

Structured settlements helpful after ODSP changes

BY DALE SMITH

For Law Times

In an attempt to keep awards from being cut by changes in provincial social service rules, plaintiffs can use structured settlements as the means of protecting their awards, say lawyers.

Lawyers say that while the August 2017 changes to the Ontario Disability Support Program mean that more of their settlements are protected than before, structures remain a valuable tool to remain in needed programs.

"Whenever anyone is receiving social assistance, regardless of whether it's Ontario Works or ODSP, when it comes time to settle, my clients are always looking for a way to not have to repay those funds," says Jasmine Daya of Jasmine Daya & Co. Personal Injury Lawyers in Toronto.

Daya says that while her clients recognize that they've received the benefits, they are all injured and they require the funds because awards are never enough for their needs.

"You never get 100 per cent of what you've lost," says Daya.

"It's essential that when you settle a case, you help your client to the best of your ability. You owe a duty to your client to do the best you can, and that includes trying to strategically allocate funds to ensure that they can keep the most that they can."

Daya says that because of the changes that were made in the 2017 Ontario budget, settlements for future costs of care, pain and suffering, out-of-pocket expenses and pre-judgment interest are all exempt from ODSP eligibility.

Income replacement benefits, non-earner benefits, past and future income loss and punitive damage awards, however, continue to be treated as income for ODSP purposes, she says.

Chris Clifford, founding partner of Bergeron Clifford LLP in Kingston, Ont., says that

other benefits that structures can help protect include things such as the Canada child benefit, the guaranteed income supplement for seniors and HST credit benefits, as structure payments don't count as income for tax purposes.

"The nice thing about a structure is that the money flows out and it's not income," says Clifford. "For some clients, even if their settlement is significant, being able to structure the payments may be of benefit for them in keeping other income-tested benefits in place."

The changes to the ODSP were part of the April 2017 Ontario budget and also included a two-per-cent rate increase for those receiving benefits. It also allowed former applicants who were found to have a disability but were ineligible for the program for other reasons to re-apply for re-adjudication. The ODSP medical review program was also simplified.

Clifford says that when it comes down to figuring out how to handle settlement funds, lawyers need to be careful in the advice they give, which can mean working with a structure company in order to ensure that income-tested benefits can be protected.

Daya agrees.

"It's really important that when you're negotiating a settlement that you are allocating funds appropriately," says Daya.

This includes allocating funds for any ongoing tort action, she says, as well as toward benefits that will be beneficial to the client so that there is no repayment obligation.

On a tort claim, a structured settlement is beneficial where the settlement is large, particularly when there is a client under disability, says Daya.

"It protects the funds," she says. "It ensures that someone with the requisite knowledge of financial instruments is investing the funds, it safeguards the



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funds for clients to ensure consistent payments over a period of time and that period is specified and known."

Daya says that a structured settlement can enable an individual to continue to receive ODSP in certain circumstances, depending on how the funds are characterized. Lump sums for general damages can be subject to repayment obligations whereas a structured settlement can still mean someone can be entitled to ODSP, she adds.

Daya points to *Melvin v. Ontario (Correctional Services)*, 2013 ONSC 5432 as an example where the courts could order a structured settlement in order to ensure that the plaintiff could apply to the director of the ODSP for an exemption from repayment obligations.

Sonia Leith, a lawyer with Neinstein LLP in Toronto, says lawyers can usually get leniency from the director of the ODSP in cases where the plaintiff requires the entire settlement for treatment.

"When someone is catastrophically injured and they require every cent for treatment, a structure is the appropriate vehicle for any settlement in that regard," says Leith.

She says that since the law changed with the ODSP, it has

been a huge help for clients.

When it comes to Ontario Works, the exemption is \$50,000 in assets, up from the former exemption of \$25,000. As well, the exemption for pain and suffering damages used to be \$100,000, but that has been removed.

"In terms of advising a client and agreeing to settle, if you knew there was a huge award that had to get paid back to social services, you would likely want the majority of the settlement to be put into a category that wasn't subject to the payment," says Leith. "You would then advise the minister accordingly."

Leith says lawyers were grateful that the law changed to be more in favour of the injured party in this instance.

"If someone is injured and gets pain and suffering, why should they have to pay back out of their pain and suffering because they had to go on social services to compensate for lost income?" says Leith. "It's apples and oranges."

Leith says the cutoff for the ODSP with assets has also been increased to \$40,000 from \$5,000 and the Ontario Works asset limit was increased to \$10,000 from \$2,500.

"Let's say you were on ODSP and you got a \$100,000 settlement," says Leith. "If you put that into your bank account, you would get kicked off of ODSP, but if you put that into a structure, you wouldn't."

Laura Mullin, a principal with McKellar Structured Settlements, says that before the changes in the law, there was an incentive for injured parties to blow their lump sum in the hopes that they could re-qualify for ODSP once it had been spent, which is why McKellar helped to push for changes to the law.

"Because of really significant needs, rarely was a plaintiff compensated for all of their damages," says Mullin. "If they were getting an award of \$1

million or \$2 million, it was for extraordinary care items that ODSP wasn't meant to cover."

Mullin says that while plaintiffs with an award could apply to the director of the ODSP for an exemption to prove that any funds above the cap were needed for future care, it still required the plaintiff to report to the ODSP in an annual audit that all of the awarded funds were spent for care or rehabilitation.

"Many times, counsel would work hard to secure a director's exemption, but then because of the onerous reporting requirements, people would wind up losing access to ODSP benefits in any event," says Mullin.

She says that because even lump sum funds from exempt categories can be subject to having interest clawed back from the ODSP if it's put into a bank or an investment, a structure that is built using exempt money would be exempt from the ODSP until the point in the future where the structure has paid out more than what went into it.

Mullin says that even with smaller settlements for a client on the ODSP, the value of structuring even \$150,000 or \$200,000 in order to preserve ODSP entitlements remains significant.

"When a client is on ODSP, counsel really do need to think about structured settlements," says Mullin. She adds that this also applies to other income-tested benefits, where investing a lump sum in a traditional manner means they are earning income on a tax return, which can affect not only the Canada child benefit, HST credits, energy credits and even Trillium drug benefits and subsidized housing.

"A structured settlement is invisible — it doesn't go on a tax return," says Mullin. "It really can help you preserve sometimes large and sometimes small income-tested benefits, but for many of our structure clients, every little bit helps." **LT**