S.116 Of The Courts of Justice Act
Can Defendants Impose A Structured Settlement on the Plaintiff?

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Historically, at common law, a plaintiff was not obliged to accept a structured settlement, and the court had no jurisdiction to impose one on him.

In *McErlean v. Sarel*[1], the Ontario Court of Appeal considered whether a plaintiff, seeking a gross-up of his cost of future care assessment to cover the income tax consequences of the award, should be denied that additional sum because he could avoid any taxes by consenting to a structured settlement for his damages.

The Court of Appeal answered this question in the negative at page 433:

> While we accept, of course that the respondent is under a duty to mitigate his damages and should not be able to recover losses that are reasonably avoidable, we do not think that if he does not agree to accept periodic payments, he should receive less than what he is entitled to as part of a lump sum award. Whether or not a better system of compensation could be devised, and we are aware of various reform proposals in this regard, the respondent is legally entitled to a lump sum judgment and is not to be penalized for asserting a claim to which he is entitled.

[1] (1987), 61 O.R. (2d) 296

The same issue was considered by the Supreme Court of Canada in *Watkins v. Olafson*[2], an action which was commenced in Manitoba.

Madam Justice McLachlin for the Court stated, at page 109:

> In Ontario, legislation permits periodic awards where the parties agree (Courts of Justice Act, 1984, s.129). In addition, structured settlement, where parties agree voluntarily to a scheme of periodic future payments have become increasingly common throughout Canada.
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> This case, however, poses a different issue. The issue here is not whether the Legislature can impose or authorize periodic damage awards, or whether parties can voluntarily agree to periodically paid compensation; that is conceded. … Rather the issue here is whether, in the absence of enabling legislation or the consent of all parties, a court can or should order that a plaintiff forego his traditional right to a lump sum judgment for a series of periodic payments.

Her Honour reviewed the prior authorities, including *McErlean, supra.,* and determined that courts did not, in the absence of enabling legislation, have the jurisdiction to impose a structured settlement on an unwilling plaintiff. In reaching her decision, Madam Justice McLachlin determined that it would be unacceptable for courts to effect a major change to the long standing principle that a plaintiff is entitled to a once and for all lump sum award.

When *McErlean* was decided, the ability to impose structured settlements was set forth in s. 129 of the *Courts of Justice Act*, S.O. 1984, c. 11. That section provided that, if all affected parties consented, the court could order a defendant to pay all or part of the award of damages periodically. This section was introduced on the recommendation of the Bench and Bar Councils Committee on Tort Compensation. Interestingly, its recommendation, that the court be permitted to order a structured settlement without consent, was rejected.

The "reform proposals" referred to in *McErlean, supra*., were part of the package of reforms recommended by The Honourable Mr. Justice Osborne in his *Report* of *Inquiry Into Motor Vehicle Accident Compensation in Ontario.*[3] This proposal went into force December 14, 1989, and remains unchanged to the present time. That new section (now s. 116) provides that structured settlements are mandatory where the plaintiff requests a gross-up for income tax unless the parties consent that such an order should not be made, or if the court determines that it would not be in the best interests of the plaintiff to make such an order. Section 116(3) sets out the criteria the court must take into account in determining whether the

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[2] (1989), 50 C.C.L.T. 101

otherwise mandatory imposition of periodic payments can be avoided, namely:

a) whether the defendant has sufficient means to fund an adequate scheme of periodic payment;

b) whether the plaintiff has a plan or method of payment that is better able to meet the interests of the plaintiff;

c) whether a scheme of periodic payments is practicable, having regard to all the circumstances of the case.

Given the current market rate variation between interest rates and the discount rate prescribed in subrule 53.09 of the *Rules of Civil Procedure*, defence counsel have sought to have the court impose a structured settlement while retaining to themselves any cost savings accruing where such structures can be purchased for less than the total of the award assessed for those heads of damages which attract the gross-up.

The strategy being put forward by the defence has significant monetary consequences - who as between the plaintiff and the defendant should retain the cost advantage of the structured settlement?

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[3] Ontario, Report of Inquiry into Motor Vehicle Accident Compensation in Ontario, vol. 1 (Chair: Mr. Justice

The leading decision with respect to the procedure to be followed by the courts when an order pursuant to s. 116 may apply, is the Ontario Court of Appeal decision in *Wilson v. Martinello*[4].

Mr. Justice Finlayson reviewed the history of the legislation and cited an extract from the Osborne Report:

> Just as in the current system, the trial judge or jury will determine the plaintiff's future care costs as part of the required findings of fact. In fatal accident cases, the trial judge will make a finding as to a dependent's future pecuniary loss arising out of death. All affected parties may then give submissions on the structured settlement issue.

At p. 425, Finlayson, J.A. describes the procedure to be followed:

> Because of what transpired in the case under appeal, I think I should say something about the procedure to be followed under s.116 of the Act. To my mind, it is clear that s.116 is not engaged until the end of the trial when the court has decided all issues of liability and has assessed damages <u>in the conventional manner</u>. It is only then that the issue of whether to structure all or some of the damages arises if there is no consent under s.116 (1)(a). At that stage the plaintiff is in a position to determine if he is going to "request" a gross-up. Once the findings of fact have been made as to those heads of compensation which would attract gross-up, hopefully the parties can agree to the results that flow from the calculation of gross-up as prescribed by Rule 53.09(2) of the *Rules*. If they cannot, evidence would have to be led on the issue having in mind the formula set out in Rule 53.09(2). Once the calculation has been made, the defendant would either agree to the lump sum award with gross-up as found by the court, or put forward a scheme of periodic payments (a structure) for the

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Coulter Osborne) (Toronto: Ministry of the Attorney General, Queen's Printer for Ontario, 1998).

[4] (1995), 23 O.R. (3d) 417

> consideration of the court under s.116(1)(b) of the Act. [Emphasis added]

The Court of Appeal thus determined that, before the issue of a structured settlement even arises during a trial, the judge must first assess the plaintiff's damages, including those sums which will attract a gross-up, in the conventional manner. If the plaintiff seeks a gross-up, the court's jurisdiction to impose a structured settlement may be invoked.

Defence counsel have on occasion asked the court to hear evidence during the trial of the savings that can be had if the plaintiff's claims for future care costs are paid by way of a structured annuity. Furthermore, if such a structure can be purchased for less than the total of the sums awarded by the judgment, defence counsel request that the defendant be entitled to the cost savings.

The issue arose recently in the case of *Roberts v. Morana*[5]. Mr. Justice O'Brien was required to determine, *inter alia*:

i) Can the defendants require the plaintiff to accept a structure proposed by them under s. 116(b) for payments of an award for future care costs by providing an annuity when the present cost of

the annuity is less than the total amounts itemized in the judgment as the present value of those costs; and

ii) Is the plaintiff entitled to an answer to question (i) before deciding whether or not to make a "request" for gross-up.

Justice O'Brien decided that the plaintiff was entitled to an answer to question (i) before a decision was required regarding gross-up.

The real issue in dispute was acknowledged to be whether the intent of the judgment was to award the sum allowed of 3.8 million dollars for future care or whether it was to award an income stream to meet certain future care needs of the plaintiff. Since current investment market rates may provide for some savings, the defence sought to take advantage of that fact and retain to itself the savings resulting from the purchase of a structured annuity to provide for the future care items. The defence argued that it should only be required to pay the substantially lower cost of a structured annuity which would provide the equivalent of 3.8 million dollars over the plaintiff's lifetime. The plaintiff, on the other hand, argued that if he elected to request a gross-up, and a structured annuity was ordered pursuant to s.116, then the full

[5] (1998), 37 O.R. (3d) 333 (Gen. Div.)

amount of the future care costs awarded should be used to purchase the structured settlement.

Mr. Justice O'Brien noted that in two prior unreported Ontario decisions, *Valliant v. Powell*[6] decided October 22, 1996 by Karam, J. and *Peddle (Litigation guardian of) v. Ontario (Ministry of Transportation)*[7] decided July 10, 1997 by Jenkins, J. the entire lump sum awarded for future care was required to be used to finance the structure.

Mr. Justice O'Brien concluded that the proper procedure to be followed in considering s. 116 should be as outlined in *Wilson, supra*. The court must assess damages in the conventional manner and then conduct a hearing of evidence, putting the plaintiff to an election whether or not to request a gross-up. If the plaintiff elects a gross-up, the defendant would

then be required to agree to the lump sum award with gross-up, or submit a proposed structure. The plaintiff then has the onus of establishing a better plan or method than the structure proposed by the defence. At that point, the court would make an order in which the best interests of the plaintiff would be considered as required by s. 116(2) and (3).

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[6] (22 October 1996), Timmins 4430/92, 4891/92 (Ont. Gen. Div.).
[7] [1997] O.J. No. 3813 (QL).

Mr. Justice O'Brien also decided that, the full amount of the future care costs awarded be paid to the plaintiff to fund the structure.

In a recent medical malpractice action before Lissaman, J., *Chow (Litigation guardian of) v. Wellesley Hospital*[8], defence counsel sought to introduce evidence during the trial of the availability of structures to provide for all of the plaintiff's claims at a cost substantially less than the present value of those claims. The court was asked to ignore the decision in *Wilson* with the argument that a structure would provide "perfect compensation" and would avoid difficult issues like life expectancy and the competing proposals of the parties on the future costs. Justice Lissaman rejected the defence argument, considering himself bound to follow the procedure prescribed by the Court of Appeal in *Wilson, supra.* (and

followed by Mr. Justice O'Brien in *Roberts, supra.*). The defence in *Chow* was prevented from calling any evidence on structures until the damages were assessed in the conventional manner.

The decision in *Roberts v. Morana, supra,* was recently reviewed by the Court of Appeal. As well, the Court of Appeal has recently released

[8] [1998] O.J. No. 2225 (QL)

reasons in the case of *Chesher et al v. Monaghan*[9] which considered the interpretation of s.116 of the Courts of Justice Act.

Before discussing these two decisions, it will be of interest to compare the Ontario Rule to the Manitoba Rule. As mentioned earlier, the Supreme Court of Canada decided, in *Watkins v. Olafson*, that, in the absence of enabling legislation, a Court lacked the jurisdiction to order that a judgment be payable by periodic payments. Subsequently, Manitoba introduced s.88 to the Queen's Bench Act to provide…

> 88.2 "In a court proceeding in which damages are claimed for personal injuries or for the death of a person, or under The Fatal Accidents Act, the Court may, on the application of any party, order that damages be paid in whole or in part by periodic payments."
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> 88.3 Where the Court orders damages to be paid by periodic payments, the judgment shall
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> (a) identify each head of damage for which a periodic award is to be made;
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> (b) in respect of each head of damage for which periodic payments are awarded, state
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> (i) the amount of each periodic payment,
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> (ii) the date of, or the interval between each periodic payment,
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> (iii) the recipient of each periodic payment,

[9] (2000), 48 O.R. (3d) 451

(iv) any annual percentage increase in the amount of each periodic payment, and

(v) the date or event on which the periodic payments will terminate; and

(c) contain or have attached to it any other material that the court considers appropriate.

This legislation, allowing court ordered periodic payments following the request of either party, stands in stark contrast to the Ontario legislation which only permits such judgments on consent of the parties or if the plaintiff requests a gross up.

In *Lusignan v. Concordia Hospital*[10], in supplemental reasons issued by Jewers, J. in the Manitoba Court of Queen's Bench, that jurist interpreted the Manitoba statute as follows:

> "The scheme of the legislation is that the court may order that damages be paid in whole or in part by periodic payments. The Court must specify and identify each head of damage for which the periodic payments are to be made. Unlike the Ontario legislation, the Act does not call for an initial conventional award to be made which is then to be satisfied by periodic payments. Rather it authorizes the court to order that "damages be paid in whole or in part by periodic payments…I interpret the Manitoba legislation to mean that what the court should do is stipulate a plan of periodic payments and that all the defendant need do is produce security to meet the payments. The cost of that security (in the form of an annuity) is strictly the defendant's business as are any cost savings."

[10] (1998) 44 CCLT (2d) 90

In *Chesher v. Monaghan*, *supra,* the court observed that in Ontario, parties may consent to an order for periodic payments or may agree that they need not be considered. If the parties cannot agree, and the plaintiff asks for a gross up, s. 116 requires the court to order periodic payments unless the court considers that it would not be in the plaintiff's best interest in the circumstances.

The onus is on the plaintiff to demonstrate that periodic payments are not in his or her best interest. As stated by the Court of Appeal in *Wilson v. Martinello, supra,*… "Having regard to the circumstances of this case, and the background of the plaintiff, the court is not required to scrutinize too critically the investment plans of the plaintiff in order to make a ruling as to his best interests."

In *Chesher*, the trial judge refused to order periodic payments, in part, because the structured plan proposed by the defence did not include a guarantee period. The Court of Appeal rejected the defence argument that, the objective of the award is *restitutio integrum* and this is achieved so long as the plaintiff's care needs are provided for during his lifetime so there is no need for a guarantee period which only benefits the plaintiff's estate. The

court agreed that the best interests of the plaintiff in the circumstances included providing for his family during and after his life. The court also stipulated that it was not open to the defence to redraft its proposal and include a guarantee period after sensing or realizing that the court will reject its proposal. The Court of Appeal refused to reverse the trial judge's decision that, in the circumstances, periodic payments were not in the plaintiff's best interest.

In *Chesher* the Court considered the Manitoba statute, and Jewers J's decision, and deferred the question whether the defence or the plaintiffs are entitled to any "savings" from a structured settlement, in lieu of a lump sum award, to the then pending decision in *Roberts v. Morana, supra*. In passing, Austin J.A. characterized the question to be "Who gets the savings? Does the Defendant get to keep them – or must the whole amount be applied to the structure? If the latter, will the plaintiff be overcompensated. If the former, will the defendant be paying less than the amount awarded to the plaintiff.

The issue was laid to rest by the Court of Appeal's decision in *Roberts v. Morana, supra*. In *Roberts*, the "savings" in the cost of the

proposed structured annuity was approximately $800,000.00 less than the present value of the future care award.

The Court reiterated its position, stated in *Wilson v. Martinello, supra*, that the starting point for the interpretation of s.116, is the determination of the present value of the future care award. It is only after the calculation of the award is made that consideration is given to a periodic payment or gross up.

The Court then went on to state:

> "The wording of s.116 does not permit the Court to order periodic payments in the manner suggested by the appellants. In our view, "the award" that is to be paid periodically can only be "the award" that triggers consideration of periodic payments. The wording of s.116 may be contrasted with the Manitoba legislation, considered in *Lusigman v. Concordia Hospital (1998), 44 CCLT (2d) 90 (Man. QB)* which specifically requires the Court to order structured payments on an item by item basis. But for s.116, the respondent would have been entitled to a lump sum award including the amount necessary to offset liability for tax on income derived from the award. We accept the respondent's submission that specific legislation, along the lines of the Manitoba scheme, would be required to take away her right to receive the full benefit of the present value of the award in her favor. We do not accept the submission of the appellants that it appropriate for this Court to "read in" the words that would be needed to alter the effect of s.116 to avoid what they perceive to be over-compensation to the respondent. The appellants have been relieved of the obligation to pay approximately four million dollars by way of gross up for income tax. That is the benefit intended by s.116. Any further reduction in their liability would require legislative change."

In conclusion, in Ontario neither the court nor a party can force the imposition of a scheme of periodic payments in lieu of a lump sum award. After the assessment of damages in the conventional manner, in circumstances where the plaintiff seeks a gross up of all or part of assessment to offset income tax, the Court will impose a structured annuity unless satisfied that, in the circumstances, it is not in the plaintiff's best interest to do so. If the plaintiff does not request a gross up, no periodic payments can be ordered. The cost of the structure, including the cost of including a guaranteed period in the scheme, is payable by the defendant predicated on the present value assessment of damages and is not to be based on the reduced cost to purchase a structured annuity, which arises as the result of business and market considerations among competing life insurers.