



**Citation: The Estate of Kayla Duff-Foley v. TD General Insurance Company, 2022
ONLAT 20-012047/AABS**

Licence Appeal Tribunal File Number: 20-012047/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:

The Estate of Kayla Duff-Foley

Applicant

and

TD General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: The Estate of Kayla Duff-Foley, Applicant
Tally Vanounou, Counsel
Todd J. McCarthy, Counsel

For the Respondent: TD General Insurance Company
Eric K. Grossman, Counsel

HEARD: **Via Written Submissions**

OVERVIEW

- [1] Kayla Duff-Foley (“applicant”) was involved in automobile accidents on November 18, 2015 and May 1, 2016, and sought benefits from the respondent, TD Insurance, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (“Schedule”).
- [2] The parties participated in a global mediation on September 1, 2020 to resolve the tort and accident benefit components associated with the two accidents. At the conclusion of the mediation, the parties came to terms regarding a settlement for both accidents. The Minutes of Settlement were drafted by the mediator and circulated to the parties.
- [3] Tragically, on September 11, 2020, the applicant died at the hands of her mother. The criminal proceedings are ongoing.
- [4] While the parties exchanged correspondence between September 1, 2020 and the applicant’s passing on September 11, 2020, there is no dispute that the applicant failed to sign releases for any of the four settlements that were reached at the global mediation. During this time, the parties were finalizing details of how the settlement would be structured. On receiving notice of the applicant’s death on September 14, 2020, TD Insurance indicated on September 16, 2020 that it would seek a legal opinion under the circumstances.
- [5] The applicant’s sister was appointed Litigation Administrator for the applicant’s Estate on October 1, 2020. The applicant’s sister has since signed three of the four releases for the respective settlements and the funds with respect to the tort settlements for both accidents were disbursed.
- [6] TD Insurance took the position that there was no enforceable settlement between the parties, as it argues that the essential terms of the Minutes of Settlement—chiefly, the applicant being unable to provide direction on how the settlement would be structured and the actual signing of the release by the applicant—were not completed by the applicant herself. Further, TD Insurance relies on the common law slayer rule to argue that the settlement should not be enforced because the money would flow to the applicant’s mother.
- [7] The applicant, through her Estate, disagreed, arguing that the settlement was not contingent on the applicant personally signing the release and neither issue was an essential term of their agreement. The applicant’s Estate submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of the dispute.

ISSUES

[8] The sole issue in dispute is as follows:

- i. Did the parties reach a binding settlement agreement with respect to the deceased's accident benefit claims for the November 18, 2015 and the May 1, 2016 accidents?

RESULT

[9] The parties reached a binding settlement agreement on September 1, 2020 with respect to the applicant's accident benefit claims for the November 18, 2015 and May 1, 2016 accidents.

ANALYSIS

The mediation and Minutes of Settlement

[10] The global mediation was held on September 1, 2020 and successfully resolved on the same day. The mediator drafted and circulated Minutes of Settlement via email to all parties confirming the terms of the settlement. Although it is not pertinent to this dispute, for context, the particulars of the tort settlements were as follows: Aviva, on behalf of its insured, agreed to fund a \$60,000 settlement for the November 18, 2015 accident and TD Insurance, on behalf of its insureds, agreed to fund a \$275,000 settlement for the May 1, 2016 accident. These tort settlements were net of statutory accident benefits.

[11] The particulars of the accident benefit settlements are confirmed in the Minutes of Settlement provided by mediator Michael Schmidt via email dated September 1, 2020 titled "Duff-Foley v. TD Insurance – Settlement terms." As accident benefit carrier for both accidents, TD agreed to the following terms, presented verbatim from Mr. Schmidt's email:

- a. Claim No. 1 (November 18th, 2015) is resolved for \$3,700.00;
- b. Claim No. 2 (May 1, 2016) is resolved for \$957,000;
- c. Both settlements include all benefits, and include all expenses even if approved, incurred, but not billed;
- d. The only exception to paragraph 3 is the next non-earner benefit for \$640.00 which will be released on September 3rd;

- e. The plaintiff is obligated to structure at least 60% of the settlement amounts. The final structure figure is to be provided by the plaintiff to TD as soon as possible. TD will assign the structure, but there will be no assignment cost to the plaintiff. TD will purchase a reversion of the structure to age 60;
- f. The plaintiff is obligated to execute a release and SDN in both claims, with documents to be provided by TD upon being advised of the structure amount.

- [12] On September 1, 2020, and following the mediator's email confirming the Minutes of Settlement, Simon Chiu, TD's handling claims specialist and representative at the mediation, expressly confirmed via email that TD agreed to the terms and would await confirmation of the percentage structure before sending out the Settlement Disclosure Notice ("SDN") for the May 1, 2016 claim and passing the settlement on to McKellar Structured Settlements for finalizing.
- [13] On September 2, 2020, Mr. Chiu emailed applicant's counsel asking if a decision had been made on the percentage structure for the settlement. On September 3, 2020, Mr. Chiu emailed the SDN and final release in the amount of \$3,700 for the November 18, 2015 accident. On September 3, 2020, applicant's counsel emailed Mr. Chiu to discuss the breakdown of the non-earner benefit on the SDN as it would affect the applicant's ODSP claim.
- [14] On September 4, 2020, Mr. Chiu emailed applicant's counsel indicating that: "We will agree to the following on SDN with structuring (at least 60%) to her age of 65 YO and TD will purchase reversion up to her 60 YO." The breakdown of quantum per benefit was provided and Mr. Chiu asked for confirmation of the final structure percentage before drafting the SDN. The parties exchanged emails again on September 9, 2020 confirming that there was no update.
- [15] On September 11, 2020, the applicant's life was taken. The accused is the applicant's mother, who is awaiting her criminal trial.
- [16] On September 14, 2020, applicant's counsel wrote to Mr. Chiu and indicated that the settlement would proceed in accordance with the Minutes of Settlement, with 60% to be structured and subject to a reversionary interest in TD Insurance's favour. Applicant's counsel asked Mr. Chiu to finalize the SDN. In the same email, applicant's counsel then notified Mr. Chiu that she had just learned that the applicant is deceased and indicated that a Litigation Administrator who will be able to sign the SDN and release would be appointed.

- [17] On September 16, 2020, Mr. Chiu responded, stating, “Due to circumstance, we are waiting for legal opinion at this point and shall keep you informed of development.” (*sic*)
- [18] On October 1, 2020, the applicant’s sister was appointed as Litigation Administrator of the Estate by Justice Taylor of the Ontario Superior Court.

Positions of the parties

- [19] The applicant submits that it is well-established law that a settlement is a binding contract subject to the general law of contract regarding offer and acceptance. She submits that there is no question that the parties had a mutual intention to create a legally binding contract and the settlement was negotiated during a global mediation where all parties were represented and the settlement was confirmed in a Minutes of Settlement. The applicant submits that the percentage structure was agreed by the parties to be a minimum of 60%, that her counsel had no limitation on her authority to confirm that percentage and that the Estate is ready and willing to sign the SDN and release. The applicant relies primarily on the decisions in *Riggs Estate v. Intact Insurance Co.*, 2019 ONSC 6846 and *The Estate of Rebecca Wu v. Zurich Insurance*, 2006 CanLII 16344 (ON CA), amongst other jurisprudence, to support her position.
- [20] To this end, the applicant submits that the fact that the applicant herself was unable to sign the SDN and release prior to her death does not negate the validity or enforceability of the settlement because it was merely a term of the settlement that had already been finalized. Further, the applicant submits that the requirement of an SDN is a consumer protection provision and TD Insurance could have made the settlement expressly contingent on the applicant personally signing the SDN and release or being alive at the time it was finalized, but it did not. Finally, the applicant submits that the family and Estate is committed to taking whatever steps are necessary to ensure that the funds do not flow to the applicant’s mother. The Estate is only seeking payment of the 40% of the settlement that was not subject to the structure and reversionary interest.
- [21] TD Insurance submits that there is no enforceable settlement between the parties as two of the essential terms of the Minutes of Settlement were not completed by the applicant when she did not advise of the final structure of the settlement, pursuant to paragraph 5 of the mediator’s email confirming the terms, or execute the SDN and release herself, pursuant to paragraph 6. TD Insurance argues that it was not until September 14, 2021—after the applicant’s passing—that applicant’s counsel advised that the settlement be 60% structured, which it submits was not a decision based on explicit instructions. TD Insurance relies

primarily on the affidavit of Philippe Thorpe, Principal of McKellar Structured Settlements and the Tribunal's finding in *I.R. v. Allstate Insurance Company*, 2017 CanLII 81585 (ON LAT), to argue that in the absence of a confirmed structure and a signed SDN there is no settlement under s. 9.1 of O. Reg. 664. Lastly, TD Insurance submits that the settlement funds are not payable in accordance with the common law slayer rule, which it submits prevents the applicant's mother from being a beneficiary from her death.

- [22] For the reasons that follow, I agree with the applicant and find that the parties entered into a binding settlement agreement which entitles the applicant to the remaining 40% of the agreed upon settlement.

There was a binding settlement agreement

- [23] As a first principle, the parties agree that the Court of Appeal has determined that a settlement is a binding contract that is subject to the general law of contract regarding offer and acceptance. That is, a binding contract exists where the parties had the mutual intention to create a legally binding contract and reached an agreement on all of the essential terms of that contract.¹
- [24] On the evidence before the Tribunal, I find that there is no question that the parties had a mutual intention to create a legally binding contract, as the settlement was negotiated and reached within the context of a full day global mediation where all of the parties were represented (on both the tort and accident benefits sides) and where the mediation was reached with the help of a neutral and experienced mediator. Based on the September 1, 2020 email from Mr. Schmidt confirming the Minutes of Settlement, I find it clear that the parties reached an agreement on all of the essential terms of the settlement on that date. Mr. Chiu's September 1, 2020 email in response to the Minutes of Settlement was, in my view, express confirmation of the parties' agreement on settlement. In this vein, as Mr. Chiu was the representative for TD Insurance at the mediation, TD Insurance is bound by the settlement he negotiated and which he confirmed agreement with. Fundamentally, I find there was offer, acceptance and agreement on the essential terms of settlement.
- [25] On review of the Minutes of Settlement and, given the submissions of the parties, the dispute can be narrowed to paragraphs 5 and 6 of Mr. Schmidt's email. TD Insurance takes the position that these paragraphs constitute essential terms

¹ *Olivieri v. Sherman*, 2007 ONCA 491.

and/or conditions precedent of the agreement that were not finalized due to the applicant's passing, invalidating the settlement.

The percentage of the structure

- [26] First, paragraph 5 provides that the percentage of the structure of settlement agreed to by the parties was "at least 60% of the settlement amounts", with further direction that the applicant provide TD Insurance with the final structure percentage, at which point TD Insurance would assign the structure and purchase the reversion interest until the applicant's 60th birthday. On a plain reading, I agree with the applicant that this language provided her with the option to structure a larger percentage if desired. Further, this 60% minimum structure and reversionary interest until the age of 60 was also to the benefit of TD Insurance, and especially so given the applicant's unexpected death ten days following the settlement. Indeed, there does not seem to be a dispute that it was a principled approach by TD Insurance, as the tort side paid less money on the basis that the accident benefits side was paying more.
- [27] In any event, there is no indication in paragraph 5 of the Minutes of Settlement that the settlement would be void if the applicant herself failed to communicate her desire for a larger percentage structure. There is similarly no indication that applicant's counsel was unable to communicate on the applicant's behalf or that the scope of her authority was limited in this regard. In my view, the parties negotiated a minimum (or perhaps better articulated as a default) of a 60% structure to the settlement. It was open to the applicant to increase this amount but there is no rational or principled basis to find that her personal failure to do so negates the validity of the settlement agreement.
- [28] Similarly, there is no basis to find that the applicant's untimely passing somehow resulted in a limitation on her counsel's authority or ability to confirm that the structure would proceed at the 60% minimum agreed upon. The percentage of the structure was confirmed at 60% in the September 14, 2020 email from applicant's counsel to Mr. Chiu. The fact that applicant's counsel also relayed the news of the applicant's passing in the same email does not alter the fact that counsel, as the representative for the applicant, conveyed to TD Insurance that the structured percentage would not increase beyond 60%. This means that the percentage of the cash settlement would remain at 40%.
- [29] I agree with the applicant that the purpose of the minimum structure and reversion terms reflects the parties' anticipation of the very thing that occurred after the mediation: being the untimely and premature death of the applicant. In my view, that this occurred ten days following the settlement rather than when

the applicant turned 60 does not make any aspect of the global settlement unenforceable or void. Rather, I agree with the applicant that it simply makes redundant the need for the 60% minimum structure and reversion terms of the \$957,000 settlement because the applicant is only seeking the remaining 40% cash figure that is unaffected by the structured percentage. This removes many of the concerns articulated in Mr. Thorpe's affidavit.

[30] This is because the structured percentage was a form of protection for the applicant, designed to ensure that the settlement funds extended and were available for her lifetime to fund her treatment needs, which is why same was subject to a reversionary interest to TD Insurance's benefit. While I am alive to TD Insurance's submissions from Mr. Thorpe's affidavit on the importance of the structure of a settlement for legal and tax purposes, the applicant's death has eliminated the cost of future care and diminished the value of her claim considerably, as reflected by the fact her Estate is only seeking the remaining 40% that was not subject to TD Insurance's reversion.

[31] I agree that these facts do not create a new situation not already contemplated by the parties that would void their agreement on the other aspects of the settlement or allow TD Insurance to resile from its agreement based on the purported importance of the settlement structure to third parties like McKellar or the Canada Revenue Agency. As the applicant submits, life expectancy is but one of the many contingencies that parties settling a claim are bound to consider when determining the value of a settlement. The unexpected death of the applicant does not negate the foundation of the parties' agreement to settle, generally, or to somehow void the remaining 40% that was not subject to the reversion, specifically.

The unsigned SDN and release

[32] Second, turning to paragraph 6 and the issue of whether an unsigned SDN and release negates the validity and enforceability of the settlement. I find that the unsigned SDN and release does not negate the validity or enforceability of the settlement between the parties. While I am alive to the FSCO cases cited by TD Insurance, these cases are not binding on me. Instead, I prefer the jurisprudence provided by the applicant, which is directly on point.

[33] On a plain reading, paragraph 6 of the Minutes of Settlement does not indicate that the settlement was expressly contingent on the personal signing of the SDN and release by the applicant herself, which is a term that TD Insurance could have negotiated. While I do not think it is particularly controversial to say that it is generally assumed that the insured will be the person who signs the documents,

I find there are myriad circumstances in accident benefits settlements where an insured may lack capacity to sign or direct that a document be signed. These situations do not invalidate settlements. Further, I agree with the applicant that the requirement of an SDN in O. Reg. 664 is designed for consumer protection to ensure that the insured fully appreciates the terms of the settlement they are entering. While s. 9.1 requires that an SDN be executed for an accident benefits settlement to be enforceable, an SDN is not for the benefit of the insurer and the Regulation does not provide that the Estate of a deceased claimant is prevented from signing an SDN.

[34] *Riggs Estate v. Intact* is directly on point. In that case, the insured died prior to executing the settlement documents. As is the case here, the insurer argued that the Regulations provided that the insured person must execute the SDN personally. The Superior Court disagreed, stating that at most while there is a presumption that the insured person will sign the document, it is not uncommon for a recipient of accident benefits to be under the age of majority or be suffering from a physical or mental disability that legally prevents them from signing the document without the assistance of a representative. The Court opined that there is no distinction between an insured under disability who cannot sign an SDN and a deceased insured, ultimately finding that an authorized personal representative must be allowed to sign for the insured person. Justice Reid held that the Court would have found the settlement between the parties binding and enforceable if such a dispute was not subject to this Tribunal's jurisdiction.² While I agree with TD Insurance these comments are *obiter dicta*, I see no basis to depart from the reasoning.

[35] I find there is similarly no distinction here. The Minutes of Settlement were not expressly contingent on the personal signing of the SDN and release by the applicant herself. TD Insurance also seemingly does not dispute the legal capacity of the applicant's Estate to sign the documents. While the applicant died prior to signing the SDN, her sister was appointed Litigation Administrator for her Estate on October 1, 2020 and has purportedly executed the other releases on behalf of the Estate, including the SDN for the other accident benefit settlement totalling \$3,700. Given that the applicant's Estate is only seeking the remaining 40% of the settlement that was not subject to the complications of a reversionary interest and where the Estate was permitted to sign off on the other settlements, including paragraph 2 from the same Minutes of Settlement, it remains unclear

² *Riggs Estate*, at 34.

why the Estate is prevented from doing so again here. According to her affidavit, the applicant's sister is ready and willing to do so on behalf of the Estate.

- [36] In my view, as the applicant's sister was appointed by the court and has already been permitted to sign off on the other settlements that occurred at the same global mediation, she is clearly an authorized personal representative who is able to sign the SDN and release here. With the applicant's sister installed as the Litigation Administrator for the Estate, there is accordingly no distinction between the applicant's death preventing her from signing the SDN and, for example, a minor who is legally incapable of signing an SDN or an adult who lacks capacity as a result of a catastrophic brain injury to understand and direct counsel to sign an SDN, both of which occur regularly in accident benefit settlements. To borrow from the Court of Appeal's analysis in *The Estate of Rebecca Wu*, I "disagree that the settlement died" with the applicant where, prior to her death, her claim for accident benefits had, by virtue of the settlement, become a contractual right to the agreed amount and which devolved to her Estate upon her death.³
- [37] TD Insurance relied heavily on the Tribunal's decision in *I.R. v. Allstate Insurance Company*, which is not binding on me and, at any rate, I find very distinguishable from the matter before me. First, the contrast between the cases is obvious where the purported "settlement" offer in *I.R.* arose from a hearsay telephone conversation between the parties and was not the result of a full day global mediation involving two tort and two accident benefit claims related to separate accidents involving two insurers that was presided over by a mediator. Second, the insurer in *I.R.* denied even making an offer to the applicant, let alone confirming an offer in writing, which is markedly different from the undisputed facts here, where the parties negotiated in good faith during a full day global mediation and where a neutral mediator confirmed the parties agreement in writing via the Minutes of Settlement email that was circulated on the same day. There can be no dispute that an offer was made and accepted and that there was a meeting of the minds where TD Insurance's own representative confirmed in writing its agreement of the terms. Third, *I.R.* contemplated an unsigned SDN where there was no actual or written offer of settlement, which cannot, in my view, be remotely comparable to the issue here, where there is an unsigned SDN as a result of the premature death of the insured at the hands of her own mother that prevented signing. Fourth, and in this vein, *I.R.* only considered whether an SDN must be signed by a claimant to make a settlement enforceable and not whether s. 9.1 of O. Reg. 664 requires that the claimant personally sign the SDN

³ *The Estate of Rebecca Wu*, at 17.

or, more specifically, whether s. 9.1 precludes the Estate of the claimant from signing the SDN where the parties have agreed on the terms of settlement.

- [38] All of this is to say that I disagree that paragraph 6 of the Minutes of Settlements, which states that “the plaintiff is obligated to execute a release and SDN in both claims,” is mandatory language evidencing an “essential” term for the settlement agreement that has not been complied with. These documents are required to prevent claimants from entering settlements that they do not understand or regret, not as a condition precedent for settlement. Where the parties have agreed to a settlement and confirmed same in writing, it constitutes a binding contract. In this case, the SDN and release are mere formalities and are not essential terms of that agreement. I find that the applicant’s Estate, as her sister has already done for other claims, can execute the SDN and release for the remaining 40% of the unstructured portion of the settlement with TD Insurance that the applicant cannot sign due to her unfortunate and tragic passing. According to the applicant, this amounts to \$382,800.

The Slayer Rule

- [39] As a final argument that I will address for completeness, TD Insurance submits that the settlement funds should not be payable in accordance with the common law Slayer Rule. It points to s. 47(3) of the *Succession Law Reform Act* to argue that the beneficiaries of the applicant’s estate are her father and mother. It submits that the applicant’s mother has not signed renunciation papers to date and has not been found criminally responsible for the applicant’s murder, so it is unconscionable and contrary to the Slayer Rule to allow the settlement funds to flow to the applicant’s killer as a beneficiary.
- [40] In evidence are affidavits from the applicant’s sister, the Litigation Administrator of her Estate, as well as the applicant’s aunt, who is assisting the applicant’s sister with the administration. The affidavits confirm that the family is committed to taking whatever steps are necessary to ensure that the Estate flows to the applicant’s sister. The applicant’s mother has purportedly also confirmed that she wants nothing to do with the settlement and will sign renunciation papers as soon as her criminal legal team allows her to. Further, the applicant submits that the Slayer Rule as public policy does not apply to a person found not criminally responsible for their actions and neither party can speculate on what the outcome of the criminal trial will be.
- [41] While TD Insurance submitted that the affidavits should be afforded no weight, I am persuaded by the family’s commitment to see that only the applicant’s sister inherits the applicant’s Estate. I do not see the common law Slayer Rule as a

basis for TD Insurance to resile from an otherwise binding settlement. The issue before me is whether a valid and enforceable settlement agreement occurred on September 1, 2020. I find that there was a valid and enforceable settlement. The issues relating to the applicant's mother's criminal trial and how she may plead are purely speculative at this point. If there is indeed an issue in the future over how the remaining cash settlement funds flow and to whom, that is not an issue for which the Tribunal has jurisdiction. To be frank, once the settlement is paid to the Estate, I am not convinced that it is any of TD Insurance's business anyways.

Award and Costs

- [42] Lastly, while not listed in the Tribunal's Order as an issue in dispute, in her request for relief, the applicant sought an order "for an appropriate award and costs" against TD Insurance "for its unreasonable attempt to resile from the settlements." Awards are governed by s. 10 of O. Reg. 664 and costs are applied pursuant to Rule 19 of the Tribunal's *Common Rules of Practice and Procedure*. While these issues may be raised at any time, some particulars for this relief are required from the requesting party to assist the Tribunal and none were stated.
- [43] While I have found for the applicant, she did not provide specifics to support how TD Insurance's conduct rose to the level of "excessive, imprudent, stubborn, inflexible, unyielding or immoderate" that the Tribunal has adopted for assessing s. 10 awards. While unsuccessful, TD Insurance's position was understandable given the case law, the quantum of the settlement and the circumstances giving rise to the dispute. Similarly, I find no basis for a costs order under Rule 19.5, as TD Insurance did not breach a Tribunal direction or interfere with my ability to carry out a fair, efficient and effective process.

ORDER

- [44] The parties entered into a binding and enforceable settlement agreement for the accidents that occurred on November 18, 2015 and May 1, 2016, payable to the applicant via her Estate in the amounts of \$3,700 and \$382,800, respectively.

[45] TD Insurance shall provide a Settlement Disclosure Notice and Release to the applicant for execution by her sister the Litigation Administrator on behalf of the Estate of Kayla Duff-Foley. The funds from these settlements shall be released, as instructed, upon receipt of the signed documents.

Released: March 15, 2022



Jesse A. Boyce
Vice-Chair