

Corporations, Deceaseds and Incompetents – Special Considerations

The practice of law at our firm is restricted to assisting injured accident victims. In this practice, we regularly deal with clients who are incompetent due to their young age or serious injuries. We regularly litigate on behalf of, or against, the estate of a person who was killed in a crash. We regularly sue corporations, the vast majority of which are insurance companies. Despite the regularity with which we deal with these types of parties, there is nothing routine about involving them in litigation. This paper will outline some of the special considerations, and provide some practical advice, for a lawyer dealing with such parties.

It is important to point out that the issues raised and advice offered in this paper are within the context of personal injury litigation. While many of the issues will have relevance to other areas of practice, the suggested course of action may not be applicable to these other areas. When in doubt, seek counsel from those with more experience in the particular area, conduct specific research about the issue in question, or contact the Practice Management section of the Law Society.

i. Corporations

A corporation is legally a “person”¹, who can sue and be sued like any “natural person”, with a few important exceptions. Unlike a competent human being, corporations must be represented by a solicitor². While this is certainly good for lawyers, counsel representing a corporation or suing a corporation must be aware of some unique issues that arise in this context.

While our practice does not involve representing corporations in lawsuits, representing plaintiffs in a personal injury setting means that, in many cases, the defendant is an insurance company. We often have to sue our client's own insurer, most often to claim no-fault benefits arising from a car accident, or long-term disability benefits arising from their inability to work.

At the discovery stage of a benefits action we typically examine a representative of the insurer. Rule 31.03 of the *Rules of Civil Procedure* addresses the process for examining a representative of a corporation.

Examination for Discovery

31.03 (1) A party to an action may examine for discovery any other party adverse in interest, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (3) to (8).

¹ *Interpretation Act*, R.S.O. 1990, C. I.11, s. 29.

² Rule 15.01, *Rules of Civil Procedure*.

(2) Where a corporation may be examined for discovery,

(a) the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee; and

(b) the examining party may examine more than one officer, director or employee only with the consent of the parties or the leave of the court.

In the context of our practice, it is important to examine the representative of the insurance company who is most familiar with the plaintiff's claim for benefits. The most obvious reason for this is to learn the basis for the insurance company's denial of benefits and to learn something about the insurer's conduct in handling the claim. A less obvious reason to discover the person with the most knowledge about the insured's claim is to avoid having defence counsel proffer answers on behalf of the deponent. In my experience, some defence counsel will try to be "helpful" by providing answers, stating that the deponent had no knowledge of what happened prior to his or her handling of the claim. While there will be circumstances where defence counsel has worked on the file longer, or knows more about the file, than the current adjuster, it is best to insist that the deponent answer the questions. It is important to know whether the deponent understands the basis for the continued denial of benefits or to explain whether she would have handled the claim in the same manner as her predecessor. These sorts of answers may strengthen a bad faith claim against the insurer. An adjuster is far

more likely to provide an answer that is damaging to the insurer's legal position than is her lawyer.

If the insurer produces a person for discovery who is not adequately familiar with the file, counsel is entitled to request that another person, one who is adequately familiar with the file, be produced.³ It may become apparent that the representative is not on top of the file where, as suggested above, defence counsel begins answering more questions than does the deponent, or where the evidence provided is so vague that an extraordinary number of undertakings have to be requested to obtain the information sought. This often happens when a "litigation adjuster" is produced at an examination for discovery, instead of a person who actually handled the file on a day-to-day basis.

The purpose of the discovery is to learn more about the insurance company's case and this is best achieved by examining the person with the most knowledge of the claim and the manner in which it has been handled. The same is true when examining the representative of any corporation – be proactive to ensure that you are examining the person with enough knowledge to get the information, and admissions, that your client requires.

While we do not represent corporations, we witness the acts of corporations throughout the course of a lawsuit. The vast majority of the time, these acts are

the everyday steps that regularly occur during the litigation process. However, when a corporation takes the rare step of initiating a proceeding that is outside the normal course of the corporation's everyday business, counsel must ensure that such steps are being taken with proper authority. Rule 15.02 permits a defendant or respondent to demand that a solicitor for a plaintiff corporation declare, in writing, whether the corporation authorized the proceeding. Under the circumstances described, a special resolution of the corporation's Board of Directors is required to properly authorize the proceeding. If the solicitor is not able to show this authority, the proceeding will be stayed.

.ii. Deceaseds

Rule 9 of the *Rules of Civil Procedure* governs proceedings by and against executors and administrators of deceased parties to an action.

Retainer

If a deceased plaintiff (John Smith) suffered fatal injuries as a result of an accident that gave rise to a lawsuit, the Executor of the John Smith's estate or his family members retain our services to pursue claims on behalf of the estate and often on behalf of his family members. The estate's claim for damages is limited to the damages John sustained as a result of the accident until the time of his death. The time frame for John's family members' claims for damages does not necessarily end upon John's death. However, these claims belong to the

³ This may be done with the consent of defence counsel or with leave of the Court. Rule 31.03(2),

individual family members, not to the estate. This is described in more detail below.

Commencing and Conducting an Action

The *Family Law Act* claim for pecuniary damages⁴ will include out-of pocket expenses incurred in caring for or assisting John as a result of the accident and before his death. This type of claim also includes loss of financial support that each person would have received from John had he not been killed, and other expenses, including expenses associated with funeral arrangements. Pecuniary damages may also include any loss of income incurred to provide care and/or assistance to John. These plaintiffs (often referred to as FLA claimants) may also have a claim for non-pecuniary damages for the loss of care, guidance and companionship that they normally would have received from John had he not been killed in the accident. It is important to remember that all of these claims belong to the individual claimants and not to the estate.

We will get involved on behalf of an estate where a person dies after he or she has sustained compensable injuries in an accident. It is not uncommon for a seriously injured or elderly accident victim to die during the course of the litigation. In this case, and continuing with the above example, a motion must be made in writing to request an Order to Continue in the name of the "Jane Smith as Executor of the

Rules of Civil Procedure.

⁴ The family members' claims for damages are made pursuant to the *Family Law Act*, R.S.O. c. F.3, s. 61.

Estate of John Smith” and to request that all subsequent documents issued, served or filed thereafter include the new title of proceeding. It is important to obtain instructions from the executor to initiate, continue or settle the claim on behalf of the estate. The action on behalf of the estate is stayed until such instructions are taken and until the Order to Continue has been granted.

Upon his death, the claim for damages on behalf of John’s estate has, in essence, crystallized. After John dies there cannot be a further claim for his pain and suffering, nor is there a further claim for his pecuniary or other damages.

In some cases the defendant in the lawsuit is killed in the accident or dies during the course of litigation. In either of these circumstances, counsel should determine the name of the person who has become the executor or administrator of the deceased’s estate. Once the name is determined, a motion must be brought to seek an Order to Continue the action with the appropriate title of proceeding as described above. Where there is no executor or administrator of the estate then a motion may be brought to appoint a litigation administrator to represent the estate for the purposes of the proceeding.⁵ Such a motion must include an Affidavit of Consent to Act as Litigation Administrator. This Affidavit states that the Affiant has no interest adverse to the deceased defendant or to the

⁵ Rule 9.02, *Rules of Civil Procedure*.

deceased defendant's estate, and that the Affiant consents to act as Litigation Administrator.⁶

Resolution of the Claim

From a Plaintiff's perspective, an insurance company often represents a Defendant estate. Where the Plaintiff is successful in litigation, the insurer pays the judgment or settlement. There are circumstances, however, where the amount of damages sought exceeds the insurance coverage or where there is no insurance coverage at all. Where the Defendant estate did not file (or amend) its pleading to indicate that it does not have sufficient assets to satisfy a judgment in the amount claimed, the executor of the estate may become personally liable for the debt and costs beyond what is available from the estate.⁷

Plaintiffs may be concerned about the executor of a Defendant estate distributing estate assets to the beneficiaries before a claim is commenced or resolved. The executor is responsible for ensuring that amounts owing to the estates' creditors, including Plaintiffs, are paid before assets are distributed. Furthermore, if the estate's assets are depleted then creditors are able to proceed against the beneficiaries in their personal capacity. To prevent this from occurring, an executor will advertise for creditors in the local media. The purpose is to provide

⁶ The claim is not affected if it is later determined that the deceased party had an executor or administrator other than the court appointed executor or administrator. In these circumstances, the court may order that the proceeding continue against the non-court appointed executor or administrator.

⁷ *Commander Leasing Corp. v. Aiyede Estate* (1984), 44 O.R. (2d) 356 (Ont. C.A.).

notice to creditors to claim against the estate. This step is considered to be an exercise of an executor's due diligence. However, it is unlikely that this step alone would be considered enough in a case where the deceased died as a result of a motor vehicle accident in which other people were injured. In these circumstances, an executor may issue a notice to a potential litigant to commence their claim within 30 days, failing which their claim may be forever barred.⁸ It would also be sensible in these circumstances for the executor to wait for the expiration of the limitation period for issuing and serving a Statement of Claim before distributing the assets of the estate.

Where there is a Plaintiff estate, the settlement or judgment in respect of the estate's claim is paid to the estate and is distributed from the estate in accordance with the terms of the will, or in accordance with the governing statutory provisions where there is no will.

As stated above, it is important to obtain instructions from the executor of the estate to initiate, continue or settle the claim on behalf of the estate. These instructions, provided on behalf of the estate, must come from the executor and not the FLA claimants. Where the executor is a FLA claimant, counsel must take separate, specific instructions for the estate, and consider any conflicts between the estate and the FLA claimants. For instance, a conflict may arise where there are inadequate insurance limits available to address the needs of each individual

⁸ *Estates Act*, R.S.O. 1990, c. E. 21, s. 44.

claimant and the estate. If there are conflicts that cannot easily be resolved counsel must refer one or more of the parties for separate legal representation.

iii. Persons under Disability

Retainer

We act for many people who would be considered persons under a disability within the meaning of Rule 7 of the *Rules of Civil Procedure*, particularly children and victims who sustain injuries that render them unable to make decisions for themselves. Where our client is a minor, the parent or guardian typically retains our services on their behalf and on behalf of the child. Similarly, where the party is an incompetent adult, it is usually the spouse or another family member who retains our services on their behalf and on behalf of the incompetent adult.

There are instances when clients retain our services when they have the requisite mental ability to do so on their own. At some later stage, however, it becomes apparent that the client is no longer able to properly manage her legal affairs and to provide us with instructions regarding her claim. When this happens, we are obliged, pursuant to the *Rules of Civil Procedure* and the Rules of Professional Conduct⁹, to take steps to have a Litigation Guardian appointed on the client's behalf.

Commencing an Action

The basic rule in Ontario is that a person under disability cannot commence a court proceeding until there is a Litigation Guardian to act on his or her behalf. A person under disability is a minor, mentally incapable within the meaning of the *Substitute Decisions Act*, 1992 (ss. 6 or 45) or an absentee within the meaning of the *Absentees Act*. The Litigation Guardian will be either the Children's Lawyer, in the case of a minor plaintiff, or the Public Trustee, unless there is another person who is willing to act as Litigation Guardian. This other person must file an Affidavit of Litigation Guardian with the Court to confirm that, amongst other things, she consents to acting as Litigation Guardian and that she has no interest in the proceeding adverse to that of the person under disability¹⁰. Rule 7 of the *Rules of Civil Procedure* governs certain steps in a proceeding involving a person under disability.

Conducting an Action

Where a party is under disability, the party's Litigation Guardian may do anything that a party in a proceeding is required or authorized to do. This would include having the Litigation Guardian examined for discovery on behalf of the party under disability where the person under disability is not competent to give evidence. Parties under disability are not automatically shielded from providing evidence at

⁹ Section 2.02(6), *Rules of Professional Conduct*.

¹⁰ Rule 7.02(2), *Rules of Civil Procedure*.

discovery or at trial, rather, such protection is only afforded to those who are found incompetent to testify.¹¹

Courts place a great deal of weight on the Defendant's right to examine for discovery any other party adverse in interest. Having said that, this right must be balanced with the Court's duty to protect the interests of vulnerable parties in a proceeding. The *parens patriae* jurisdiction vested in Ontario courts is an illustration of the significance that courts of equity have historically afforded the protection of vulnerable parties. Plaintiff counsel who would like to produce a Litigation Guardian in the place of the party must provide expert medical evidence to substantiate the claim that the party is not competent to testify. "Competency" for the purposes of oral discovery requires a deponent to understand and respond to questions put to him.

When determining whether a party under disability should be compelled to attend an Examination for Discovery, the Court will consider the nature of the disability and the effect that the disability has, if any, upon the competence of the party under disability to answer questions.¹² The Court will also weigh the right of the examining party to full disclosure against the potential harm to the party under disability, should an Examination for Discovery occur. Where there is compelling

¹¹ *Barnes v. Kirk*, [1968] 2 O.R. 213 (Ont. C.A.).

¹² *Abrahamson v. Buckland*, [1990] 5 W.W.R. 193 (Sask. C.A.): The Court determined that the Court of Chancery practice to immune an infant party from discoveries was not adopted in Canadian (or Saskatchewan) law. The Court then provided a framework for determining whether a party under disability should be compelled to attend discoveries.

medical evidence that the party under disability will suffer psychological damage then the Court should order that the party is not required to attend examinations for discovery.¹³

Resolution of the Claim

Counsel must take instructions from the Litigation Guardian about whether to settle the claim and the particulars of any settlement, however, that does not end the matter. Settlement of claims involving parties under disability must have Court approval.¹⁴ The Court approval process involves counsel preparing and submitting settlement documents to the Court. The Minutes of Settlement will set out specifically how the settlement funds will be distributed to any party under disability. An affidavit from counsel is submitted setting out the nature of the case and the proposed settlement, with exhibits relevant to the quantum of damages and the manner in which the funds are to be distributed, such as future care cost reports, economic loss reports, etc. An Affidavit of the Litigation Guardian must also be submitted to outline that the affiant reviewed, understands and consents to the proposed settlement and the manner in which the funds will be distributed.

For minor Plaintiffs the settlement is usually paid into court until they become 18 years of age, assuming that they will be legally competent when they reach the age of majority. Where the party is mentally incompetent under the *Substitute Decisions Act*, a guardianship application, along with a Management Plan, must

¹³ *Kidd v. Lake* (1999), 42 O.R. (3d) 312.

be submitted for Court approval. A Management Plan outlines the person, company or trust to whom the funds will be directed and from whom the funds will be paid out on behalf of the party under disability. The party's assets and liabilities are set out with some particularity so that the Court may determine whether the party's financial future and well being have been appropriately addressed.

In some cases, we recommend structuring all or a portion of a judgment or settlement amount to the party under disability, especially where the settlement involves a substantial sum of money. This is done through a structured settlement company, and it enables the party to have a steady, reliable source of income to address her needs. Depending on the client's circumstances, it may also be beneficial to have the money set aside in this manner so that it is not accessible to a person who may not use the funds in the best interests of the person under disability.

When dealing with settlements for a client who is mentally incompetent, counsel should be sure to consult with, or retain the services of an expert in the area of guardianship applications and management plans, including counsel who practice in this area. It is imperative to ensure that the future financial requirements of the incompetent client are appropriately addressed, to protect both the client and the responsible lawyer.

¹⁴ Rule 7.08, *Rules of Civil Procedure*.

Concluding Remarks

While this paper addresses some of the issues counsel will face where litigation involves a minor, mentally incompetent, deceased or corporate litigant, competent counsel must familiarize themselves with the *Rules of Civil Procedure* and case law on these issues before litigation on behalf of, or against, such a party. Seeking the advice of counsel who routinely deals with these issues is advisable, as is seeking assistance from the Law Society's Practice Management section where necessary. All of these circumstances require extreme caution in order to protect both the client and the lawyer throughout what will likely be complicated litigation.

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