User Name: GEORGE BROWN
Date and Time: May 4, 2017 10:30:00 AM EDT
Job Number: 47260193

Document (1)

1. *Tsaoussis, by her Litigation Guardian, The Children's Lawyer et al. v. Baetz* Tsaoussis, by her Litigation Guardian, Metcalf v. Baetz [Indexed as: Tsaoussis (Litigation Guardian of) v. Baetz], 41 O.R. (3d) 257*

   Client/Matter: -None-
   Search Terms: settlement finality
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	Court: Appellate Courts ; jurisdiction: Ontario

Tsaoussis, by her Litigation Guardian, The Children's Lawyer et al. v. Baetz* Tsaoussis, by her Litigation Guardian, Metcalf v. Baetz [Indexed as: Tsaoussis (Litigation Guardian of) v. Baetz], 41 O.R. (3d) 257

Ontario Reports

Court of Appeal for Ontario
Doherty, Abella and Charron JJ.A.
September 2, 1998
Docket No. C27319

41 O.R. (3d) 257 | *[1998] O.J. No. 3516*

Case Summary

*An application for leave to appeal to the Supreme Court of Canada was dismissed with costs January 28, 1999 (Lamer C.J. and McLachlin and Iacobucci JJ.). S.C.C. File No. 26945. S.C.C. Bulletin, 1999, p. 152.

Judgments and orders — Setting aside — Infant settlements — Settlement of claim by minor plaintiff in personal injury action approved by court in 1992 and judgment granted accordingly — Judgment set aside in 1997 on ground that medical evidence developed after judgment indicated that plaintiff significantly undercompensated as she had sustained serious brain damage which was unsuspected at time of settlement — Motions judge erring in finding that plaintiff's best interests sole factor for consideration in deciding whether to set aside judgment — Judgment approving settlement of minor's personal injury claim that has not been appealed final and should be given same force and effect as any other final judgment — Parens patriae jurisdiction not enabling court to create different compensation regime for minor plaintiffs involving periodic reviews of adequacy of compensation — Plaintiff failing to show that evidence developed after 1992 judgment could not have been available by exerc ise of reasonable diligence prior to judgment — Defendant's appeal allowed.

In 1992, counsel for the minor plaintiff brought an application seeking court approval of the settlement of the plaintiff's claim for damages arising out of a motor vehicle accident. On the basis of evidence which indicated that the plaintiff had suffered a skull fracture in the accident but that she should make a complete recovery, the settlement was approved and judgment was granted accordingly. Assessments done after the 1992 judgment revealed that the plaintiff had numerous ongoing medical and developmental problems, some of which were attributed to the head injury suffered in the car accident. In 1994, a new action was commenced claiming that the defendant's negligence had caused injuries to the plaintiff resulting in damages of some $2.2 million. In her defence, the defendant pleaded that the claim had been settled by the 1992 judgment, leaving the plaintiff with no cause of action against her. In 1996, counsel brought a motion in the 1994 action to set aside the 1992 judgment on the basis of the medical evidence which had come into existence since that judgment. In granting the motion and setting aside the 1992 judgment, the motions judge made it clear that she had considered only the best interests of the plaintiff. In her view, the criteria generally applied on a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement. She specifically held that prejudice to the defendant was irrelevant. The defendant appealed.

Held, the appeal should be allowed.

The motions judge erred in holding that the best interests of the plaintiff governed whether the 1992 judgment

should be set aside. A judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment. A motion to set aside that judgment should be tested according to the same criteria used on motions to set aside other final judgments.

Because damages are assessed on a once and for all basis and a single lump sum amount is awarded, judges must determine what constitutes full and fair compensation on the basis of information available at the time the adjudication is made. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over- or under-compensation. However, one time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those awards. Paramount among those advantages is finality. Attempts to re-open matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would be an illusion.

A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation if the minor establishes a personal injury claim. The court's parens patriae jurisdiction does not expand that entitlement. A minor, like any other plaintiff, is entitled to have the compensation assessment made on a once and for all basis and to be paid that compensation in a single lump sum. The parens patriae jurisdiction does not enable the court to create a different compensation regime for minor plaintiffs involving periodic reviews of the adequacy of the compensation provided to the minor. The court must protect the minor's best interests, but it must do so within the established structure for the compensation of personal injury claims. The risk of under-compensation in minors' personal injury claims, especially those involving very young children with head injuries, is very real. That risk demands that the court vigorously exercise its parens patriae jurisdiction when asked to approve a settlement. Once the settlement is approved, however, and the judgment is final and not appealed, the parens patriae jurisdiction is spent. It can only be re-asserted if there is a valid basis for setting aside the final judgment.

The motions judge erred in equating her position on a motion to set aside a final judgment with that of an appellate court asked to admit evidence of events which occurred between the judgment and the appeal. While finality concerns are relevant in both situations, they must carry a great deal more weight where the judgment is final and the proceedings which culminated in that judgment have long since ended.

In deciding whether to set aside a judgment based on evidence said to be discovered after judgment, the court must first decide whether that evidence could have been tendered before judgment. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to re-litigate the same issue. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus. In this case, the plaintiff failed to show that the evidence developed after the 1992 judgment could not have been available by the exercise of reasonable diligence prior to obtaining that judgment. The order of the motions judge should be set aside and the 1994 action should be dismissed.

Makowka v. Anderson *(1990), 45 B.C.L.R. (2d) 136*, *67 D.L.R. (4th) 751* (C.A.), distd

Other cases referred to

Andrews v. Grand & Toy Alberta Ltd., *[1978] 2 S.C.R. 229*, *83 D.L.R. (3d) 452*, *19 N.R. 50*, *8 A.R. 182*, *3 C.C.L.T. 225*, *[1978] 1 W.W.R. 577*; Braithwaite v. Haugh *(1978), 19 O.R. (2d) 288*, *84 D.L.R. (3d) 590* (Co. Ct.); Carter v.

Junkin *(1984), 47 O.R. (2d) 427*, *6 O.A.C. 310*, *11 D.L.R. (4th) 545*, [1984] I.L.R. ô1-1815 (Div. Ct.); Castlerigg Investments Inc. v. Lam *(1991), 2 O.R. (3d) 216*, *47 C.P.C. (2d) 270* (Gen. Div.); Eve (Re), *[1986] 2 S.C.R. 388*, *61 Nfld. & P.E.I.R. 273*, *31 D.L.R. (4th) 1*, *71 N.R. 1*, 185 A.P.R. 273, *13 C.P.C. (2d) 6*; Glatt v. Glatt, *[1937] S.C.R. 347*, *[1937] 1 D.L.R. 794*, *19 C.B.R. 14*, affg *[1936] O.R. 75*, *[1936] 1 D.L.R. 387*, *17 C.B.R. 219* (C.A.); Grandview (Town) v. Doering, *[1976] 2 S.C.R. 621*, *61 D.L.R. (3d) 455*, *7 N.R. 299*, *[1976] 1 W.W.R. 388*; Hennig v. Northern Heights (Sault) Ltd. *(1980), 30 O.R. (2d) 346*, *116 D.L.R. (3d) 496*, *17 C.P.C. 173* (C.A.); Kendall v. Kindl Estate *(1992), 10 C.P.C. (3d) 24* (Ont. Gen. Div.); L.M. Rosen Realty Ltd. v. D'Amore *(1988), 29 C.P.C. (2d) 106* (Ont. H.C.J.); McCann v. Shepherd, [1973] 2 All E.R. 885, [1973] 1 W.L.R. 540, 117 Sol. Jo. 323 (C.A.); McGuire v. Naugh, *[1934] O.R. 9* (C.A.); Mercer v. Sijan *(1976), 14 O.R. (2d) 12* (C.A.); Poulin v. Nadon, *[1950] O.R. 219*, *[1950] 2 D.L.R. 303* (C.A.); Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801 (H.L.); Reference re Manitoba Language Rights, *[1985] 1 S.C.R. 721*, *35 Man. R. (2d) 83*, *19 D.L.R. (4th) 1*, *59 N.R. 321*, *[1985] 4 W.W.R. 385*, 3 C.R.R. D-1; R. v. Sarson, *[1996] 2 S.C.R. 223*, *135 D.L.R. (4th) 402*, *197 N.R. 125*, *36 C.R.R. (2d) 1*, *107 C.C.C. (3d) 21*, *49 C.R. (4th) 75*; R. v. Thomas, *[1990] 1 S.C.R. 713*, *108 N.R. 147*, *75 C.R. (3d) 352*; Russell v. Brown, *[1948] O.R. 835* (C.A.); Sengmueller v. Sengmueller *(1994), 17 O.R. (3d) 208*, *111 D.L.R. (4th) 19*, 1 L.W.R. 46, *25 C.P.C. (3d) 61*, *2 R.F.L. (4th) 232* (C.A @.); Steeves v. Fitzsimmons *(1975), 11 O.R. (2d) 387*, 66 D.L.R. (3d) 230 (H.C.J.); Tepperman v. Rosenberg *(1985), 48 C.P.C. 317* (Ont. H.C.J.); Tiwana v. Popove *(1988), 23 B.C.L.R. (2d) 392* (S.C.); Toronto General Trusts Corp. v. Roman, *[1963] 1 O.R. 312*, *37 D.L.R. (2d) 16* (C.A.), affd *[1963] S.C.R. vi*, *41 D.L.R. (2d) 290*; Watkins v. Olafson, *[1989] 2 S.C.R. 750*, *39 B.C.L.R. (2d) 294*, *61 Man. R. (2d) 81*, *61 D.L.R. (4th) 577*, *100 N.R. 161*, *[1989] 6 W.W.R. 481*, *50 C.C.L.T. 101* (sub nom. Watkins v. Manitoba); Whitehall Development Corp. v. Walker *(1977), 17 O.R. (2d) 241*, *4 C.P.C. 97* (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 116 Family Law Act, R.S.O. 1990, c. F.3

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 7, 59.06

Authorities referred to

Jacob, The Fabric of English Civil Justice, Hamlyn Lectures, 1987, pp. 23-24
Report on Compensation for Personal Injuries and Death, Ontario Law Reform Commission (1987), chap. 5
Waddams, The Law of Damages (looseleaf ed.), pp. 3.10-3.260

APPEAL from an order of Leitch J. *(1997), 33 O.R. (3d) 679*, *13 C.P.C. (4th) 136* (Gen. Div.) setting aside a judgment approving an infant settlement.

Sheldon A. Gilbert, Q.C., for appellant. André I.G. Michael, for respondents.

The judgment of the court was delivered by
DOHERTY J.A.: —

The Issue

Should a judgment approving a settlement made on behalf of a minor plaintiff in a personal injury case be set aside some four and one-half years later if, based on medical assessments done after the settlement, it appears that the minor was significantly under-compensated by the terms of the settlement?

I.

In April 1990, the respondent, Lorrie Tsaoussis (Lorrie), aged three, was struck by a car driven by the appellant, Juanita Baetz. Lorrie was hospitalized for three days and subsequently seen by her family doctor and paediatrician. Her mother, Carol Metcalf, retained counsel who, within a month of the accident, notified the appellant of Lorrie's claim against her. After negotiations between Lorrie's former counsel and counsel for the appellant's insurer, the parties reached a settlement. As the settlement involved a minor plaintiff, it had to be approved by the court.

Early in 1992, former counsel for Lorrie brought an application under rule 7.08 seeking court approval of the settlement of Lorrie's claim against the appellant arising out of the accident. In compliance with rule 7.08(4), counsel filed his affidavit and the affidavit of Carol Metcalf, Lorrie's mother and litigation guardian. Counsel also attached the hospital records and reports from Lorrie's family doctor and her paediatrician to his affidavit. According to that material, Lorrie had suffered a skull fracture in the accident. Although she had some medical problems in the weeks following the accident, they seemed relatively minor. Assessments done in the six months following the accident indicated that Lorrie was essentially "normal". Nearly a year after the accident her family doctor said:

> It is my impression that she should have a complete recovery without any significant sequela anticipated.

In Ms. Metcalf's affidavit, she indicated that the information supplied on the medical records was correct, and that based on counsel's advice, she had accepted the terms of the settlement on behalf of Lorrie.

On February 7, 1992, Scott J. of the Ontario Court (General Division) approved the settlement and granted judgment (the 1992 judgment). Under the terms of the settlement and judgment, $5,420 was paid into court for the benefit of Lorrie and $1,250 was paid by the appellant in full satisfaction of costs. After the funds were paid into court, counsel for Ms. Baetz wrote to Lorrie's counsel confirming that "this resolves all claims arising out of this accident".

Ms. Metcalf remained concerned about her daughter's health. Lorrie had headaches, did not sleep through the night, seemed easily distracted and had become increasingly clumsy. With the help of a social worker, Lorrie's mother arranged to have Lorrie seen by a paediatric neurologist at Children's Hospital in London, Ontario. Assessments done between the summer of 1992 and the fall of 1994 revealed that Lorrie had numerous ongoing medical and developmental problems, some of which were attributed to the head injury she had suffered in the car accident in 1990. By February 1996, Lorrie's doctor opined that Lorrie's "attention and concentration problems are attributable to the motor vehicle accident". Her doctor also felt that the full extent of those problems could not be determined for another year or two.

At some point, Lorrie's mother retained new counsel on behalf of Lorrie. In the fall of 1994, that counsel commenced a new action (the 1994 action) claiming that the appellant's negligence had caused injuries to Lorrie resulting in damages of some $2.2 million. Counsel also claimed damages under the Family Law Act, *R.S.O. 1990, c. F.3* on behalf of Lorrie's mother and sister. In her defence, Ms. Baetz pleaded that the claim had been settled by the 1992 judgment leaving Lorrie with no cause for action against her. Ms. Baetz also denied any liability for the accident.

In the fall of 1996, counsel brought a motion in the 1994 action to set aside the 1992 judgment. at end of document.] Although counsel argued that Scott J. should not have approved the settlement in 1992, the affidavits filed on the motion make it clear that medical evidence developed after the 1992 judgment provided the sole basis for setting aside that judgment. The final paragraph of counsel's affidavit filed on the motion summarizes his position:

> There is no doubt in my mind that the present medical evidence now clearly establishes that the court approved settlement was not in the best interests of either Lorrie or her mother. The medical tests and assessments

> which have been performed since the time of the court approval have clearly provided new evidence of the extent and effect of the brain damage sustained by Lorrie which was not available to Madam Justice Scott. It is my opinion that the interests of justice require that the judgment of Madam Justice Scott be set aside.

Leitch J., for reasons reported at *(1997), 33 O.R. (3d) 679*, granted the motion, set aside the 1992 judgment and directed that the 1994 action should proceed. at end of document.] In doing so, she did not purport to review the correctness of the judgment as of the date it was made. Instead, Leitch J. held that she was obliged to consider the medical evidence developed after the 1992 judgment and decide whether in the light of that evidence the 1992 judgment could be said to be in the best interests of Lorrie. She said, at p. 688:

> I find it necessary to consider evidence that was not before the judge who approved the settlement in 1992 not to show that the assessment of the previously existing evidence was incorrect but to allow this court to assess whether Lorrie's best interests have been met.

After a careful review of the new medical evidence, Leitch J. concluded that as the 1992 judgment had been premised on medical information indicating that Lorrie's injury was relatively minor and would cause no long-term effects, it could not be said to meet Lorrie's best interests in the face of medical evidence indicating a much more serious injury with significant long-term effects. Leitch J. made it clear that in setting aside the 1992 judgment she had considered only the best interests of Lorrie. In her view, the criteria generally applied on a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement. She specifically held that prejudice to the appellant was irrelevant.

I think Leitch J. properly characterized her function on the motion to set aside the 1992 judgment. She was not, and indeed could not, sit on appeal from the decision of Scott J. Arguments as to whether Scott J. should have approved the settlement based on the information placed before her could only be properly made by way of a direct appeal from that judgment and no such appeal was ever taken.

Leitch J. also properly avoided any consideration of the adequacy of former counsel's representation of Lorrie in making her determination that the 1992 judgment should be set aside. Former counsel is not a party to these proceedings, and it would be inappropriate to take anything said by Leitch J. or by me as a comment on the adequacy of his representation. If Lorrie wishes to take issue with that representation, she can do so in separate proceedings instituted against the former counsel for that express purpose. at end of document.]

II.

If, as Leitch J. held, the best interests of Lorrie is the only factor to consider in deciding whether to set aside the 1992 judgment, her decision is unassailable. The medical evidence gathered after the 1992 judgment strongly suggests that if the appellant is responsible for Lorrie's injuries, Lorrie was significantly under-compensated by the terms of the 1992 judgment. I cannot agree, however, that the best interests of Lorrie govern the decision whether the 1992 judgment should be set aside. In my view, a judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment. A motion to set aside that judgment should be tested according to the same criteria used on motions to set aside other final judgments. Applying those criteria, I would hold that the 1992 judgment should not have been set aside.

III.

A person who is injured as a result of the negligence of another is entitled to full but fair compensation for those injuries: Watkins v. Olafson, *[1989] 2 S.C.R. 750* at p. 757, *61 D.L.R. (4th) 577* at p. 581. Under our system of adjudication of personal injury cases, full but fair compensation is determined at a specific point in time on a once and for all basis, and awarded in the form of a single lump sum payment. Absent statutory authority, a court cannot provide for periodic payments to a plaintiff in a personal injury case, or periodically review damages based on developments subsequent to the initial assessment: Watkins v. Olafson, supra, at pp. 756-64 S.C.R., pp. 580-86 D.L.R. Because we assess damages on a once and for all basis and award a single lump sum amount, judges must determine what constitutes full but fair compensation on the basis of information available at the time the

adjudication is made. Judges must also factor future costs and future losses into that assessment in many personal injury cases. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over- or under-compensation. Despite the likelihood of inaccuracy which has spawned strong judicial and academic criticism of one time lump sum awards, at end of document.] this province maintains that approach in personal injury cases in all but very limited circumstances. at end of document.] One time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those words. at end of document.]

Paramount among those advantages is finality. Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, The Fabric of English Civil Justice, Hamlyn Lectures 1987, at pp. 23-24.

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that end point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.

Finality is important in all areas of the law, but is stressed more in some than in others. Its significance in tort law was highlighted by McLachlin J. in Watkins v. Olafson, supra, at p. 763 S.C.R., p. 585 D.L.R., where in the course of discussing problems associated with a scheme of compensation based on reviewable periodic payments, she said:

> Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of plaintiff and defendant. Unlike persons who join voluntarily in marriage or contract -- areas where the law recognizes periodic payments -- the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in an uneasy and unterminated relationship for as long as the plaintiff lives.

The importance attached to finality is reflected in the doctrine of res judicata. That doctrine prohibits the re-litigation of matters that have been decided and requires that parties put forward their entire case in a single action. Litigation by instalment is not tolerated: Toronto General Trusts Corp. v. Roman, *[1963] 1 O.R. 312*, *37 D.L.R. (2d) 16* (C.A.), affirmed *[1963] S.C.R. vi*, *41 D.L.R. (2d) 290*. Finality is so highly valued that it can be given priority over the justice of an individual case even where fundamental liberty interests and other constitutional values are involved: R. v. Thomas, *[1990] 1 S.C.R. 713*, *75 C.R. (3d) 352*; R. v. Sarson, *[1996] 2 S.C.R. 223*, *107 C.C.C. (3d) 21*; Reference re Manitoba Language Rights, *[1985] 1 S.C.R. 721* at p. 757, *19 D.L.R. (4th) 1*.

That is not to say that finality interests always win out over other interests once final judgment is signed and entered. Sometimes the rigor of the res judicata doctrine will be relaxed: Grandview (Town) v. Doering, *[1976] 2 S.C.R. 621* at p. 638, *61 D.L.R. (3d) 455*; Hennig v. Northern Heights (Sault) Ltd. *(1980), 30 O.R. (2d) 346*, *116 D.L.R. (3d) 496* (C.A.). The court also has the power to set aside final judgments: Glatt v. Glatt, *[1937] S.C.R. 347*, *[1937] 1 D.L.R. 794*, affirming *[1936] O.R. 75*, *[1936] 1 D.L.R. 387* (C.A.); Whitehall Development Corp. v. Walker *(1977), 17 O.R. (2d) 241*, *4 C.P.C. 97* (C.A.). The limitations on the res judicata doctrine and the power to set aside previous judgments are, however, exceptions to the general rule that final judgments mark the end of litigation. Those exceptions recognize that despite the value placed on finality, there will be situations in which other legitimate interests clearly outweigh finality conce rns. The power to set aside a final judgment obtained by fraud is the most obvious example. As important as finality is, it must give way when the preservation of the very integrity of the judgment process is at stake.

Attempts, whatever their form, to re-open matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would become an illusion. The applicant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line. I think Anderson J. struck the proper judicial tone on applications to re-open final judgments in L.M. Rosen Realty Ltd. v. D'Amore *(1988), 29 C.P.C. (2d) 106* (Ont. H.C.J.). He was asked to set aside a judgment and vary the rate of post-judgment interest granted because subsequent events showed that the rate was much too high. He said, at p. 109:

> Even if I thought I had the discretion, I would be reluctant to intervene because I feel it would be offensive to the basic proposition that there should be finality in litigation. Adjusting the result after judgment, save in response to unusual circumstances, would be a conspicuous and dangerous meddling with that proposition.

I am not aware of any personal injury case in which a final judgment has been set aside, other than on appeal, because evidence developed after the judgment indicated that the award was much too high or much too low. at end of document.] I would be surprised to find such a case as it would be entirely inconsistent with our system of one time lump sum awards for personal injuries. As assessments which ultimately prove to be inaccurate are inherent in that scheme, I do not see how the demonstration of that inaccuracy in a particular case could, standing alone, justify departure from the finality principle.

IV.

The approach taken by Leitch J. constitutes a departure from the traditional approach taken to final judgments in personal injury litigation. She discounts finality concerns entirely. If she is correct, no judgment approving an infant settlement is final. Instead, all carry the unwritten caveat -- subject to being set aside if subsequent events reveal that the plaintiff may have been under-compensated. at end of document.] Nor, in my view, would it be an unusual case in which this caveat would come into play. Medical assessments change, unanticipated losses arise and estimates of anticipated costs prove inaccurate. In all such situations where the change was significant, minor plaintiffs would be entitled to set aside a judgment approving a settlement and re-litigate their claim based on the latest information available as to the extent of the damage suffered by them.

In addition to discounting finality concerns, Leitch J. has, in effect, introduced a scheme of compensation by reviewable periodic payments in personal injury cases involving minor plaintiffs. Amounts awarded pursuant to settlements approved by the court would become periodic payments if, before the minor reached majority, circumstances revealed that the amount awarded did not provide full compensation. This is the sort of drastic innovation in our tort compensation scheme which the court in Watkins v. Olafson, supra, instructed should be left to the legislature.

The respondent contends that the court's obligation to ensure that the best interests of Lorrie were met trumped all other concerns. There can be no doubt that a court is obliged to look to and protect the best interests of minors who are parties to legal proceedings. at end of document.] This obligation, sometimes referred to as the court's parens patriae jurisdiction, requires that the court abandon its normal umpire-like role and assume a more interventionist mode. For example, the court must decide who will act on behalf of the minor (rules 7.03-7.06) and the court must take control of any proceeds paid to the benefit of the minor (rule 7.09). The supervisory powers of the court are most clearly evinced by the requirement that the court approve any consent judgment to which a minor is a party and the closely aligned requirement that the court approve any settlement of a minor's claim before that settlement will bind the minor (rule 7.08). The duty on the court when a motion for approval of a settlement is made wa s authoritatively described by Robertson C.J.O. in Poulin v. Nadon, *[1950] O.R. 219* at p. 225, *[1950] 2 D.L.R. 303*:

> If, upon proper inquiry, the judge shall be of the opinion that the settlement is one that, in the interests of the infant, should be approved, he may give the required approval. If, on the other hand, the judge is not of the

> opinion that the settlement is one that should be approved, he may give such direction as to the trial of the action as may be proper.

The inquiry described by Robertson C.J.O. requires that the court make its own determination whether the proposed settlement is in the minor's best interests. Rule 7.08(4) demands that the parties place sufficient material before the court to allow it to make that determination.

As important and far reaching as the parens patriae jurisdiction is, it does not exist in a vacuum, but must be exercised in the context of the substantive and adjectival law governing the proceedings. The parens patriae jurisdiction is essentially protective. It neither creates substantive rights nor changes the means by which claims are determined.

The proper limits of the parens patriae jurisdiction were drawn in Carter v. Junkin *(1984), 47 O.R. (2d) 427*, *11 D.L.R. (4th) 545* (Div. Ct.). The defendant insurance company proposed to make an advance payment to a minor under the provisions of the Insurance Act. The defendant applied for an order approving the advance payment, but the motion judge refused to make that order unless the insurer agreed to a term which would protect the minor's claim to pre-judgment interest. The defendant refused to make the payment on that term and appealed. The Divisional Court held, at p. 430:

> The court has no jurisdiction to compel an insurer to pay money into court under s. 224 [the Insurance Act], and to make good the interest differential. But that is not what was done here. The learned motions court judge did not require the insurer to pay money into court. He simply granted leave to the insurer to do so, if the insurer was willing to agree to give the undertaking as to the interest differential. The insurer can still decline to make the payment, in which event the infant plaintiff will recover at trial the full amount of prejudgment interest to which he is entitled.

The court properly drew a distinction between a court imposed term on a voluntary payment as a condition to court approval of that payment and the court requiring that the defendant make a payment. The former protected the minor's best interests under the scheme of voluntary payments established under the Insurance Act and was a proper exercise of the parens patriae jurisdiction. A forced payment would, however, have gone beyond the limits of the statute and given the minor rights which he did not have under that statute. While a forced advance payment may have been in the minor's best interests, it was not within the scope of the parens patriae jurisdiction as it was not contemplated under the statutory scheme.

A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation if the minor establishes a personal injury claim. The parens patriae jurisdiction does not expand that entitlement. For example, a minor plaintiff who cannot establish that the defendant's negligence caused the injury, cannot succeed on the basis that, despite that failure, compensation is in the minor's best interests. Similarly, a minor, like any other plaintiff, is entitled to have the compensation assessment made on a once and for all basis and to be paid that compensation in a single lump sum. The parens patriae jurisdiction does not enable the court to create a different compensation regime for minor plaintiffs involving periodic reviews of the adequacy of the compensation provided to the minor. The court must protect the minor's best interests, but it must do so within the established structure for the compensation of personal injury claims: Kendall v. Kindl Estate *(1992), 10 C.P.C. (3d) 24* (Ont. Gen. Div.).

Finality is as important in cases involving minor plaintiffs as it is in cases involving adult plaintiffs. The need for finality must temper the goal of meeting the minor's best interests just as it must temper the desire to provide every plaintiff with full but fair compensation. Proposed settlements of minors' personal injury claims, especially those involving very young children with head injuries, raise real concerns about the adequacy of compensation provided by those settlements. The risk of under-compensation in those cases is very real. at end of document.] That risk demands that the court vigorously exercise its parens patriae jurisdiction when asked to approve a settlement. Once the settlement is approved, however, and the judgment is final and not appealed, the parens patriae jurisdiction is spent. It can only be re-asserted if there is a valid basis for setting aside the final judgment.

In arriving at the conclusion that the best interests of the minor justified setting aside the previous final judgment, Leitch J. relied exclusively on the decision of the British Columbia Court of Appeal in Makowka v. Anderson *(1990), 67 D.L.R. (4th) 751*, *45 B.C.L.R. (2d) 136*. In Makowka, a motion judge was asked to approve an infant settlement.

He did so over the objections of the Public Trustee acting on behalf of the infant. The Public Trustee argued that more time was needed to assess the extent of the minor's head injury and the cause of her various medical problems. The Public Trustee appealed the judgment approving the settlement and sought to introduce evidence on appeal of medical assessments done between the judgment approving the settlement and the hearing of the appeal. Those assessments confirmed the Public Trustee's concerns and indicated that the minor's injuries were serious and that in all likelihood she would suffer significant long-term disabilities.

On a motion to admit the fresh evidence heard before the actual appeal, Lambert J.A., for the court, while accepting the importance of finality, even in litigation involving minors, acknowledged that the appeal court could receive evidence of matters arising after the judgment appealed from. He stressed that the evidence proffered by the Public Trustee was not directed to a purely factual question, but rather to the assessment of the minor's best interests. The reasons of Lambert J.A. admitting the evidence are referred to in the reasons disposing of the appeal. He said, at p. 758:

> So the purpose of the introduction of fresh evidence in this appeal is not to show that a factual assessment of the previously existing evidence was incorrect, but it is to show that the best interests of the infant may not in fact have been carried through in the way that the chambers judge thought he was carrying them through.

Accordingly, the factors are quite different in this case. Having regard to the crucial ones, which are the best interests of the child and the good administration of justice, it would, in my opinion, in the words of the cases, be an affront to justice to insist on imposing this settlement on this infant if it was, when it was agreed upon, an unjust settlement.

The court hearing the appeal described its task in words that were adopted by Leitch J. (at p. 758):

> So we are entitled to look at the new evidence, which includes subsequent medical reports, for the purpose of determining whether the settlement originally placed before the court seems a just one today. We are not limited to considering the strengths and weaknesses of Meghan's [the minor] case as they appeared from the material placed before the judge below.

Not surprisingly, the court went on to conclude that the amount provided for in the settlement was totally inadequate and set aside the order approving the settlement.

The facts in Makowka are quite similar to our facts. The proceedings were, however, fundamentally different. Makowka was a direct appeal from the judgment approving the settlement. When the fresh evidence was tendered the matter was still in the litigation system and the rights and obligations of the parties were subject to appellate review, the purpose of which was to determine the correctness of the order approving the settlement. The defendant in Makowka had no reason to think the end of the litigation line had been reached. The Public Trustee continued to maintain that the settlement should not have been approved and the new evidence went directly to the central issue both on the motion and on the appeal.

On this motion, Leitch J. was not asked to, and could not, review the correctness of the order of Scott J. Instead, she was asked to allow Lorrie to begin her claim afresh and to re-litigate a claim which, in the eyes of the law and the mind of Ms. Baetz, had ceased to exist when it became the subject of final judgment in 1992. In my opinion, there is an important difference between allowing a party to supplement a record at the appellate stage of an ongoing proceeding and allowing a party to resurrect a claim which is the subject of a final judgment. That distinction has been recognized by appellate courts faced with applications to admit fresh evidence concerning events which occurred between the judgment and the appeal. In McCann v. Shepherd, [1973] 2 All E.R. 881 at p. 885 (C.A.), Lord Denning M.R., said:

> The general rule in accident cases is that the sum of damages falls to be assessed once and for all at the time of the hearing; and this court will be slow to admit evidence of subsequent events to vary it. It will not normally do so after the time for appeal has expired without an appeal being entered -- because the proceedings are then at an end. They have reached finality. But if notice of appeal has been entered in time -- and pending the

> appeal, a supervening event occurs such as to falsify the previous assessment -- then the court will be more ready to admit fresh evidence -- because until the appeal is heard and determined, the proceedings are still pending. Finality has not been reached.

Admitting fresh evidence on appeal of events which occurred between the judgment and the appeal raises finality concerns for the reasons set out by Lord Denning, however, those concerns are moderated, first by the fact that the proceeding is still underway and second because the parties know that their rights remain undetermined until appellate remedies have been exhausted. Even in those circumstances, evidence is only admitted where it would be "an affront to common sense" to refuse to admit the evidence on appeal: Mercer v. Sijan *(1976), 14 O.R. (2d) 12* at p. 17 (C.A.); Sengmueller v. Sengmueller *(1994), 17 O.R. (3d) 208* at p. 211 (C.A.). This was the test applied in Makowka.

Leitch J. erred in equating her position on a motion to set aside a final judgment with that of an appellate court asked to admit evidence of events which occurred between the judgment and the appeal. at end of document.] While finality concerns are relevant in both situations, they must carry a great deal more weight where the judgment is final and the proceedings which culminated in that judgment have long since ended. The court in Makowka did not have to address the threshold issue raised on this motion -- should a litigant, based on evidence developed after final judgment and after proceedings have ended, be allowed to start the litigation process all over again? That issue could not be resolved by reliance on the parens patriae jurisdiction.

V.

A party who would otherwise be bound by a previous judgment can bring an action to set aside that judgment. Fraud in the obtaining of the initial judgment is the most common ground relied on in such actions: McGuire v. Naugh, *[1934] O.R. 9* at pp. 11-13 (C.A.); Russell v. Brown, *[1948] O.R. 835* at pp. 846-48 (C.A.), per Hogg J.A. (concurring); Glatt v. Glatt, supra, at p. 79 (C.A.). Rule 59.06 allows that kind of relief to be claimed by way of a motion in the original proceedings. The rule does not, however, confer the power to set aside a previous judgment, nor does it articulate a test to be applied in deciding whether a previous judgment should be set aside. The rule merely provides a more expeditious procedure for seeking that remedy: Glatt v. Glatt, supra; Braithwaite v. Haugh *(1978), 19 O.R. (2d) 288* at p. 289, *84 D.L.R. (3d) 590* (Co. Ct.). The language of Rule 59.06 does, however, provide insight into the varied factual circumstances which may give rise to motions to set aside a judgment.

For present purposes, I am concerned with Rule 59.06(2)(a) and particularly, the part of the rule which refers to motions to set aside orders "on the ground . . . of facts arising or discovered after it [the order] was made". The rule draws a distinction between facts which come into existence after the judgment was made and facts which, while existing when the judgment was made, were discovered after judgment. In this case, the facts relied on to set aside the previous judgment concerned the exact nature of Lorrie's head injury and, more importantly, its potential impact on her physical, intellectual and cognitive development. That injury and those potential effects existed at the time of the judgment.

In deciding whether to set aside a judgment based on evidence said to be discovered after judgment, the court must first decide whether that evidence could have been tendered before judgment. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to re-litigate the same issue. In Glatt v. Glatt, supra, the appellant moved to set aside a judgment partly on the basis of evidence discovered after the judgment. Duff C.J.C., for a unanimous court, rejected the claim stating, at p. 350:

> It is well established law that a judgment cannot be set aside on such a ground unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule were applied with the utmost strictness.

That same view prevailed in the majority judgment in Grandview v. Doering, supra, some 40 years later. Mr. Doering sued the Town of Grandview alleging that it was responsible for the flooding of his land. The suit was dismissed. A few months later he commenced a second action, again claiming damages for the flooding of his land. The second claim referred to different years than the first claim and alleged a different means by which the flooding

occurred. An expert consulted by Mr. Doering after the first trial had developed a new theory explaining how the flooding had occurred. The Town moved to have the second action stayed on the basis that it was res judicata. A closely divided Supreme Court of Canada sided with the Town and stayed Mr. Doering's claim. The minority were of the view that the two actions did not raise the same issue. The majority took the position that the two actions were sufficiently similar to warrant the application of res judicata. Ritchie J., for the majority, went on to consider whether the new theory as to the cause of the flooding could provide a basis for re-litigating the Town's liability. He cited with approval, at p. 636, the judgment of Lord Cairns in Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801 at pp. 814-15 (H.L.), where His Lordship said:

> As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before.

(Emphasis added)

Ritchie J., at p. 638, observed that Mr. Doering had not alleged, much less proved, that the expert evidence advancing the new theory concerning the flooding could not have been available by the exercise of reasonable diligence at the first trial. Consequently, Mr. Doering had not cleared the first hurdle required to allow him to re-litigate a claim which was res judicata.

These and numerous other authorities (e.g., Whitehall Development Corp. v. Walker, supra, at p. 98) recognize that the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus.

Lorrie cannot show that the evidence developed after the 1992 judgment could not have been available by the exercise of reasonable diligence prior to obtaining that judgment. Ms. Metcalf testified that she told Lorrie's former lawyer that Lorrie was having problems sleeping and walking before the 1992 judgment. According to Ms. Metcalf, the former counsel was aware that arrangements had already been made to have Lorrie seen at the Brain Injury Clinic in London when the settlement was made in February 1992. Documentation produced by Lorrie's present counsel in response to undertakings given during Ms. Metcalf's cross-examination indicates that the arrangements were actually made shortly after the 1992 judgment. The fact remains, however, that according to Ms. Metcalf, she and Lorrie's former counsel were aware of Lorrie's ongoing problems and Ms. Metcalf's desire to have a further medical assessment done. Ms. Metcalf testified that Lorrie's former counsel did not suggest that the settlement be delayed pendin g further assessment and Ms. Metcalf did not request that the settlement be delayed for that purpose.

The reasons no further assessments were made prior to proceeding with the settlement and judgment are irrelevant in this proceeding. Certainly, there is no suggestion that Ms. Baetz or her insurers were aware that further assessments were needed or even contemplated. Those acting on behalf of Lorrie chose to proceed with the settlement without further medical assessments. It cannot now be said that the evidence eventually generated by further assessments could not have been available by the exercise of reasonable diligence prior to the judgment approving the settlement.

I would allow the appeal, set aside the order of Leitch J., and in its place make an order dismissing the 1994 action. Ms. Baetz is entitled to her costs both here and in the court below.

Appeal allowed.

Notes

Note 1: Under the terms of Rule 59.06(2), the motion should have been brought in the 1992 proceedings, but it would appear that nothing turns on this procedural irregularity.

Note 2: Justice Leitch also directed that the payment pursuant to the 1992 judgment should be treated as an advance payment to Lorrie under the terms of the Insurance Act. She further dismissed a motion brought by Ms. Baetz for summary judgment on the derivative action brought by Lorrie's mother, Carol Metcalf, under the Family Law Act. Given my disposition of the appeal from the order setting aside the 1992 judgment, I need not consider the correctness of either of these orders.

Note 3: In the cross-examination of Ms. Metcalf on her affidavit, counsel for Lorrie indicated that the former solicitor had been put on notice of a possible claim against him based on the 1992 settlement. That lawsuit is being held in abeyance pending the result of this appeal.

Note 4: E.g. see the comments of Dickson J. in Andrews v. Grand & Toy Alberta, *[1978] 2 S.C.R. 229* at 236, *83 D.L.R. (3d) 452*.

Note 5: Section 116 of the Courts of Justice Act, R.S.O. 1990, c. 43, provides for periodic payment and review of damages on consent of the parties and in one other very limited circumstance.

Note 6: The arguments for and against one time lump sum payments are set out in Waddams, The Law of Damages (looseleaf edition) 3.10-3.260, and in the Report on Compensation for Personal Injuries and Death, Ontario Law Reform Commission (1987), chap. 5. The majority of the Commission did not favour a periodic payment scheme.

Note 7: In Tiwana v. Popove *(1988), 23 B.C.L.R. (2d) 392* (S.C.), the court re-opened the trial after it had delivered its reasons for judgment, set aside its reasons and allowed the plaintiff to call further evidence concerning certain medical evidence which had developed after the trial had ended. In that case, however, formal judgment had not been entered when the plaintiff moved to set aside the reasons and call further evidence. A trial judge has a wide discretion to permit the reopening of a case prior to the entering of judgment: Castlerigg Investments Inc. v. Lam *(1991), 2 O.R. (3d) 216*, *47 C.P.C. (2d) 270* Div.).

Note 8: Leitch J. was concerned with a judgment approving a settlement, however, if she is correct in holding that the best interests of the child are paramount, I see no reason why a judgment following a trial could not also be set aside if subsequent events showed that the child had been under-compensated by the amount awarded at trial.

Note 9: The parens patriae jurisdication over minors extends beyond claims to which minors are a party. It also protects others who are under a legal disability: See Re Eve, *[1986] 2 S.C.R. 388* at pp. 407-27, *31 D.L.R. (4th) 1* at 13-28 (S.C.C.); Rule 7. I refere only to minors, and only to the exercise of the parens patriae jurisdiction in the context of proceedings in which a minor is a party because those are the circumstances which operate in this case.

Note 10: Steeves and Fitzsimmons *(1975), 11 O.R. (2d) 387*, *66 D.L.R. (4th) 230* (H.C.J.) provides an interesting approach to this problem. The settlement approved by the court provided that the minor could apply to vary the judgment at any time before his seventh birthday.

Note 11: Tepperman v. Rosenberg *(1985), 48 C.P.C. 317* (Ont. H.C.J.) is more on point than Makowka. In that case an infant plaintiff moved before O'Leary J. to set aside an order of Craig J. approving a settlement. The infant relied on evidence that was not before Craig J. O'Leary considered the fresh evidence so that he could decide whether the settlement was in the infant's best interests. He held that it was and dismissed the motion. As the fresh evidence did not effect the result, O'Leary did not have to decide whether he could have set aside the judgment of

Craig J. solely on the basis that the new evidence suggested that the child's best interests were not served. The concluding paragraphs of his reasons (p. 320) suggest he would have set the judgment aside if he thought the fresh evidence supported the conclusion that it was not in the child's best interests. In my view, it would have been wrong to do so without first considering the other relevant factors.

End of Document