).¹⁴

Although structured settlements are not considered assets in relation to ODSP, they are still subject to the \$100,000.00 income limit (or more, if approved by the Director). The amount payable to a recipient from a structured settlement that will be exempted is equal to the exempt amount of capital invested into it, regardless of the total amount that will be paid to the recipient.¹⁵ Importantly, though, structured settlements may be considered income *and/or assets* for the purposes of OW, depending on the heads of damage involved.¹⁶

What can be done if the court award or out-of-court settlement exceeds prescribed income or asset limits?

Applying for an expansion of the income/asset restrictions

Counsel might consider applying for an expansion of the income/asset exemptions. In relation to ODSP, the exemptions may be expanded if the Director of ODSP Branch is satisfied the amount exceeding \$100,000.00 is:

- paid for expenses actually or reasonably incurred or to be incurred as a result of injury to, or death of, a member of the benefit unit;
- used for expenses, approved by the Director, for disability-related items or services for a member of the benefit unit that are not and will not be otherwise reimbursed; or
- used for education or training expenses for the recipient because of the member’s disability and the expenses are not and will not be otherwise reimbursed.¹⁷

Notably, there is no corresponding provision in OW legislation or the relevant directives.

Opening a Registered Disability Savings Plan

A second option, in certain cases, is to open a Registered Disability Savings Plan (“RDSP”).¹⁸ The advantage of this type of account is that any money deposited into it is considered an exempt asset, as is the interest earned from, and reinvested into, the account, as well as any payments out of the account.¹⁹ However, when the court award or out-of-court settlement is initially received, it is not exempt as *income*. This means that there would be a clawback equal to a recipient’s past benefits, but there would be no reassessment of the recipient’s assets in relation to calculating her future benefits. Therefore, such a strategy could be useful in a case where a client has received no, or little, benefits to date, but is hoping to receive substantial future benefits.

Voluntary contributions made to an RDSP by family members and other third parties are exempt as income.²⁰ Therefore, any funds voluntarily contributed by FLA claimants to the recipient’s RDSP would be considered exempt as income and assets (up to the lifetime limit for RDSP contributions of \$200,000.00).

Absolute Discretionary/Henson Trust

Another very powerful tool is the absolute discretionary/Henson trust, which is a trust that gives the trustee absolute and sole discretion regarding payments from the trust to the beneficiary.²¹ A true absolute discretionary trust is not considered an asset for ODSP or OW purposes. **Therefore the capital value of such a trust can exceed \$100,000.00 (for ODSP) or \$25,000.00 (for OW).**²² However, one must still be cautious in relation to *income* restrictions. If the trust itself is funded by a court award or settlement in favour of a benefits

recipient, that *income* will only be exempt up to the respective maximums for ODSP and OW.

Payments to a benefits recipient out of an absolute discretionary trust are considered voluntary payments, because they are made at the discretion of the trustee, who has no obligation to make the payments.²³ This allows the benefits recipient to take advantage of the voluntary payment provisions discussed earlier.

Structuring the Settlement and Allocating the Award/Settlement

The strategies described above beg the question: What amount can be awarded to FLA claimants? In certain situations, it would be beneficial to a client who accesses social services to have the majority of a court award or settlement allocated to an FLA claimant, who could

beneficial way in which to structure a settlement. For instance, where a plaintiff is suing for non-pecuniary damages, and there exist FLA claims that are difficult to quantify (e.g. claims for the loss of care, guidance and companionship), plaintiff’s counsel might consider canvassing with the clients the possibility of allocating the maximum “exempt” award to the client accessing social services, and the remainder of the award to the FLA claimant(s). Of course, the allocation must be reasonable and just in the circumstances, and not simply a method of circumventing legislative restrictions. Furthermore, in the case of persons under a disability (including minors), counsel will need to explain and justify the allocation to the Court, in order to gain its approval for settlement.²⁴

...the framing of your client's claim for damages in the originating process can play a crucial role in determining what portion of the settlement will be attributed to pain and suffering by the Ministry (and, therefore, what amount will need to be repaid by the recipient, if any).

then contribute an “exempt” amount of money into the recipient’s RDSP account, or deposit the money into an absolute discretionary trust.

Keeping the *Rules of Professional Conduct* and one’s obligations to the Court and the administration of justice in mind, one should consider the most

Final Thought

Different strategies will be required to address various clients’ individual circumstances and different social services, in order to maximize the benefit of a court award or settlement for the client. Lawyers must be cognizant of the effect a court award or out-of-court settlement can have on a client’s social

service benefits, and address relevant concerns head-on with innovative approaches.



Michael Wilchesky
is a lawyer with
Rochon Genova LLP
in Toronto, Ont.

ss. 39(1)12. & 12.1 and 39(3).

¹⁵ ODSP Directive 4.6.

¹⁶ OW Directive 4.6.

¹⁷ ODSP Act, O. Reg. 222/98, ss. 28(2) and 43(2); ODSP Directive 4.6.

¹⁸ It is very important to discuss and evaluate the viability of this option with the client and a financial advisor.

¹⁹ ODSP Act, O. Reg. 222/98, ss. 28(1)26.1 and 43(1)15.5 & 15.6; OW Act, O. Reg. 134/98, ss. 39(1)21.1 and 54(1)11.5 & 11.6.

²⁰ ODSP Act, O. Reg. 222/98, subsection

43(1)15.4; OW Act, O. Reg. 134/98, subsection 54(1)11.4.

²¹ ODSP Directive 5.7; OW Directive 4.10. *N.B.:* Legal Services of ODSP or OW should be consulted in order to ensure all the terms of the trust meet the requirements of this type of trust.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Rules of Civil Procedure*, R.R.O. 1990, REGULATION 194, Rule 7.08.

NOTES

¹ For ODSP - Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sch. B (“ODSP Act”), ss. 2 & 5(1)(c); ODSP Act, O. Reg. 222/98, ss. 27(1), 29(1) and 37.

For OW - Ontario Works Act, S.O. 1997, c. 25, Sch. A (the “OW Act”), ss. 2 & 7(3)(b); OW Act, O. Reg. 134/98, ss.38 & 40-41.

² ODSP Act, ss. 8, 14 and 15; OW Act, ss. 13, 19 and 20.

³ *Employment Insurance Act*, S.C. 1996, c. 23, ss. 19 and 43-45.

⁴ *Moss v. Hutchinson* (2007), 85 O.R. (3d) 604 (S.C.J.).

⁵ This exemption does not apply to automobile insurance accident benefits. See ODSP Act, O. Reg. 222/98, subsection 43(3); ODSP Directive 5.1; *Anglin v. State Farm Mutual Automobile Insurance Co.*, 2012 CarswellOnt 16933 (Financial Services Commission of Ontario (Arbitration Decision)); and OW Act, O. Reg. 134/98, subsection 54(4).

⁶ ODSP Act, O. Reg. 222/98, ss. 43(1)4. and 4.1; OW Act, O. Reg. 134/98, ss. 54(1)4 and 4.1.

⁷ ODSP Act, O. Reg. 222/98, subsection 43(2); OW Act, O. Reg. 134/98, subsection 54(2).

⁸ ODSP Directive 4.6; OW Directive 4.6; *Mule v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)*, 2007 CarswellOnt 7782 (Div. Ct.).

⁹ ODSP Act, O. Reg. 222/98, ss. 43(1)9 & 13; OW Act, O. Reg. 134/98, subsection 54(1)8.

¹⁰ ODSP Directive 4.6; *Ontario (Director of Disability Support Program) v. Ansell*, 2011 CarswellOnt 2658 (C.A.) - in relation to court orders.

¹¹ ODSP Act, O. Reg. 222/98, subsection 43(1)9.1; OW Act, O. Reg. 134/98, subsection 54(1)20.

¹² ODSP Act, subsection 5(1)(c); OW Act, subsection 7(3)(b).

¹³ ODSP Act, O. Reg. 222/98, s. 27; OW Act, O. Reg. 134/98, s. 38.

¹⁴ ODSP Act, O. Reg. 222/98, ss. 28(1)14. & 14.1 and 28(2); OW Act, O. Reg. 134/98,

One word says it all

“Exemplary”



WITH
EXEMPLARY
STANDING

AVEC
MENTION
D'HONNEUR



Step Up!

ABI Recovery

A division of Brain Injury Services

Why we are the preferred agency for Acquired Brain Injury rehabilitation

Accreditation Canada has awarded us its highest – and rarest – rating: Accreditation with Exemplary Standing. That standing signifies that the designated agency has far surpassed rigorous standards in quality care and service. It has, in fact, reached the very pinnacle of programming excellence and is an “exemplar” to others of how things should be done.

A full range of proven, exemplary, ABI rehab services

- Transition from hospital
- Group homes
- Transitional living apartments
- Outreach services program
- Group activities program
- Adolescent program
- Therapeutic groups
- Daily living skills

- Vocational training
- Workplace support
- Home support
- Accessing education
- Community re-integration
- Experts in complex care
- Experts in cognitive rehabilitation
- Experts in behavioural rehabilitation

When only “exemplary” will do: www.step-up-abi.ca

225 King William St., Suite 508, Hamilton, ON L8R 1B1, 905-523-8852 Ext. 117