

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Citation: V.G. vs. Western Assurance Company, 2020 ONLAT 18-005817/AABS

Date: October 8, 2020

Tribunal File Number: 18-005817/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

[V.G.]

Applicant

and

Western Assurance Company

Respondent

DECISION

ADJUDICATOR: Anita John

APPEARANCES:

For the Applicant: R. Matthew Barteaux, Counsel

For the Respondent: Erik K. Grossman, Counsel
Sharla Bandoquillo, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] [V.G] was born on December 21, 1994. He was in a motor vehicle accident on November 11, 2014.
- [2] He was initially taken by ambulance from the accident scene to [hospital 1] before being transferred to [hospital 2]. He underwent two surgical operations: one to repair a fractured right femur, the other to repair a fractured left knee-cap.
- [3] Ultimately, he was transferred to [hospital 3]. His discharge summary from [hospital 3] lists his health conditions as follows:

Closed head injury. Soft tissue injury, forehead. Subarachnoid hemorrhage. Sternal fracture. Left clavicle fracture. Right femur fracture. Left patella fracture. Hemoperitoneum. Liver laceration. Right ulnar styloid fracture. Right midshaft tibia fracture.
- [4] He applied for statutory accident benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “Schedule”) on November 24, 2014. Over the course of the next year and a half, he underwent extensive rehabilitation, including physiotherapy, massage therapy, chiropractic treatment and occupational therapy.
- [5] On April 3, 2016, Mr. [G.] signed a full and final settlement of his accident benefit claim.
- [6] On or about June 30, 2016, Mr. [G.] underwent a capacity assessment. The capacity assessor, Louise Silverston, concluded that Mr. [G.] was not able to understand and appreciate the information and consequences of entering into a settlement or to instruct counsel. Ms. Silverston concluded that Mr. [G.] was “not able, when educated and informed, to understand information necessary to make his necessary financial, other property and other legal decisions nor his decisions involving his accident claim or settlement.”
- [7] Mr. [G.] forwarded the capacity assessment to the respondent, Western Assurance. In light of Ms. Silverston’s capacity assessment report, Mr. [G.] requested that his settlement be set aside and his accident benefits file re-opened. The respondent refused.

ISSUE

- [8] Did Mr. [G.] have capacity when he signed the settlement agreement? If Mr. [G.] did not have capacity, should the settlement be set aside and should Mr. [G.]’s accident benefits file be re-opened?

RESULT

- [9] The applicant has not established, on a balance of probabilities, that he was incapable of entering into the settlement agreement. Therefore, the settlement was valid, and the applicant did not rescind the settlement within two business days, as required in s. 9.1(4) of O. Reg. 664 of the *Insurance Act*.

MENTAL INCAPACITY

- [10] The *Substitute Decisions Act, 1992* (“SDA”) sets out the test for capacity with regards to property. The relevant portions are as follows:
- 2(1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract.
- 2(3) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be.
- [11] As explained below, I find that Mr. [G.]’s medical history both leading to the settlement and during the requisite cooling period after does not override the legislated presumption of capacity.
- [12] There was a discharge summary completed by Dr. P. Chu on November 19, 2014 that indicated that Mr. [G.] “was found to have a closed head injury with subarachnoid blood but no gross neurologic deficits,” and that his head injury had been managed by neurosurgery. Based on this assessment, I find that there were no gross neurologic deficits in Mr. [G.]’s mental capacity.
- [13] In the December 22, 2014 Admission Notes – History & Physical, Dr. Morris Tushinski noted Mr. [G.] sustained a “closed head injury with soft tissue injuries of his forehead and a small questionable subarachnoid hemorrhage,” but that a neurological exam was normal. Based on this assessment, Dr. Tushinski found that Mr. [G.]’s mental capacity was normal.
- [14] In a home assessment conducted within days of Dr. Tushinski’s note, Heather Lyons, occupational therapist (OT), rejected the need for basic supervision for Mr. [G.]. In doing so, she observed as follows:
- Mr. [G.] presented as a pleasant and cooperative [age]-year-old man who was observed to be alert and oriented. No tangential

speech was noted, and he was able to follow directions and answer questions as requested by this assessor.¹

- [15] In January 2015, Dr. Tushinski again found no mental impairment. As he recorded:

Mental Impairment Classification Class 1 – Patient is able to function under stress and engage in interpersonal relations (no limitations).

(In the (AMA) *Guide to the Evaluation of Permanent Impairment*, class 1 means no impairment, class 2 means mild impairment, class 3 means moderate impairment, class 4 means marked impairment a class 5 means extreme impairment).²

- [16] Dr. Angelica Stanilou, who works at the Traumatic Brain Injury Clinic at Sunnybrook Health Sciences Centre, assessed Mr. [G.] on February 19, 2015. It is her opinion that Mr. [G.] acquired a traumatic brain injury in the accident “which falls at least in the category of complicated *mild* traumatic brain injury.” She goes on to state that he presents with post-concussive symptoms. She states Mr. [G.] presents with symptoms suggestive of an adjustment disorder with mixed depression and anxiety.
- [17] Dr. Stanilou recommended that Mr. [G.] continue to work with his occupational therapist and noted that the work with the occupational therapist “should be broadened to encompass cognitive rehabilitation.”
- [18] In a Medical Imaging Report, MRI Brain, dated February 26, 2015, Dr. Matylda Machinowska stated the following: “unremarkable MRI brain...” This brief note contained no comments of Mr. [G.]’s lack of cognitive capacity.
- [19] In a home assessment, dated June 2015, Ms. Lyons, OT, found that there was an improvement in Mr. [G.]’s cognitive abilities since his accident. As she observed:

Emotional/Cognitive: Mr. [G.] noted gradually improving tolerance for concentration and ability to focus with multiple stimuli or large quantities of information, and gradually improving memory

¹ Discharge Planning/Attendant Care Assessment Report by H. Lyonss dated December 22, 2014, page 8.

² American Medical Association (AMA) *Guide to the Evaluation of Permanent Impairment*, 4th edition 1993.

since his accident. He did not endorse emotional issues or concerns at this time.³

[20] In January 2016, Mr. [G.] underwent a vocational assessment conducted by Jeff Cohen. Jeff Cohen's evidence was that he was qualified before as an expert in other court cases. In summary, Mr. [G.] tested average in General Education Development and Aptitude. The computerized assessment was comprised of computer-based subtests measuring all 3 General Educational Development (GED) levels (General Reasoning Development, Mathematical Development and Language Development) below:

General Educational Development (GED) Score

General Reasoning Development: The ability to apply knowledge and Logical principles to solve general problems. **3/6**

A score of 3 means that Mr. [G.] can apply common sense understanding to carry out instructions furnished in written, oral or diagrammatic form. It also means that Mr. [G.] can deal with problems involving several concrete variables in or from standardized situations.

Mathematical Development: The ability to apply mathematical principles To solve problems ranging from simple addition to modern algebra and Statistics (calculator provided) **3/6**

A score of 3 means that Mr. [G.] can apply mathematical principles to compute discounts, interest, profit and loss, calculate surfaces, volume, weights and measures, calculate plane and solid figures, calculate variables and formulae.

Language Development: The ability to use language ranging from simple reading, writing and speaking tasks to complex tasks including reading and writing books and technical and technical manuals, and, being familiar with principles and methods of effective speaking **3/6**

A score of 3 means that Mr. [G.] can read novels, magazines, atlases, shop instructions for tools and equipment with reports and essays using proper format, punctuation, spelling and grammar. It also means that he can speak before audience with poise, confidence, voice control, using correct English.

³ In Home Attendant Care Report with Form 1 by H. Lyonss, dated June 11, 2015 pp. 7, 14.

Aptitude**General learning ability** 3/5

This score means that Mr. [G.] can take dictation and transcribe using a typewriter and repair electrical equipment.

Ability to understand meaning and words 3/5

This score means that Mr. [G.] can proofread printed copy, type letters and reports and perform on-the-job training and conduct tours.

Ability to perform arithmetic operations (calculator provided) 3/5

This score means that Mr. [G.] can compute costs of materials, measure parts using micrometers, perform shop math and measure chemicals.

Ability to perceive pertinent details 3/5

[21] This testing was conducted shortly before the signing of the settlement. In the scale from 1 to 5, 1 is considered high and 5 is considered low.

[22] In Mr. Cohen's vocational assessment report, dated January 2016, he states:

In considering Mr. [G.]'s assessed abilities (with a view on ascertaining his residual worker traits and developing his vocational options) a series of tests that consider general educational development [GED] were administered to him wherein Mr. [G.] demonstrated mid-level development across measures of Reasoning, Math and Language. His performance to this extent was indicative of the ability to apply common sense understanding to carry out instructions furnished in written or oral form or in the form of a diagram. Mr. [G.]'s math result using a calculator implies the ability, for example with training, to calculate discount, interest, profit and loss, and to calculate algebraic variables and formulae.

His language development score is suggestive of the ability to use language ranging from simple to moderately complex reading, writing short reports or correspondence with proper format, punctuation, spelling and grammar, and speaking with the general public using correct English.

[23] Mr. [G.] signed the settlement disclosure notice on April 3, 2016 while witnessed by Ms. Gracey. He also signed the Full and Final Release, which acknowledged section 9.1 of the *Insurance Act*. He further signed an "Addendum A to the Settlement Disclosure Notice," which emphasized the two-day cooling off period.

In addition, Mr. [G.] also had the benefit of having counsel explain everything to him.

- [24] In a report prepared by occupational therapist, Heather Lyons, dated March 10, 2016, Ms. Lyons remarked that bi-weekly to monthly occupational therapy sessions continued with Mr. [G.] from December 2015 to March 2016. She went on to state that despite one missed session and occasional misplacement of handout sheets, Mr. [G.] generally demonstrated improving preparation upon arrival... (i.e. dressed/groomed for session, less frequently drowsy).
- [25] In the March 10, 2016 report, Ms. Lyons stressed how occupational therapy continued to be centered on facilitating re-activation to pre-accident activities through goal-settings and planning procedures as well as working with other professionals (family physician, physiotherapist, vocational counselor), to ensure support and education as Mr. [G.] continues to increase cognitive and physical activity demands.
- [26] In her March 10, 2016 report, Ms. Lyons indicated that Mr. [G.] will improve his attention and memory skills with the use of environmental compensatory aids and metacognitive strategy implementation. She observed firsthand that Mr. [G.] continued to benefit from occasional cueing, tools, assistance to ensure accuracy, ongoing practice for self-monitoring and application of external/meta-cognitive strategies to improve success.
- [27] Three months after the settlement, Mr. [G.] underwent a capacity assessment in June 2016 conducted by social worker Louise Silverston. In her report, Ms. Silverston found the following of Mr. [G.]:
- Mr. [G.] is not legally capable to manage property at this time secondary to his diagnoses impacting mental status, including traumatic brain injury (TBI). He is not able, when educated and informed, to understand information necessary to make his necessary financial, other property and legal decisions, nor his decisions involving his accident claim or settlement, in my opinion. It is my opinion that Mr. [G.] is at high risk and vulnerable, and unable to appreciate the outcomes of making or not making his financial, complex property, legal or accident settlement decisions, referencing, the *Substitute Decisions Act* criteria as a guide to capable, recognized, legal financial decision making at this time.
- [28] Both Ms. Silverston and Mr. Cohen have worked with individuals who have had minor, moderate, and severe head injuries as well other neurological injuries. Ms. Silverston's report contradicts Mr. Cohen's report with respect to Mr. [G.]'s

capacity to make decisions involving his accident claim or settlement. I find that Mr. Cohen's vocational assessment aligns with the contemporaneous medical evidence, which establishes that, despite Mr. [G.]'s physical, psychological and cognitive difficulties emanating from his motor vehicle accident, Mr. [G.] has generally average level GED, aptitudinal, nonverbal intelligence and problem-solving abilities.

- [29] Health professionals such as Dr. Chu, Dr. Tushinski, Dr. Matylda Machinowska Heather Lyons and Dr. Stanilou have acknowledged the mild traumatic brain injury sustained by Mr. [G.]. Not one of them, however, raised an issue with respect to incapacity or mental impairment. Not one of them made recommendations for a guardian of property or guardian for health care decisions. Over the course of the year and a half after the accident, Mr. [G.] underwent extensive rehabilitation, including physiotherapy, massage therapy, chiropractic treatment and occupational therapy. I find that the applicant's injuries to be orthopedic in nature, rather than cognitive.

LAW AND ARGUMENT

Mental Incapacity

- [30] Mr. [G.] was represented by Moira Gracey, a partner at Carranza LLP, from the commencement of his AB claim on November 25, 2015 to its settlement on April 3, 2016.
- [31] Although it has been acknowledged that Mr. [G.] had been through a lot of trauma, Mr. [G.] has not raised any compelling evidence that he was incapacitated. There were no reasonable grounds to suggest that Mr. [G.] lacked capacity at the time of signing the settlement or two days after.
- [32] Based on the results of the vocational assessment report and, in addition to the above, I find that Mr. [G.] possessed the common sense understanding to appreciate the information and consequences of entering into a settlement or to instruct counsel. I find that Mr. [G.] had the mental ability to perceive pertinent details such as the breakdown of numerical figures in the settlement agreement. Given Mr. Cohen's findings, I find that Mr. [G.] had the ability to understand simple to moderately complex documents, such as the settlement agreement.
- [33] Mr. [G.] cited the LAT's decision in *N.K. v. Certas Home and Auto Insurance*, 2018 CanLII 76411 (ON LAT). In that decision, the applicant sought to set aside a settlement that was agreed upon on December 14, 2017. The applicant submitted that it was an improvident settlement as he was placed under duress

and lacked capacity to understand and consider the settlement documents due to mental illness.

- [34] Adjudicator Maedel found that, although the applicant suffered from depression, stress and anxiety, he had failed to demonstrate how these ailments incapacitated him on the date of settlement and the immediate days thereafter. Adjudicator Maedel found that the applicant was aware of the settlement and hearing process, and that the applicant had not established he was mentally incapacitated when he entered into the settlement on December 14, 2017 or even at any time during the cooling off period which expired on December 18, 2017.
- [35] In the decision at hand, I find that Mr. [G.] has failed to demonstrate how his symptoms incapacitated him on the date of settlement and the immediate days thereafter. I find that Mr. [G.] was aware of the settlement process and was not mentally incapacitated. Mr. [G.] has not established he was mentally incapacitated when he entered into the settlement on April 3, 2016 or even at any time during the cooling off period which expired two business days later.
- [36] Mr. [G.] also cited FSCO's decision in *Wachmenko v. Primmum Insurance Co.* in which the applicant reached an agreement to settle his accident benefits claim on a full and final basis. As part of the settlement, she executed settlement documents. She subsequently complained of the insurer's conduct and implied she was pressured into an improvident settlement.
- [37] Arbitrator Wilson noted the applicant's awareness of the consequences of the settlement, stating "if anything, Ms. Wachmenko's comments on the fairness of the settlement and its shortcomings display a critical awareness of the consequences of the settlement in question." Arbitrator Wilson then concluded that the applicant may have suffered a brain injury and have been handicapped with ongoing problems but found no compelling evidence of incapacity to allow her to vitiate the settlement agreement.
- [38] In the case at hand, it is acknowledged that Mr. [G.] suffered a mild traumatic brain injury and was handicapped with ongoing problems (fatigue, irritability, depressed feelings, feeling frustrated or impatient, forgetfulness, poor memory, poor concentration, taking longer to think, blurred vision, light sensitivity). However, I find that Mr. [G.]'s problems were manageable with occupational therapy and did not impact his ability to understand the implications of signing the settlement agreement.

- [39] Mr. [G.] also relies in the FSCO decision, *T.P. v. TD General Insurance Company*, FSCO A15-00674 in his authorities. The applicant argues that the evidence of the capacity assessment was what the arbitrator concluded served to override the presumption of capacity.
- [40] In *T.P. and TD General Insurance Company*, the applicant led compelling evidence of five psychiatric hospitalizations under the *Mental Health Act* on the day of and the immediate days after the settlement. The applicant was admitted to hospital eight hours after signing the settlement disclosure notice and diagnosed with paranoid psychosis, paranoid ideation and hypomania. The hospital staff described him to be “frankly psychotic” and to having “auditory hallucinations.” Based on the evidence, the hearing arbitrator found incapacity on the day that the applicant signed the settlement and in the two-day cooling off period.
- [41] Unlike in *T.P.*, Ms. Silverston’s report did not identify evidence of incapacity on the day of settlement and two days after, not does she proffer a clear opinion of incapacity for that specific period. I find that at the time of settlement on April 3, 2016 and two days after, that the insurer is entitled to rely upon the presumption of capacity of Mr. [G.] as there were no reasonable grounds to believe he was incapable of giving or refusing consent. Ms. Silverston’s finding of incapacity as of July 16, 2016 does not negate the presumption.
- [42] I find that the quality of evidence led by Mr. [G.] is significantly deficient in comparison to the five psychiatric hospitalization evidence led in *T.P.*, a case that he relies on. Mr. [G.] failed to present clear evidence of incapacity on April 3, 2016 and in the days immediately after. Notwithstanding the evidence of mild traumatic brain injury, they fall short of calling his mental capacity into question.

Expiry of the Cooling Period ~ Settlement of Accident Benefits on April 3, 2016

- [43] Section 9.1 of O. Reg. 664 of the *Insurance Act* sets out the criteria required in a settlement disclosure notice, including: clarification of the offer to settle, a description of the benefits available to the insured under the *Schedule*, a statement regarding the two-day cooling period, a description of the consequences of settlement, a statement advising the insured person to consider seeking independent legal, financial and medical advice before entering into settlement, and a statement that the insured person has to read all of the above.
- [44] Section 9.1(3)6 prescribes that the settlement disclosure notice must include a statement for signature by the insured person acknowledging that he or she had

read the disclosure statement and has considered seeking independent legal, medical and financial advice before entering into the settlement.

- [45] Section 9.1(4) gives the insured person a recession, or “cooling off” period of two business days from the later of the date he or she signs the settlement disclosure notice or the date he or she signs the release. A recession must be delivered to the respondent in writing, and any money received in consideration of accepting the agreement must be refunded under s.9.1(7).
- [46] On March 18, 2016, Ms. Gracey corresponded with Western to canvass interest in the settlement of Mr. [G.]’s accident benefits claim. She acknowledged her client’s serious injuries but also his preference to settle.
- [47] Negotiations took place over the phone between Ms. Gracey and Lisa Dely, an adjuster at Western.
- [48] As noted above, Mr. [G.] signed the settlement disclosure notice on April 3, 2016 while witnessed by Ms. Gracey. He also signed the Full and Final Release, which acknowledged section 9.1 of the *Insurance Act*. He further signed an “Addendum A to the Settlement Disclosure Notice,” which emphasized the two-day cooling off period. I find that the settlement agreement is compliant with the *Insurance Act* in terms of form and substance.
- [49] The requisite cooling off period passed without any objection from Mr. [G.].
- [50] At no point did Mr. [G.] or Ms. Gracey raise an issue about this capacity to enter into settlement or take any steps within two days of the agreement to rescind it.
- [51] Instead, approximately three and a half months after the settlement, on July 26, 2016, Kurt Bergmanis of Bergmanis Preyera LLP advised Western that he had taken over the matter. He further advised that the AB settlement was not enforceable as Mr. [G.] “was not capable of understanding the significance of the decision to settle his AB claim.”

Potential Negligence of Former Counsel

- [52] There have been submissions with respect to the competence of Mr. [G.]’s lawyer in her handling of the settlement. I find that any claims regarding the adequacy of the applicant’s former counsel or the lack of genuine intention of former counsel to act in the applicant’s best interests are beyond the scope of this hearing and outside of the jurisdiction of this Tribunal. These are claims best left to another forum or adjudicative body.

CONCLUSION

[53] For the reasons outlined above, the Tribunal orders that:

- i. I find that the applicant had capacity to enter into settlement on April 3, 2016 and two days after.
- ii. I find that the applicant's settlement on April 3, 2016 was valid.
- iii. The applicant is barred pursuant to O. Reg. 664 from proceeding with his application because he entered into a valid settlement agreement with the respondent.
- iv. The application is dismissed.

Released: October 8, 2020

**Anita John
Adjudicator**