BC Injury Claims, Infant Settlements And The Office Of The Public Trustee

February 15th, 2010

When an infant (*in BC every person below the age of 19 is considered legally an 'infant'*) is involved in a BC Injury claim a settlement generally cannot be reached without the approval of the Office of the Public Guardian and Trustee. This holds true whether the infants claim is prosecuted by a lawyer or not. Since infants cannot enter into legally binding contracts this protection is necessary both to bring certainty to the settlement process and to protect the interests of the child.

As with any bureaucratic organization, however, there are some limits in the discretionary factors the trustee takes into consideration when approving a proposed settlement. Reasons for judgement were released today demonstrating this.

In today's case (Lotocky v. Markle) the Plaintiff suffered a brain injury shortly before his birth. A lawsuit was brought (*through his parents who acted as his litigation guardians*) alleging medical negligence against nurses, doctors and the hospital where the infant was born. After a lengthy trial the case was dismissed by Mr. Justice Macaulay with costs being awarded to the Defendant.

In a very real demonstration of the extraordinary costs losing litigants can pay after a lengthy BC Supreme Court Trial the Defendants claimed over $330,000 in costs from the Plaintiff's parents. The Plaintiff appealed the dismissal. Before the appeal was heard the Defendants offered to walk away from their claimed costs if the Plaintiff abandoned the appeal. This offer appealed to the Plaintiff's parents given the '*magnitude of the costs*' and their prohibitive consequences on their financial future.

The Plaintiff's parents wished to accept the offer and approached the Public Trustee's office for permission. The Public Trustee obtained their own legal opinion which concluded that the appeal had "*merit*". As a result the Trustee refused to consent to the infant abandoning the appeal. In an unusual development the BC Court of Appeal was asked to intervene and approve the settlement. They indeed did approve the settlement and provided the following useful reasons:

[66] It is clear that payment of the trial costs would present a significant additional burden for the Lotocky family, and that this would inevitably affect Michael's home life and future care.

[67] Turning to the position of the Public Guardian and Trustee on the issue of costs, it takes no issue with the good intentions of the Lotockys, but says that their potential liability for trial costs creates an inevitable conflict of interest between them and Michael. It maintains that their endorsement of the settlement should therefore play no role in this Court's examination of whether it is in Michael's best interests to approve the settlement.

[68] The Public Guardian and Trustee says that it, by contrast, is able to speak to Michael's interests with the "purity of independence". In that guise, it argues that the overarching issue must remain the merits of the appeal, and says it is not in Michael's interests to abandon it. It maintains that it has acknowledged the parents' burden of costs by offering to act as litigation guardian on the appeal, and carry the responsibility for the appeal costs. It is adamant, however, that it will not assume the parents' responsibility for the trial costs.

[69] While I do not doubt that the Public Guardian and Trustee's position is well-intentioned, it is, with respect, artificial and misguided to judge the merits of the appeal in isolation from the financial ramifications that would arise from an unsuccessful appeal. This became abundantly clear when the Lotockys raised an argument that the offer of the Public Guardian and Trustee to undertake the appeal amounted to a determination under s. 7(3) of the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383, and that the Court should compel it to undertake the appeal on the same terms as the parents. Section 7(3) reads:

7(3) If a litigation guardian is required for a young person under the Court Rules Act and is not otherwise provided for by the Infants Act, the Public Guardian and Trustee must act as litigation guardian for the young person if the Public Guardian and Trustee considers it is in the young person's best interests to do so.

[70] The Lotockys argued that they were not prepared to act as Michael's litigation guardian for the appeal due to their financial circumstances. The Public Guardian and Trustee had nevertheless decided it was in Michael's best interests that the appeal proceed. Thus a new litigation guardian was required, and under s. 7(3) the Public Guardian and Trustee must step into that role. As a trustee charged with acting in the best interests of the young person, it cannot properly use financial considerations as a reason to abandon its statutory role. It must accordingly take on the appeal by stepping into the same shoes as the former litigation guardian, and assuming her outstanding obligation for trial costs.

[71] This argument was strenuously resisted by the Public Guardian and Trustee, and it ultimately withdrew its offer to undertake the appeal as litigation guardian and pay appeal costs, on the basis that it had not intended the offer to be an ultimate determination under s. 7(3). While its arguments were couched in terms of statutory construction, administrative policy, and budgetary constraints, I cannot resist the inference that its opposition was fuelled as well by the fact that, if the Court accepted the Lotockys' argument, it faced significantly heightened financial risks in pursuing the appeal.

[72] Essentially, it became evident that, if placed in the same position as the Lotockys, the Public Guardian and Trustee would decline to act on the appeal due to the financial risks. It was also apparent that if the Lotockys could have pursued Michael's appeal on the terms proposed by the Public Guardian and Trustee, they would have had no hesitation in doing so.

[73] In short, the outstanding obligation for Dr. Markle's trial costs must play a part in deciding whether the settlement is in Michael's best interests. While I appreciate the conflict of interest that potential liability creates for the litigation guardian, the financial burden and risks it represents cannot be ignored as the Public Guardian and Trustee advocates. His parents' financial circumstances have significant repercussions for Michael's well-being both now and in the future.

[74] The Lotockys face a potential liability for $205,000 if the appeal is unsuccessful. I earlier indicated that I view the merits of the appeal as arguable at best. I am persuaded that those factors, taken together, make it untenable to proceed with the appeal. I am satisfied that it is in Michael's best interests to approve the proposed settlement.

This post is not intended to be a criticism of the Public Trustee. To the contrary the Public Trustee's office has a difficult and sometimes thankless job which involves making critical decisions in the best interests of injured infants in BC. However, settlement decisions are often made with the real world cost consequences of Supreme Court litigation in mind. For this reason the BC Court of Appeal's comments are most welcome in discussing these risks and requiring their consideration in a 'best interest of the child' analysis.