

**CITATION:** Saleh v. Haefner, 2024 ONSC 2019  
**COURT FILE NO.:** CV-18-7639-00 (Milton)  
**DATE:** 2024 04 05

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

SAHAR SALEH and GHULLAM )  
MOSTAFAH JAGHOORI and MARINA ) *Ryan M. Naimark, for the Plaintiff*  
AID SALEH, Minor by her Litigation )  
Guardian Sahar Saleh and MILAD )  
SAID SALEH, Minor by his Litigation )  
Guardian Sahar Saleh )  
Applicant )

**- and -**

ERICH REILY HAEFNER and LISA )  
MICHELE HAEFNER and ) *Kaylie Handler, for the Office of the*  
CHRISTOPHER R. DUNN, ) *Children's Lawyer*  
LITIGATION ADMINISTRATOR OF )  
THE ESTATE OF SAID SLAEH and )  
HYUNDAI CAPITAL LEASE INC. and )  
THE TOWN OF HALTON HILLS and )  
ECONOMICAL MUTAL INSURANCE )  
COMPANY )  
Respondent )

**HEARD:** at Milton, in writing and with  
submissions by video-conference on  
March 22, 2024

**REASONS FOR DECISION**

**Emery J.**

[1] The plaintiffs' motion for the (Ontario) Superior Court of Justice to approve the settlement reached with the defendants in this action has been filed under Rule 7.08 of the *Rules of Civil Procedure* as a motion in writing. The approval of the Court is required because the plaintiffs Milad Said Saleh, born November 3, 2011 and Marina Said Saleh, born April 5, 2006, were under eighteen years of age when the settlement was reached. Marina has since turned eighteen years of age and the evidence of her mother, Sahar Saleh, is that she suffers no legal disability.

[2] I propose to refer to members of the Saleh family by their first names in these Reasons for ease of reference. I mean no disrespect to any of them by this informality.

[3] Milad and Marina were not involved in the motor vehicle accident on the Halton-Erin Townline in Wellington County on October 21, 2017 that took the life of their father, Said Saleh. The accident left their mother, Sahar Saleh, with serious and permanent injuries. The accident and its aftermath have been a tragedy of epic proportions for this family. Sahar brought this action in which she claimed damages as a plaintiff and as litigation guardian for the children Milad and Marina for dependents relief under the *Family Law Act* ("FLA").

[4] To approve the settlement, the court must be satisfied the settlement is reasonable and in the best interests of Milad and Marina respectively. I include Marina in this requirement as she was a minor at the time of the accident and when

the settlement was negotiated by Ryan Naimark Professional Corporation (the “Naimark firm”), the lawyers representing their family. The lawyers also seek the approval of the court of their legal bill under a contingency fee agreement Sahar entered with the Naimark firm on October 2, 2018 (the “CFA”). The approval of a contingency fee involves considerations of whether the CFA was fair to the clients when it was entered, and if the proposed fees under the CFA are reasonable in the final analysis.

[5] Sahar also seeks an Order as the children’s mother and litigation guardian to dispense with notice of the motion to the defendants, and that the court seal all documents relating to the settlement. In view of the forthcoming approval of the settlement by this court, Sahar has withdrawn the motion to seal the motion materials.

### **Motion to approve the settlement**

[6] The statement of claim was issued in the (Ontario) Superior Court of Justice in Milton on July 12, 2018.

[7] After developing the evidence in the case, the plaintiffs and the defendants reached a global settlement of \$2,925,000. The Naimark firm, as counsel for the plaintiffs, broke the settlement down into the following components:

- a. Sahar - \$1,810,000 for damages, inclusive of pre-judgment interest (PJI);

- b. Milad - \$320,000 for damages, inclusive of PJI;
- c. Marina - \$320,000 for damages, inclusive of PJI;
- d. Costs and disbursements - \$475,000 inclusive of HST. These costs have been allocated proportionately to each plaintiff.

[8] In Re: *Wu Estate*, 2006 CanLII 16344, the Ontario Court of Appeal, although deciding another point of law, confirmed that the requirement for court approval of a settlement made on behalf of parties under a disability derives from the *parens patriae* jurisdiction of the court. That jurisdiction is “founded on necessity, namely the need to act for the protection of those who cannot care for themselves...to be exercised in the ‘best interest’ of the protected person...for his or her benefit or welfare.” The court has a duty to examine the proposed settlement to ensure that it is in the best interests of the party under disability: *Poulin v. Nadon*, 1950 CanLII 121.

[9] That description of the court’s jurisdiction applies to this case. The amount of the settlement that is allocated to the person who is under a disability must adequately cover the needs of that person: *Batalla v. St. Michael’s Hospital*, 2016 ONSC 1513 (SCJ).

[10] Ryan Naimark of the Naimark firm has filed extensive evidence in an affidavit that includes medical records and expert reports. This evidence has been summarized in a fair and balanced way in his affidavit. In this affidavit, Mr. Naimark has carefully laid out the case for the plaintiffs, the avenues of recovery and the

frailties about the claims of each Milad and Marina because of their pre-existing issues.

[11] On August 17, 2023, I released an endorsement directing the Naimark firm to serve the motion materials along with the endorsement and all submissions to the Office of the Children's Lawyer (OCL). The OCL was directed to make a written report stating any objections the officer having carriage had to the proposed settlement of the claims made on behalf of Milad and Marina, and making recommendations, with reasons, in connection with the proposed settlement.

[12] Both Milad and Marina were born with *Usher's Syndrome*. Sahar has now provided an affidavit to explain that *Usher's Syndrome* impacts a person's hearing vision and balance. Marina's loss of vision has been progressive, and she is now legally blind. Sahar states in her affidavit that *Usher's Syndrome* has not had any impact on Marina's cognitive functioning. Sahar goes on to state in paragraph 9 of her affidavit dated December 19, 2023 that Marina has no neurological, developmental or intellectual disorder or disability and is able to understand information that is relevant to making a decision about the management of her property. She has the ability to understand information that is relevant to making a decision regarding her own health care, nutrition, shelter, clothing, hygiene and safety. Her ability to understand the consequences of these decisions is not impaired by the Adjustment Disorder she suffers along with residual depressive

bereavement as fallout from the loss of her father and injuries to her mother. She is in grade 12 this year, doing well in school, and plans to attend university next year. Therefore, it will not be necessary for her mother to apply for appointment as her guardian of property or guardian of her person now that she has turned eighteen years of age.

[13] Milad, however, has Autism Spectrum Disorder and Moderate Disability. He will likely not have capacity to care for himself or his property after he reaches the age of majority. A structure for part of his settlement is required, with the balance of the non structured amount payable to the Accountant of the Superior Court in trust. If Milad is assessed as not having capacity upon turning eighteen years of age, a guardian of property will have to be appointed for him under the *Substitute Decisions Act*.

[14] On March 18, 2024, the Report of the OCL authored by Ms. Handler was provided. In her comprehensive Report, Ms. Handler called the attention to the court that s. 267.10 of the Insurance Act and s. 6 of O.Reg. 461/96 require that portion of a minor plaintiff's settlement for pecuniary loss must be paid by structured settlement. As the settlement with respect to Milad was not broken down as to heads of damages, it was estimated that 59% of his settlement would be a fair estimation of damages for pecuniary loss that should be structured. I approve of that estimate.

[15] In addition to the affidavits of Mr. Naimark and Sahar Saleh in support of the motion, I have read their further affidavits in the Supplementary Motion Record filed on January 22, 2024 in response to my endorsement dated August 17, 2023, the Report of the OCL and Mr. Naimark's letter dated March 21, 2024 to make further adjustments to the plaintiff's position having regard to the comments and recommendations made by Ms. Handler. Finally, a Case Conference was convened by video-conference at 9 a.m. on March 22, 2024 to discuss any outstanding issues. This material and the subsequent conference has resulted in the terms of the settlement and its implementation I have now approved in the form of the Order (with attached Schedule "A") issued today.

[16] Having read the evidence filed, I understand that, while the quantum of each claim for non-pecuniary damages, loss of income and special damages was contentious, the greatest issue taken by the defendants was liability on the part of one or more defendants to increase the pot of money available. Another challenge was the proof of damages claimed for Milad and Marina under the *Family Law Act* for the impact of the accident on their lives independent of their pre-existing issues, and to establish a causal link to that subsequent impairment. A third consideration related to the programs and funding available to the public for individuals who suffer from anxiety or who have lost a loved one.

[17] I find that the claims of each Milad and Marina for non-pecuniary loss and special damages were settled for amounts representing a reasonable compromise under the circumstances. I do not find that the settlement of the claims made by their mother, Sahar, for direct compensation she claimed for general damages or for income loss, or her own derivative claim under the *Family Law Act* in any way detracts from the amounts Milad or Marina are entitled to receive.

[18] I am satisfied on the evidence that it would be in the best interests of Milad and Marina to approve the settlement without requiring their written consent. Seeking a written consent from either of them has the potential of causing greater psychological trauma to that individual. I therefore “order otherwise” and dispense with that consent requirement under Rule 7.08(4)(c). I also recognize that Sahar has sworn an affidavit under Rule 7.08 agreeing to the settlement reached for each of the children, and the breakdown of each settlement between fees and funds recovered for their benefit. Sahar also offers in her affidavit to agree to a re-allocation of the funds she is to receive to increase the recovery of one or both children if required by the court.

**Motion to approve the fees and disbursements proposed under the CFA**

[19] The Naimark firm seeks approval for the fees it proposes to charge the Saleh family under the CFA on the motion to approve.



[20] Approving the proposed fees of counsel under a CFA is a two-step process. The court must first look at the CFA and the circumstances in which it was entered to determine if it was fair to the plaintiffs at the time it was entered. If it is upheld, the court goes on to consider the terms of the CFA and what is reasonable for the lawyers to charge under those terms at the time of the proposed account.

[21] To address the first step, I find that the CFA entered by Sahar on behalf of her family with the Naimark firm under the circumstances was fair. There is no evidence filed on the motion for approval of the proposed fee that would lead me to conclude that CFA entered in 2018 was other than fair at the time. This CFA enabled Sahar to quality legal services for her family at a time when they required effective legal representation the most. The CFA is therefore approved.

[22] As a starting point for the second step, I refer to the factors set out by this court in *Re Cogan*, [2007] O.J. No. 4539 to assess the reasonableness of the contingency fee the Naimark firm proposes to charge the plaintiffs. See also *Krukowski (Litigation Guardian of) v. Aviva Insurance Co. of Canada*, [2019] O.J. No. 3027, *aff'd* at [2020] O.J. No. 4323 (Ont. C.A.).

[23] The proposed fees must be found reasonable, and in the interests of the plaintiff under disability in all the circumstances. This was the standard for the reasonableness of the fees under consideration in *Mulhall v. Fraser*, 2017 ONSC 6551 (at paragraph 58). I adopt that standard in this case.

[24] The legal fees that the Naimark firm proposes to charge are substantial, having regard to the lack of dockets kept for the time the firm has incurred representing the Saleh family. The only reference to time in Mr. Naimark's affidavit related to the representation of the plaintiffs appears in paras. 213-218 of his first affidavit.

[25] Mr. Naimark subsequently provided charts in his supplementary affidavit in response to my endorsement commenting on their absence in the Moton Record. Those charts gave what he described as "conservative time estimates" for the time his legal team spent that the fees are intended to cover, and do not include file review, telephone calls and email correspondence. Billable services were valued by Mr. Naimark at \$42,485 for Milad, and \$53,210 for Marina.

[26] In para. 22 of his supplementary affidavit he also summarized the value of the time for services for which he agreed not to charge. These services related primarily to time spent to date in making the claims made for Milad and Marina for Accident Benefits. Mr. Naimark estimates this non-billable time at a value of \$25,767 for Milad, and \$8,132 for Marina.

[27] It is clear from the evidence that the Naimark firm has incurred large amounts of time on the plaintiffs' case, which has resulted in the benefit and value from the time and expertise in the professional services provided.

[28] I find that the fees that the Naimark firm is proposing, based on 25% instead of 30% of the damages recovered net of fees and disbursements, are reasonable.

In particular, I make the following findings on the factors set out in *Re: Cogan*:

- a. The time and effort required and provided by counsel for the plaintiffs was considerable. Although the Naimark firm did not attach any actual dockets to the motion record for approval of the settlement, Mr. Naimark's affidavit focuses on the time, skill, energy and resources put into the case, as well as the result. Time dockets in other cases were held to provide but one part of the basis to determine whether a proposed fee is fair and reasonable: *Lau (litigation guardian of) v. Bloomfield*, [2007] O.J. No. 3200 (SCJ).
- b. Complex personal injury law is not for the faint of heart.
- c. It is clear the Naimark firm brought the expertise and special skills of counsel to investigate, develop, and to document and present this case in an effective and efficient manner.
- d. The work of the Naimark firm (and the risk taken on a contingency fee retainer) produced a good result, having regard to the circumstances.

[29] An Order shall go approving the fees and disbursements, plus applicable taxes, that the Naimark firm proposes to charge under the CFA as set out in the Order dated today.

### **Motion to seal the record**

[30] Mr. Naimark advised me that the request for a sealing Order was made to protect lawyer and client privilege and litigation strategy if this motion for approval of the settlement was not granted. As the settlement is approved and the action is at an end, he has withdrawn the request for that relief.

### **Conclusion**

[31] The motion is granted. An Order shall go approving the settlement as follows:

- a. The settlement of this action in the amount of \$2,925,000.00 all-inclusive is hereby approved with the following allocations to each plaintiff:
  - i) \$2,164,235.57 all-inclusive is allocated to the Plaintiff Sahar Saleh;
  - ii) \$382,563.12 all-inclusive is allocated to the Plaintiff Marina Said Saleh; and
  - iii) \$238,791.31 in non-structured consideration and the promise of payments set out in Schedule "A" to the Order approving the

settlement all-inclusive is allocated to the minor Plaintiff Milad Said Saleh.

- b. The Contingency Fee Retainer Agreements dated October 2, 2018, as executed by the Litigation Guardian, Sahar Saleh, on behalf of the minor Plaintiffs, Marina Said Saleh and Milad Said Saleh, attached as Exhibits “LL” (Marina Said Saleh) and “MM” (Milad Said Saleh) to the Affidavit of Ryan M. Naimark sworn July 11, 2023 at a reduced contingency fee rate of 25% are hereby approved.
- c. From the minor Plaintiff Marina Said Saleh’s total settlement of \$382,563.12, the following amounts are payable to Ryan Naimark Professional Corporation in satisfaction of its legal fees, HST, and disbursements:
  - i) Legal fees in the amount of \$80,000.00;
  - ii) HST for legal fees in the amount of \$10,400.00; and
  - iii) Disbursements in the amount of \$20,753.12 inclusive of HST.
- d. The settlement funds of \$271,410.00, after the deductions above at sub paragraph c., for the Plaintiff Marina Said Saleh, born April 5, 2006 and who resides at 54 Vanhorne Close, Brampton Ontario, L7A 0X8, when paid to

Ryan Naimark Professional Corporation will be released to Marina Said Saleh.

e. from the minor Plaintiff Milad Said Saleh's settlement of \$238,791.31 in non-structured consideration, the following amounts are payable to Ryan Naimark Professional Corporation in satisfaction of its legal fees, HST, and disbursements:

- i) Legal fees in the amount of \$80,000.00;
- ii) HST for legal fees in the amount of \$10,400.00; and
- iii) Disbursements in the amount of \$16,391.31 inclusive of HST.

f. the non-structured settlement funds of \$132,000.00, after the deductions above at subparagraph e., and the promise of payments set out in Schedule "A" hereto, for the minor Plaintiff Milad Said Saleh, born November 3, 2011, who resides at 54 Vanhorne Close, Brampton Ontario, L7A 0X8, be paid to Ryan Naimark Professional Corporation in trust and will be released as follows:

- i) \$130,000.00 for non-pecuniary damages to be paid within thirty (30) days of receiving the settlement funds to the Accountant of the Superior Court of Justice;

- ii) \$2,000 shall be used to pay the assignment fee; and
- iii) The Defendants, by Sun Life Insurance (Canada) Limited shall pay the periodic payments set out in Schedule "A" hereto, which periodic payments shall be irrevocably directed to Milad Said Saleh as follows:
  - i. The periodic payments from this structured settlement will be paid to the Accountant of the Superior Court of Justice to the credit of Milad Said Saleh, subject to further Order of the Court;
  - ii. In the event of Milad Said Saleh's death before all the guaranteed payments have been made, to Milad Said Saleh's Estate.
- g. That upon payment of the total amount of non-structure consideration set out in paragraph 1, 3, 4, 5, 6(a) and 6(b) hereof and upon receipt, by the Litigation Guardian, Sahar Saleh, of a certified copy of the non-assignable, non-commutable, and non-transferable annuity issued by Sun Life Assurance Company of Canada to fund the periodic payments set out in Schedule "A" hereto, with Sun Life Insurance (Canada) Limited named as owner and annuitant (beneficiary) of the said annuity, with the payments under the said annuity irrevocably directed as set out in paragraph 6(c) hereof, the Defendants, shall be released and discharged from any and all actions, causes of action, claims, and demands for damages, loss, or injury,

howsoever arising, which heretofore may have been or may hereafter be sustained by the Plaintiffs, in consequence of and arising out of an incident which forms the subject matter of this Action. PROVIDED THAT nothing herein contained, or contained in any other release to be given in favour of the said Defendants, shall release and discharge Sun Life Insurance (Canada) Limited from its obligation to make the periodic payments set out in Schedule "A" hereto, for which periodic payments Sun Life Insurance (Canada) Limited shall remain liable until paid. Payments made pursuant to the said annuity contract, in discharge of the periodic payments set out in Schedule "A" hereto, shall, to the extent of each annuity payment and only to that extent, release and discharge Sun Life Insurance (Canada) Limited from its corresponding periodic payment obligation in Schedule "A" hereto.

- h. That between six and three months prior to Milad Said Saleh attaining the age of majority, Sahar Saleh is to obtain a capacity assessment for Milad Said Saleh and provide it to the Accountant of the Superior Court of Justice. If Milad Said Saleh is found to have capacity, the Accountant of the Superior Court of Justice shall release the funds to Milad Said Saleh when he attains the age of majority. If Milad Said Saleh is found not to have capacity, Sahar Saleh or another suitable party may apply to be Guardian of Property for Milad Said Saleh under section 22 of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30.



- i. a copy of this Order shall be served on the Office of the Children's Lawyer by email at [OCL.LegalDocuments@ontario.ca](mailto:OCL.LegalDocuments@ontario.ca) within thirty (30) days of the date of this Order.
- j. service of the Motion Record on the defendants is dispensed with.
- k. a sealing order is not granted as the Plaintiffs have withdrawn their request for an Order of that nature.

[32] On consent, the action and all cross-claims are dismissed, without costs.



**Released:** April 5, 2024

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**Emery J.**

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**COURT FILE NO.:** CV-18-7639-00 (Milton)  
**DATE:** 2024 04 05

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

SAHAR SALEH and GHULLAM  
MOSTAFAH JAGHOORI and MARINA  
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**REASONS FOR DECISION**

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Emery J.