

## SUPERIOR COURT OF JUSTICE

## FACSIMILE TRANSMITTAL SHEET

TO:

FROM:

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DATE:

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Overdevest Infant Settlement

☐ URGENT☐ FOR REVIEW☐ PLEASE REPLY*Please find attached the endorsement of Justice Raikes.**Thank you**Sandra Doupe**Assistant Trial Coordinator**Superior Court of Justice**Sarnia, Ontario 519-333-2960 Email: [sandra.doupe@ontario.ca](mailto:sandra.doupe@ontario.ca) -*

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**CITATION:** Overdevest v. Overdevest, 2015 ONSC 7940  
**COURT FILE NO.:** 96/12  
North Waterloo Farmers Mutual Insurance v. Stadegaard  
**COURT FILE NO.:** 33/13  
Overdevest v. North Waterloo Farmers Mutual Insurance  
**COURT FILE NO.:** 111/15  
Overdevest v. The Office of the Children's Lawyer  
**COURT FILE NO.:** 119/15  
**DATE:** 20151217

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COURT FILE NO.:** 96/12

**RE:** MITCH OVERDEVEST, JANEEN OVERDEVEST AND DAMY  
OVERDEVEST minors by their litigation guardian JOANNA OVERDEVEST,  
Plaintiffs

**AND:**

PETRUS OVERDEVEST, TERRA NOVA FARMS LTD., and MARLEEN  
STADEGAARD, Defendants

**AND BETWEEN:**

**COURT FILE NO.:** 33/12

NORTH WATERLOO FARMERS MUTUAL INSURANCE, Applicant

**AND:**

MARLEEN MARIA THEODORA STADEGAARD and PETRUS JOHANNES  
MARIA OVERDEVEST custodial parents of MITCH JACOBUS CORNELIS  
OVERDEVEST, Respondents

**AND BETWEEN:**

**COURT FILE NO.:** 111/15

MITCH OVERDEVEST, a minor by his litigation guardian JOANNA  
OVERDEVEST, Plaintiffs

**AND:**

NORTH WATERLOO FARMERS MUTUAL INSURANCE, Respondent

**AND BETWEEN:**

**COURT FILE NO.: 119/15**

PETRUS OVERDEVEST and THE BANK OF NOVA SCOTIA TRUST  
COMPANY, Applicants

**AND:**

THE OFFICE OF THE CHILDREN'S LAWYER and MARLEEN  
STADEGAARD, Respondents

**BEFORE:** The Honourable Justice Russell Raikes

**COUNSEL:** James L. Vigmond, Counsel for the Plaintiff in Court File No. 96/12 and  
Applicants in Court File No. 119/15

David Zuber, Counsel for the Defendant's Overdevest and Terra Nova in Court  
File No. 96/12

Karl K. Beyer, Counsel for the Defendant Stadegaard in Court File No. 96/12 and  
the Respondent in Court File No. 33/13 and the Respondent in Court File No.  
119/15

Todd McCarthy, Counsel for the Applicant in Court File No. 33/13

**HEARD:** November 12, 2015 at Woodstock

### **ENDORSEMENT**

#### **Overdevest Infant Settlement**

#### **Introduction**

- [1] On April 3, 2012, seven-year-old Mitch Overdevest (hereafter "Mitch") was catastrophically injured when the John Deere Gator he was driving struck a metal bar in a barn located on farm property owned by Terra Nova Farms Ltd. (hereafter "Terra Nova"). At the time, Mitch was residing with his father, Petrus Overdevest (hereafter "Petrus"), and two sisters, Janeen and Dany. His mother, Marleen Stadegaard

(hereafter "Marleen"), had separated from Petrus and was then living in the Netherlands.

- [2] In the aftermath of Mitch's accident, a claim for statutory accident benefits (SABs) was made and accepted by the insurer of the vehicle Mitch was operating, North Waterloo Farmers Mutual Insurance (hereafter "North Waterloo"). A tort claim was commenced on Mitch's behalf and that of his two sisters by his aunt, Joanna Overdevest (hereafter "Joanna"), acting as their Litigation Guardian. Petrus and Marleen together with Terra Nova were the named defendants in that action. The claim on behalf of Janeen and Dany is a derivative claim for loss of care, guidance and companionship pursuant to section 61 of the Family Law Act.
- [3] The tort action and SAB claim have been settled subject to court approval. Corollary proceedings which relate to the ongoing management and responsibility for the settlement proceeds, if approved, have been brought. There is also related litigation and motions brought by Marleen in respect of her claims for recovery of accident benefits submitted but not paid by North Waterloo and a tort action which was stayed on an earlier motion by Justice Leach. All of these proceedings are the subject of the matters before me and are addressed below in this decision.
- [4] I will first outline the various court proceedings including the parties and relief sought. I will then set out the facts and issues. Finally, I will provide my decision on each issue with the rationale for same.

#### **Various Court Proceedings**

- [5] The following court proceedings were considered and addressed by counsel as part of the submissions related to settlement approval and corollary relief.

**Court File # 96/12**

**Plaintiffs:** Mitch Overdevest, Janeen Overdevest and Damy Overdevest, all minors by their Litigation Guardian, Joanna Overdevest

**Defendants:** Petrus Overdevest, Terra Nova Farms Ltd. and Marleen Stadegaard

This is a tort action arising from Mitch's accident. The settlement of that action is before me for court approval given the age of the plaintiffs. Janeen and Damy are sisters of Mitch and assert FLA claims only.

**Plaintiffs' Counsel:** James L. Vigmond of Oatley Vigmond

**Defendants' Counsel for Petrus and Terra Nova:** David Zuber

**Defendant's counsel for Marleen:** Karl K. Beyer

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**Court File # 33/13**

**Applicant:** North Waterloo Farmers Mutual Insurance

**Respondents:** Marleen Stadegaard and Petrus Overdevest as custodial parents of Mitch Overdevest

Initially, this was an application for directions from the court regarding conflicting SAB submissions made by each parent to the SAB insurer.

**Counsel for Applicant:** Todd McCarthy

**Counsel for Marleen:** Karl Beyer

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**Court File # 111/15**

**Plaintiff:** Mitch Overdevest , a minor by his Litigation Guardian, Joanna Overdevest

**Defendant:** North Waterloo Farmers Mutual Insurance

This is an action and motion for court approval of a lump sum SAB settlement for Mitch. With respect to approval of legal fees in the context of the SAB claim, I ruled that Marleen be permitted to make submissions on SAB settlement only, given she is a custodial parent and a Litigation Guardian was not yet appointed by the court.

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**Court File # 119/15**

**Applicants:** Petrus Overdevest and The Bank of Nova Scotia Trust Company

**Respondents:** The Office of the Children's Lawyer and Marleen Stadegaard

**Counsel for Applicants:** James L. Vigmond of Oatley Vigmond

**Counsel for Marleen:** Karl K. Beyer

**Counsel for OCL:** Counsel did not appear but did have input into the structure of the settlement and management fees for the proposed institutional guardian of property.

This application is to appoint guardians of Mitch's property until he reaches age of majority, and to set the reporting and accounting requirements for the guardians. The appointment of a guardian of property is necessary to administer the lump sum and periodic payments made to Mitch to provide for his ongoing therapy and rehabilitation expenses.

The law firm of Oatley Vigmon acted for Applicants on a *pro bono* basis.

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### The Parties

- [6] Mitch Overdevest is a minor. He was born December 24, 2004 and is presently 10 years old. Mitch suffered severe injuries in an accident on April 3, 2012. He was then 7 years old.
- [7] Janeen and Dany are Mitch's sisters – they are now 12 and 8 years old respectively and live with Mitch.
- [8] Marleen and Petrus are the biological parents of the children. They separated July, 2008 and divorced March 1, 2010. The children resided with Petrus on the date of the accident; Marleen was then living in the Netherlands.
- [9] By interim Order of Justice Marshman dated April 25, 2014, Marleen and Petrus shared custody of the children on an alternating week basis. That arrangement is now final by Order of Justice Aston dated September 17, 2015. Both Orders contain the following provision as it relates to Mitch's ongoing care and treatment:
  - "The treatment programs and decisions for the child, Mitch ..., born December 24, 2004, shall be made jointly by the Applicant and the Respondent , after

receiving a recommendation from Mitch's care team. In the event that the Applicant and the Respondent disagree on the treatment program, for the child, Mitch, the care team shall make the decision after receiving the options of the Applicant and the Respondent."

[10] Joanna is Petrus' sister and the aunt of the children. She has acted as Litigation Guardian for them in the tort action and seeks to act in that capacity for Mitch in the SAB action.

[11] North Waterloo is the motor vehicle insurer for Terra Nova which was the owner of the John Deere Gator that Mitch was driving when the accident occurred.

#### **The Accident**

[12] In April, 2012, Petrus and the children were residing on a farm located at 676212 16<sup>th</sup> Line, RR# 1, Bright, Ontario. The property was owned by Terra Nova and was used for a dairy farming operation. There is a large barn (110 x 220) on the property. There was a metal bar running across the feed alley of the barn. Mitch was driving a John Deere Gator by himself in the barn when he collided with the metal bar. The Gator was owned by Terra Nova and was regularly used in the operation of the farm.

[13] The metal bar struck the windshield, and broke the steering wheel and steering column before colliding with Mitch's head.

#### **Mitch's Injuries**

[14] Mitch sustained severe injuries in the accident. He was taken by ambulance to Woodstock General Hospital where he was assessed and airlifted to London Health



Sciences Centre. Mitch was diagnosed in London with serious and permanent injuries including:

- .bilateral hemispheric and basal ganglia infarction
- .bilateral carotid artery dissections with right internal jugular vein occlusion
- .right pontine/cerebellum infarctions
- . basal skull fracture
- . right occipital fractures
- .right temporal bone fracture
- .multiple facial fractures (LeFort Type 1)
- .left hemi-paresis.

- [15] Because of these injuries, Mitch has significant physical and cognitive impairments. Mitch is also unable to use his left hand and walks with a significant limp. He has fallen behind his classmates in school despite ongoing and regular tutoring. He also receives physiotherapy and occupational therapy support, and likely will for many years.

### **Prognosis**

- [16] According to Dr. MacGregor, a pediatric neurologist, Mitch's collision related impairments include physical motor deficits, cognitive and communication problems, hearing loss, right eye deficits and metabolic deficits. He concluded that Mitch will have a difficult future as he will not be gainfully employable and will have difficulties with activities of daily living.
- [17] Drs. McKay and Velikonja, clinical neuropsychologists, concluded that Mitch's strengths and weaknesses are consistent with a severe and diffuse traumatic brain injury. Although Mitch expressed an interest in running his family's farm, Drs. McKay and Velikonja conclude that he will need significant external support as his cognitive issues are permanent.

[18] Jeff Cohen, a vocational and rehabilitation expert, opined that but for the collision, Mitch would likely have pursued a university degree focused on agriculture and, ultimately, would have been successful in the farming industry. However, due to his physical and cognitive impairments, Mitch's participation in the industry will be dependent on a benevolent employment relationship. Mitch will not be competitively employable in any capacity.

[19] No defence medical examinations were conducted.

#### **Damages**

[20] An expert report by a chartered accountant, Gary Principe, estimates Mitch's future loss of income as \$2,283,900.

[21] Mitch's future care needs were assessed by an occupational therapist and certified life care planner, Ellen Lipkus. At page 24 of her report, she noted various potential complications and/or surgeries he may face going forward. Ms. Lipkus assessed Mitch's medical needs, rehabilitation therapies, rehabilitation supports, personal care services and supplies, equipment, aids and devices, educational and vocational support services, housekeeping and home maintenance and handyman services, transportation and living arrangements in the short and long term and provided estimates of costs for same. The estimated costs for these various services are delineated throughout the body of her report and are significant.

[22] Counsel for Mitch estimates that if the tort action had proceeded to trial and resulted in a successful jury verdict, the damages could have reached approximately \$6M, although that outcome was not without risk.

### **Tort Claims**

[23] Various allegations of negligence were made on Mitch's behalf against Petrus and Terra Nova. These included:

- . Installing a bar or barrier that blended in with the surroundings
- . Failing to warn Mitch of the metal bar
- . Failing to properly light the barn
- . Failing to have visible warnings in the barn
- . Failing to require Mitch to wear safety equipment
- . Failing to properly train Mitch on the use of the Gator
- . Failing to inspect the premises to ensure it was safe
- . Negligently and trusting the Gator to Mitch

[24] The Plaintiffs also alleged that the Defendant, Marleen, was negligent for failing to protect Mitch from an unreasonable risk of harm and for failing to ensure that he was not allowed to operate dangerous machinery.

[25] Mitch's case against Petrus and Terra Nova was advanced on the tort of negligent entrustment which required that Mitch establish:

1. There is a sufficient relationship between the injured party and the entruster;
2. The relationship makes it reasonable to conclude that a duty was owed to the injured party; and,
3. The entruster should have foreseen that the plaintiff would be injured.

[26] This is a seldom used tort in Canada.

- [27] The Defendants, Petrus and Terra Nova, raised the issue of the applicable standard of care; they suggested that allowing a child to operate a Gator was a regular or standard practice on farms in Southern Ontario and as such was not out of the ordinary in the area where Mitch resided.
- [28] In addition to liability issues, counsel for Mitch points out that a portion of the potential damages award could be offset by Mitch's future entitlements to statutory accident benefits.

### Insurance

- [29] In the tort action, Terra Nova had a motor vehicle insurance policy of \$2 million. That policy would respond to the loss provided it could be proven that Mitch's losses were the result of the use or operation of a motor vehicle. Terra Nova also had a general farm liability policy with liability limits of \$2 million; however, that policy expressly excluded injuries suffered by persons resident on the farm. Accordingly, it did not respond to Mitch's accident.
- [30] Terra Nova also had a \$6 million umbrella policy that would respond in the event that the limits of a responding policy were exceeded.
- [31] The allegations against Petrus for negligent supervision of Mitch were not covered under the automobile policy. Likewise, there was no insurance to cover the claim against Marlene.
- [32] With respect to the SAB claim, North Waterloo accepted that Mitch suffered a catastrophic impairment as a result of the collision. North Waterloo was obliged to pay reasonable and necessary medical and rehabilitation benefits to Mitch up to a total policy limit of \$2 million pursuant to the optional benefits purchased by Mitch's family

before the collision. North Waterloo was also obligated to pay attendant care required by Mitch to a maximum of \$6,000 per month to a total policy limit of \$2 million; however, there was a total aggregate limit between medical and rehabilitation benefits and attendant care benefits of \$3 million.

[33] Provided Mitch met the applicable tests in the statutory accident benefits legislation, he would also be able to claim non—earner benefits until at least age 65 at a maximum rate of \$320 per week, and reasonable and necessary housekeeping and home maintenance benefits for the rest of his life at a maximum of \$100 per week.

[34] As of April 6, 2015, North Waterloo had paid \$175,745.78 in attendant care benefits. They had also paid \$176,934.31 in medical and rehabilitation benefits. In addition, Mitch was paid \$8,998.11 for the cost of examinations and \$23,696.87 for visitation expenses.

[35] The report of Rita Levato of McKellar Structured Settlements Inc. calculated the cost to purchase annuities to replace the future payments that North Waterloo would have to pay Mitch should he continue to qualify for benefits. She concluded that the amount necessary to purchase same was \$2,396,987.55.

#### **Terms of Settlement of the Tort Claim**

[36] On April 30, 2015, the parties entered into a settlement of the tort claim at a private mediation with an experienced mediator. Pursuant to the terms of the settlement, Terra Nova and Petrus agreed to pay \$2,500,000 in damages and interest to the Plaintiffs, together with \$225,000 for costs plus HST of \$33,150 and \$126,973.45 for disbursements inclusive of HST. The total amount of the settlement of the tort claim is \$2,915,123.45.

### **Terms of Settlement of the SAB Claim**

- [37] North Waterloo is an automobile insurer in Ontario. Mitch was entitled to coverage under a policy of automobile insurance with North Waterloo. As such, he was entitled to payment of accident benefits following the collision. On October 10, 2012, Mitch was accepted as being catastrophically impaired by North Waterloo which increased the limits available to him under the policy.
- [38] On April 30, 2015, Mitch's SAB claim was settled subject to court approval. Pursuant to the terms of the settlement, North Waterloo agreed to pay Mitch \$2 million for all past and future accident benefit claims. This figure is inclusive of claims, costs, disbursements and HST.
- [39] As indicated above, as of April 6, 2015, North Waterloo had paid benefits for attendant care and medical and rehabilitation expenses in the amounts of \$175,745.78 and \$176,934.31, respectively, together with \$8,998.11 for the cost of examinations and \$23,696.87 for visitation expenses.
- [40] Further accident benefits have been paid since April 30, 2015 which amounts are to form part of the \$2 million settlement figure. Once approved, the balance owing will be paid as a lump sum thereby ending North Waterloo's accident benefits obligations to Mitch with respect to this accident and the injuries he sustained.
- [41] All parties support the settlement of the tort and SAB claims in the amounts negotiated with the insurer, North Waterloo.

### **Structured Settlement**

- [42] Regardless of the outcome of the guardianship application, all parties intend that the vast majority of the settlement funds will be placed into a structure with McKellar's Structured Settlements to allow the funds to grow over Mitch's lifetime. The motion materials indicate an intent to place \$3,900,000 into the structure upon the settlement being approved and monies paid.
- [43] The proposed structure will pay Mitch \$5790.68 per month, increasing by 2% each year, compounded. These funds will be available on a monthly basis to pay for Mitch's ongoing rehabilitation and treatment costs and, after he reaches the age of majority, will act as an income supplement in part.
- [44] In addition, lump sum payments will be made to Mitch on a schedule set out in paragraph 81 of the Affidavit of Adam Little sworn July 23, 2015. Exhibit Q to Mr. Little's Affidavit is a printout of the anticipated payments including the lump sum payments payable to Mitch over his lifetime. All payments to Mitch are tax-free. The printout indicates that based on the present investment return assumptions, the \$3.9 million will yield a payout to age 86 of \$15,966,956. Of course, only a portion of that figure is guaranteed since the return on investment is subjected to market forces. Nevertheless, the proposed structure offers the benefit of payments over Mitch's lifetime in amounts that far exceed the face value of the settlement presently.
- [45] If the settlement is not approved, Mitch will continue to be eligible to receive SABs until such time as his account is reduced to zero. By paying out in a lump sum and investing those monies, it is hoped and anticipated that the lump sum will generate additional funds for Mitch for a much longer period of time.

### **Guardianship of Property**

[46] Distinct from the terms of the settlements reached, but integral to the approval of the settlements, is the plan proposed for the monies to be received by Mitch. In that regard, Petrus and the Bank of Nova Scotia Trust Company (hereafter "BNSTC") make application for their appointment as guardians of property for Mitch. They propose that they jointly act as guardians of property until Mitch reaches age of majority. Alternatively, they propose that Marleen, Petrus and the BNSTC jointly act as guardians of property for Mitch until he reaches the age of majority.

[47] Marleen opposes the involvement of the BNSTC as an institutional co-guardian. She argues that:

1. The involvement of the BNSTC is an unnecessary expense;
2. The custody order of Justice Aston expressly provides that all medical and rehabilitation decisions for Mitch should be made by Marleen and Petrus jointly. If they cannot agree, the matter proceeds to mediation. Thus, there is already authority and a mechanism for dealing with decisions to meet Mitch's medical and other needs. The BNSTC is not part of that mechanism and adds nothing of value to what is already in place. Marleen and Petrus can as easily write a cheque to a provider as the BNSTC can, and for less money;
3. She and her husband have demonstrated over the past 18 months that they can work cooperatively for the benefit of their children, especially Mitch. There is no evidence to suggest that they will not continue to do so. In any event, if there is a disagreement regarding Mitch's needs or best interests, the order of Justice Aston already addresses that possibility.

[48] One of the grounds relied upon by Petrus and the BNSTC for the involvement of an independent institutional guardian of property is the ongoing matrimonial litigation



between Marleen and Petrus. There are still significant unresolved financial issues between them including child and spousal support. The implicit concern is that any disputes between them over financial matters arising from the breakdown of their marriage could spill over into the administration of Mitch's monies.

- [49] As indicated, it is proposed that the vast majority of the funds paid to Mitch will be placed into a structured settlement with McKellar Structured Settlements. There will be an initial lump sum of approximately \$80,000, with additional modest lump sums to be paid out at specified intervals in future years. In addition, the proposed structured settlement will pay a monthly amount to the guardians of Mitch's property to cover his estimated attendant care and rehabilitation/occupational therapy costs. These costs have to date been paid by the accident benefit insurer. The obvious benefit to Mitch of a structured settlement is that the funds will be invested prudently so as to achieve a return on investment likely to provide ongoing funding to meet all or most of his needs throughout his lifetime.
- [50] As a consequence of the structured settlement, the guardians of Mitch's property will receive the initial lump sum, monthly payments and interval lump sums. From these funds, Mitch's expenses must be paid. These funds are not there to be used to pay the ordinary costs of raising a child since that is an expense all parents are expected to bear.
- [51] Marleen seeks to have \$1500 per month paid to her for attendant care expenses from the monies received by the guardians of property for Mitch until he reaches age 18. She argues that since her return from the Netherlands shortly after Mitch's accident, North Waterloo has paid to her a monthly amount for attendant care expenses. She says this demonstrates the legitimacy of her entitlement to be paid that sum. Petrus does not seek any monies for that purpose for the periods when Mitch is living with him, i.e. on alternating weeks.

[52] Petrus argues that once the settlement is approved, the statutory accident benefit regime, which is a legislated scheme, no longer applies. As a consequence, Marleen is not "entitled" to attendant care expenses as she might be from the accident benefit insurer absent an approved settlement. The guardians of property must take care of the monies received on Mitch's behalf to ensure that they are used only for appropriate expenses and last as long as possible to maximize the benefit that Mitch will receive from this settlement.

[53] Petrus argues that:

1. Marleen should not be a guardian unless and until the financial issues between Petrus and Marlene are resolved;
2. Marleen should not be entitled to receive any monies for attendant care expenses for Mitch following the settlement – it is not for Mitch to support his mother;
3. An independent Institutional guardian adds value in that it can provide trust services including accounting for all funds received and expended, and can act as a voice of reason if a dispute arises over the monies and their use as between Petrus and Marlene;
4. The fees to be charged by the BNSTC for its services have been reviewed by the Office of the Children's Lawyer (OCL). The fees initially proposed were revised and reduced in accord with the OCL's suggestions/requests. The OCL has no further concerns with respect to the appointment of the BNSTC or the fees to be charged which are in line with similar arrangements elsewhere.

[54] In argument, counsel for Marleen raised the issue of various expenses she previously submitted to North Waterloo for reimbursement from Mitch's SAB's. The expenses were rejected by North Waterloo as either an unnecessary duplication of care services already provided and paid or as unreasonable. Marleen initially took the position that those expenses which total more than \$96,000 should be paid to her. However, it was

clear that if those funds are paid to Marleen, it will reduce the net amount paid to Mitch under the settlement of the SAB claim or may result in a further hearing to determine whether those expenses ought to be paid. The latter would necessitate a delay of the approval of the settlement.

[55] Counsel for Marleen agreed that that issue would place his client in a conflict of interest if she were a guardian of Mitch's property. He conferred with Marleen on a break and advised the court that his client would not pursue those expenses from either North Waterloo or the settlement funds; she will seek reimbursement through other avenues including possibly in the matrimonial litigation with Petrus.

[56] I am advised by counsel that a proceeding was commenced by Marleen in Brantford by which she purported to commence legal proceedings on behalf of Mitch and her daughters arising from the same accident. What was essentially a carriage battle ensued and it was determined that the action commenced by Joanna Overdevest as Litigation Guardian for Mitch and his two sisters should proceed. The Brantford action by Marleen was stayed. All counsel agreed that the Brantford proceeding is to be dismissed without costs if the settlements are approved.

#### **Marleen's Defence Costs**

[57] Marleen was separately represented in the tort action. She brought a motion for summary judgment which was dismissed by Justice Marshman who found that a jury could find that Marleen was contributorily negligent on the evidence before her at the summary judgment motion. Her appeal was settled on the basis that costs payable for the summary judgment motion were waived.

[58] Marleen seeks her costs of defending the tort action which are estimated at \$46,000 on a solicitor-client basis. She argues that she is not a party to the settlement of the action

against her. If that action is to be discontinued as against her, she should recover her costs of defending the action. Those costs would necessarily come from the settlement proceeds payable to Mitch.

- [59] Counsel for Mitch asked that the court find that the claim against Marleen meets the test for “a justified action” as confirmed by Justice Marshman’s decision on the summary judgment motion. Accordingly, there is a discretion to permit the claim against Marleen to be discontinued without costs which should be exercised in these circumstances.

#### **Family Law Act Claims**

- [60] Janeen and Dany are each to be paid \$5,000 from the proceeds of settlement in full satisfaction of their FLA claims. This figure is net of the mandatory \$15,000 statutory deductible.
- [61] Marleen objected to the amount payable to the two sisters as too little. Counsel for the Litigation Guardian indicated that the settlement funds are a fixed pool of money and any increase to the sisters would be at Mitch’s expense. A conscious decision was made to maximize the amount payable to Mitch.

#### **Legal Fees and Disbursements**

- [62] Oatley Vigmond was retained to pursue the claims arising from Mitch’s accident on May 9, 2013. Because Mitch’s parents were to be named defendants, Joanna Overdeest, Mitch’s aunt, agreed to act as Litigation Guardian. She entered into a written retainer agreement with Oatley Vigmond dated June 6, 2013.

- [63] The retainer agreement was sent to her by courier for her consideration. It was accompanied by a letter of explanation with an example of how fees and disbursements would work if success was achieved. She signed and returned the retainer agreement a week later. There is no suggestion that either the retainer agreement or the process that led to its execution were unfair.
- [64] By the terms of the retainer agreement, Oatley Vigmond was engaged to deal with both the tort claim and recovery of accident benefits. If unsuccessful, they receive nothing. If successful, the retainer agreement provides that they are entitled to be paid 15% plus any partial indemnity costs recovered or paid by the Defendants. This applies equally to monies received in the tort claim and the SAB claim.
- [65] Oatley Vigmond has reduced its proposed fees below that contemplated by the retainer agreement. They initially sought approval of fees of 10% plus the partial indemnity amount payable under the tort settlement. The fees sought amount to \$570,650 of which \$65,650 is HST.
- [66] On the SAB settlement, Oatley Vigmond also voluntarily reduced its proposed fees to 10% of \$2 million which is \$200,000 plus HST of \$26,000.
- [67] Thus, the firm will receive fees of \$705,000 plus HST from the settlement funds payable. This amounts to 15.7% of \$4.5M.
- [68] The settlement of the tort action includes \$126,973.45 which is full reimbursement of all disbursements incurred and carried by the law firm in respect of both the tort claim and the SAB claim. Those expenses were not incurred on day one of the retainer but accrued over the course of the file.

- [69] The Litigation Guardian, Joanna Overdevest, has deposed affidavits in which she supports both settlements and the proposed fees in each as fair and reasonable given the services provided by the law firm and the results achieved.
- [70] Marleen was not granted standing to make submissions with respect to fees on the tort claim as she is not the Litigation Guardian or the person paying the fees as contemplated by the Solicitors Act. She is a Defendant. Marleen was granted standing to make submissions in the SAB settlement because there is no Litigation Guardian yet appointed and she is one of the custodial parents of Mitch.
- [71] Marleen objects to the proposed fees payable to Oatley Vigmond as excessive. In her submissions, she argues that:
1. There was considerably less risk in the SAB claim especially once the insurer accepted responsibility to pay under the policy which occurred early on;
  2. Most of the work on the SAB file was done by experienced clerks or specialists as Mr. Vigmond called them, rather than lawyers;
  3. Mr. Vigmond's time was initially billed to the file at \$900 per hour and more recently increased to \$1200 per hour with little or no explanation. Those rates are too high and artificially increase the value of docketed time which makes the premium appear less than it would otherwise be; and,
  4. The amount of the fees in relation to the docketed time shows a significant premium to the firm for what was a relatively straightforward claim on the SAB side.
- [72] There is no suggestion by Marleen that the work was not done and done well. Likewise, Marleen does not dispute that Oatley Vigmond obtained a good result through its diligence. Mr. Vigmond and his colleagues have a well-deserved reputation for

excellence in the area of personal injury law, although that is not to say that \$900 per hour or \$1200 per hour is reasonable for such expertise.

- [73] The law firm notes that Marleen's actions both in court and dealing with the insurer directly added unnecessary time and expense to their efforts on Mitch's behalf.

#### Conference Call

- [74] Subsequent to the motions before, I spoke with all counsel to advise that I had three concerns with the settlements which I asked that they address if they were willing and able to do so. The three concerns were:

1. The fees contemplated for legal counsel for the SAB settlement seemed too high given the degree of risk involved. I suggested that those fees were approximately \$50,000 too high;
2. The amounts payable to Mitch's sisters seemed to me too low by \$10,000 each; and,
3. I was not prepared to permit the Plaintiffs to discontinue the action against Marleen without costs; however, the costs that she was seeking seemed to me excessive. I indicated that I felt that costs in the range of \$15 – 20,000 was appropriate.

- [75] Counsel conferred among themselves and advised me that:

1. Oatley Vigmond agreed to voluntarily reduce its fees on the SAB settlement by \$50,000;
2. The tort settlement would pay to each of Mitch's sisters the sum of \$15,000; and,
3. Marleen agreed it to accept \$15,000 for fees in defending the tort action and consented to the dismissal or discontinuance of that action on that basis.

[76] My consideration of the proposed settlements proceeds on that basis.

### **The Issues**

[77] The various motions before me raise the following issues:

1. Is the proposed settlement of the tort action in the best interests of Mitch?
2. Is the proposed SAB settlement in Mitch's best interests?
3. In respect of each proposed a settlement, are the proposed fees of the lawyers fair and reasonable?
4. Is the proposed plan for the settlement funds from the two settlements appropriate and reasonable?
5. Who should be appointed guardians of the property of Mitch and on what terms?
6. Should this Court exercise its discretion to permit the action as against Marleen to be discontinued without costs?

### **Approval of Settlements**

**Is the proposed settlement of the tort action in the best interests of Mitch?**

[78] Court approval is a prerequisite to any settlement of a person under a disability; *Rule 7.08(1)*. In deciding whether to approve a settlement and proposed legal fees to be paid by a party under a disability, the court must examine the settlement to ensure that it is in the best interests of the party under a disability: *Wu Estate v. Zürich Insurance Co.* (2006), 268 D.L.R. (4<sup>th</sup>) 670 (OCA) at para 10. The settlement need not be a perfect settlement so long as it is within the range of reasonable outcomes in the circumstances of the particular case.



[79] In this case, the settlement was achieved after three years of litigation involving senior, experienced counsel on both sides, and considerable efforts made to determine the extent of the injuries sustained and their impacts on Mitch as he gets older. The settlement figure takes into account the inherent risks in litigation as well as those germane to this case. The outcome was by no means a foregone conclusion had the defendants pressed the defence of the action to trial. Likewise, the outcome of the trial could have impacted the availability of insurance, i.e. there was risk that the insurance coverage would be in jeopardy.

[80] The quantum of the tort settlement is a reasonable compromise which falls within the range that one would reasonably expect for a case of this type involving the injuries sustained by Mitch. All parties through experienced counsel agree that the amount of the settlement is a fair and reasonable figure. I agree.

[81] The proposed settlement contemplates that the vast majority of the settlement proceeds, net of legal fees and disbursements, will be placed into a structure together with the monies from the settlement of the SAB claim. That has significant advantages for Mitch over his lifetime given the guaranteed rate of return and the prospect of significantly more money earned over the lifetime of the investment.

[82] For the foregoing reasons, I approve the settlement of the tort action as a fair and reasonable one in Mitch's best interests.

**Is the proposed SAB settlement in Mitch's best interests?**

[83] I appoint Joanna Overdevest as Litigation Guardian in the action seeking approval of the SAB settlement. Joanna retained counsel to represent Mitch in respect of that claim. She dealt with counsel throughout on the SAB claim. The contingency agreement deals with

both the tort and SAB claim and is with Joanna. The materials filed before me evidence that she has fulfilled her role as Litigation Guardian dillgently and with integrity.

[84] Absent a lump sum settlement of the SAB claim, Mitch would continue to submit claims for expenses incurred for his care and treatment. The \$2 million limit would simply decline until it reached zero providing Mitch with a maximum of \$2 million in benefits.

[85] By contrast, the proposed settlement requires the insurer to pay to Mitch the sum of \$2 million in a lump sum, less any monies already paid to the date of approval of the settlement. The lump sum payment allows Mitch to invest those monies in the structure and thereby earn significantly more which can be used to defray his future costs for a much longer period; hopefully, for his lifetime.

[86] The settlement of the SAB claim took place at the same time as the settlement of the tort action. The same experienced, senior counsels were involved with the assistance of an experienced mediator. The expert reports obtained by Mitch's counsel assisted in convincing North Waterloo that its \$2 million would be spent in any event and by paying it out as a lump sum earlier, the insurer could maximize the benefit to Mitch.

[87] In my view, the settlement of the SAB claim at this stage and for the amount agreed upon is in Mitch's best interest. It falls within the range of reasonable outcomes. Like the tort claim, none of the parties objects to the fact of or quantum of settlement of the SAB claim.

[88] For the foregoing reasons, I approve the SAB claim settlement.

[89] The motion brought by Marleen to require payment of expenses submitted but not paid by North Waterloo which total approximately \$96,000 is dismissed on consent. As indicated above, Marleen withdrew that claim and will pursue recovery elsewhere.

**In respect of each proposed settlement, are the proposed fees of the lawyers fair and reasonable?**

[90] The court must consider whether the retainer agreement entered into for the benefit of the minor meets the test of fairness and reasonableness: *Henricks-Hunter (Litigation Guardian of) v. 814888 Ontario Inc.*, 2012 ONCA 496 at para 18. In determining the fairness of the agreement, the court must assess whether the agreement was fair at the time it was entered into: *Soulliere (Litigation Guardian of) v. Robitaille Estate*, 2014 ONSC 851 at para 24. An agreement is considered fair if "... the contingency agreement was a bargain fairly made, understood and accepted by the litigation guardian.": *Re Cogan* (2007), 88 O.R.(3d) 38 at para 47 (ONSC).

[91] I am satisfied that there was no unfairness in the contingency agreement which was entered into between the law firm and Mitch's Litigation Guardian have. The terms of the agreements were written in plain language. There was an explanatory letter including an example provided which demonstrated how the agreement would work. The retainer agreement was sent to the Litigation Guardian who then had a week to consider it and consult with others before she signed it voluntarily. There is not even a hint of a suggestion in this case that this retainer agreement was unfairly entered into.

[92] The second stage is to consider whether the proposed fee pursuant to the contingency fee retainer agreement is reasonable. In that regard, the Ontario Court of Appeal in *Raphael Partners v. Lam* (2002), 61 O.R. (3d) for 17 at para 50 outlined a number of factors to be considered including:

1. The time expended by the lawyer;
2. The legal complexity of the matter at issue;
3. The result achieved; and,
4. The risk assumed by the lawyer.

[93] In *Aywas (Litigation Guardian of) v. Kirwin*, 2010 ONSC 2278 at para 18, the court set forth the following relevant considerations on the issue of reasonableness of the proposed fees in a contingency fee agreement:

1. The time expended by the lawyer;
2. The legal complexity of the matters dealt with;
3. The degree of responsibility assumed by the lawyer;
4. The monetary value of the matters in issue;
5. The importance of the matters to the client;
6. The degree of skill and competence demonstrated by the lawyer;
7. The results achieved;
8. The ability of the client to pay;
9. The client's expectation of the amount of the fee;
10. The financial risk assumed by the solicitor of pursuing the action, including the risk of nonpayment, the likelihood of success and the amount of the expected recovery; and,
11. The social objective of providing access to justice for injured parties.

[94] With respect to the tort action, I note the following:

1. Mr. Vigmond and his firm pursued this action with diligence and expertise;
2. Although at first blush this seems to be a standard motor vehicle accident, the circumstances and location of the accident together with the fact that Mitch was driving added a wrinkle and degree of risk as outlined above;
3. While there was significant time expended by experienced law clerks, the dockets provided demonstrate active and ongoing involvement of senior litigators as one would expect in the circumstances;
4. The nature of Mitch's injuries and long-term implications of same reflect the importance of this litigation to Mitch and his family. The measure of settlement funds received reflects the significant injuries suffered;

5. The results achieved are excellent;
6. The lawyers sought out well-qualified experts and assisted in the formulation of the care team. They helped coordinate tutoring and met other needs for Mitch;
7. The client understood that if the claim was entirely unsuccessful, no fees or disbursements would be payable to the firm. Accordingly, the firm took the financial risk of the carriage of the action; and,
8. The proposed fee is actually less than that contemplated by the agreement.

[95] I am satisfied for the reasons indicated that the proposed fees and disbursements payable to the law firm in respect of the tort action are reasonable and I approve those fees and disbursements.

[96] With respect to the settlement of the SAB claim, I note the following:

1. North Waterloo accepted the claim in respect of Mitch's injuries and likewise agreed that Mitch met the test for catastrophic impairment at an early stage;
2. There was certainly less risk to the law firm on the SAB side of the ledger;
3. Much of the work done on the SAB claim was performed by experienced law clerks or specialists as counsel referred to them. Nevertheless, the involvement of senior counsel on the SAB side was considerably less than on the tort side; and,
4. The objective was to establish a "burn rate" which would drive home to North Waterloo that its limits would inevitably be used up. To meet that objective, the law firm pressed North Waterloo for payment of attendant care and other expenses which would have been incurred and paid in any event albeit over a longer period.

[97] As I indicated above, I had concern with the reasonableness of the proposed fees chargeable on the SAB claim. The law firm proposed to charge the same percentage as it did in the tort action where it faced greater risk. The law firm has since voluntarily reduced its fees by \$50,000. I am satisfied that at that reduced figure, the proposed legal fees are reasonable. My observations above with respect to the tort claim and the actions of the law firm apply more or less to the SAB side of the claim. I approve the legal fees charged on the SAB side as reduced.

**Is the proposed plan for the settlement funds from the two settlements appropriate and reasonable?**

[98] It is contemplated that \$80,000 will be paid out initially as a lump sum and thereafter a monthly payment made which will increase annually by 2%. In addition, there will be further lump sum payments at specified dates as Mitch ages. The vast majority of the settlement funds are to be invested in a structured settlement vehicle for investment and paid out over time. None of the parties took issue with that proposed plan which, in my view, is entirely reasonable and appropriate. I approve the structured settlement proposal.

**Who should be appointed guardians of the property of Mitch and on what terms?**

[99] I have set out the positions taken by Marleen on the one hand and Petrus on the other above. In my view, it is appropriate to appoint Marleen, Petrus and BNSTC as joint trustees on the following terms:

1. Neither Marleen nor Petrus shall be entitled to be paid any trustee fees;
2. The BNSTC shall be responsible for maintaining all accounting records and shall provide an accounting to the court at the end of 36 months next the following its appointment and thereafter on such schedule as the court may direct;

3. All of the trustees may be a signing authority on the account(s) but any cheques issued or payments made must be signed and approved by the representative of the BNSTC;
4. No monies will be paid to either Marleen or Petrus for attendant care fees. The trustees may reimburse Marleen and/or Petrus for out of pocket expenses incurred on Mitch's behalf for travel to medical appointments etc.; however, neither parent is to be paid from Mitch's monies for income which they may forgo in providing care to him;
5. The fees chargeable by the BNSTC shall be those filed on the motion which were reviewed and recommended by the lawyer for the Office of the Children's Lawyer. They are found at page 3 of Exhibit "A" to the Affidavit of Adam Little sworn September 21, 2015 in Court File 119/15; and,
6. For greater certainty, nothing herein shall be taken to derogate from or qualify the order of Justice Aston which sets out the manner by which decisions with respect to Mitch's treatment and care are to be made. Any future change or amendment of Justice Aston's order in this regard shall be provided to the BNSTC and shall apply in place of Justice Aston's order moving forward from that date. The intent of this term is to ensure that the custodial parents continue to have primacy in making decisions with respect to Mitch's treatment and care in accordance with the terms of the order already issued or as that order may be modified in future.

[100] I have decided that there is a genuine need in these circumstances for the appointment of an institutional co-trustee. I am concerned that significant financial issues relating to spousal and child support as between Marleen and Petrus remain unresolved. That litigation is proceeding. There is a suggestion in the materials filed on this motion that Marleen regards the monies paid for Mitch as available to compensate her for time spent caring for Mitch that takes her away from her ability to find and engage in outside

employment. Clearly, that is not what this money is to be used for. Such issues are best addressed in the context of the matrimonial litigation.

- [101] With respect to signing authority, it is essential that the BNSTC be involved in the management and payments out from funds held for Mitch. Whether the co-trustees require two signatures for every cheque or only that of the corporate trustee is a matter which they can resolve between them. This court anticipates that the parties will act reasonably and responsibly and, if not, an application for direction to the court may be made. I have indicated above that each of the trustees can be a signing authority but that does not mean that they must be a signing authority save for the corporate trustee.

**Should the Court exercise its discretion to permit the action as against Marleen to be discontinued without costs?**

- [102] I advised counsel that I was not prepared to agree to a dismissal or discontinuance of the action as against Marleen without costs. She was residing in the Netherlands at the time of the accident. Notwithstanding that she was unsuccessful on the motion for summary judgment, it is my view that the chances of success against her at trial were extremely unlikely. She did not have counsel appointed by an insurer. She was sued and quite properly defended herself in that action.

- [103] The amount claimed by way of costs for Marleen was \$46,000. In my view, that figure is excessive given the extent of the examinations for discovery and her involvement in the case. Marleen has agreed that \$15,000 is an appropriate amount to be paid to her in respect of her costs of defending the action and I so order with that sum to be paid from the tort settlement.



### Miscellaneous


[104] I am advised by counsel that Marleen commenced an action in Brantford on behalf of Mitch and her daughters seeking damages arising from the same accident. That action was stayed by Mr. Justice Leach. On consent, it is to be dismissed upon approval of the settlements above. Therefore, Court file CV-12-280 in Brantford, Ontario is hereby dismissed without costs.

### Conclusion

[105] Therefore, I order as follows:

1. The settlement of the tort action in Court File 96/12 is approved.
2. The proposed legal fees and disbursements payable to counsel for the Plaintiffs in Court File 96/12 are approved.
3. Joanna Overdevest is appointed Litigation Guardian of the minor, Mitch Overdevest, in Court File 111/15.
4. The settlement of the SAB action in Court File 111/15 is approved.
5. The proposed legal fees payable to counsel for the Plaintiff in Court File 111/15, as reduced by \$50,000 plus HST thereon, is approved.
6. Court File 33/13 is hereby dismissed without costs.
7. Marleen Stadegaard, Petrus Overdevest and the Bank of Nova Scotia Trust Company are jointly appointed as Guardians of the property of the minor, Mitch Overdevest on the terms specified in paragraph 99 above.
8. The compensation payable to the Bank of Nova Scotia Trust Company as Guardian of the property of Mitch Overdevest shall be as set out in Exhibit "A" to the Affidavit of Adam Little sworn September 21, 2015 in Court File 119/15.
9. The revised management plan at Exhibit "A" to the Affidavit of Adam Little sworn September 21, 2015 in Court File # 119/15 is approved.

10. From the settlement of the tort action in Court File 96/12, each of Janeen and Dany Overdevest shall receive the sum of \$15,000 in full and final satisfaction of their respective FLA claims.
11. From the settlement of the tort action in Court File 96/12, Marleen Stadegaard shall be paid the sum of \$15,000 inclusive of fees, disbursements and HST on account of costs of defending the said action.
12. The balance of the funds paid on Mitch's behalf pursuant to the settlements in Court Files 96/12 and 119/15 net of approved legal costs shall be paid and invested in accordance with the plan approved by this Court.
13. Court File CV-12-280 in Brantford, Ontario is hereby dismissed without costs.
14. Upon payment of the monies required by the approved settlements herein, the actions in Court Files 96/12 and 119/15 are hereby dismissed without costs.
15. The motion brought by Marleen Stadegaard for payment of AB expenses previously submitted by her to North Waterloo in Court File 33/13 is hereby dismissed without costs.

  
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The Honourable Mr. Justice Russell Raikes

**Date:** December 17, 2015