

Structures now unique in ability to preserve ODSP benefits

BY JULIUS MELNITZER
For Law Times

The intersection of government benefits and structured settlements could prove to be an area that presents challenges for personal injury lawyers — even as issues relating to these benefits have made structures more attractive for clients.

By way of example, the Ontario Disability Support Program, the HST credit and the Ontario government's hydro rebate are all tied to income.

The corker, however, is that while the Canada Revenue Agency does not treat structure payments as income, provincial authorities are all over the map in their treatment of structures for the purpose of calculating income eligibility for their various benefit and support programs.

Alberta, for example, which has the country's richest disability benefits, is no longer taking structure income into account when assessing eligibility for Assured Income for the Severely Handicapped Act.

The situation in Ontario, however, is more complex. Until fairly recently, the province treated monies received from structures as income that was

included in the calculation of its means test for ODSP eligibility.

"The government looked at ODSP as a last resort, and they don't want anyone to be on the program if they can get money elsewhere," says Rita Levato, a lawyer and principal at McKellar.

Troy Lehman, a partner at Barrie, Ont.-based personal injury boutique Oatley Vigmond LLP, explains that his firm represents many clients who rely on ODSP.

"[I]f their lawyers are not careful, they're always running the risk that the clients will become ineligible for the program when they receive their settlement," he says. "So, it's important for lawyers to do what they can to preserve their entitlement."

Fortunately, Lehman says, structured settlements are "really attractive" to judges.

"That's because they know that if certain individuals, like people who are 20 [years old] and may have issues with impulse buying, don't use structures, their dad will be calling me in five years because the money will be gone," he says.

It was only in August 2017 that pressure and lobbying from disability advocate the Ontario Brain Injury Association convinced the former Liberal gov-



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ernment to reconsider — at least in part.

Kyla Baxter, president of Baxter Structures in Toronto, says the changes to the ODSP regime are "extremely significant" in that injured parties will no longer have to choose between pursuing legal recourse and receiving compensation awards and applying for disability support payments.

"The changes were initiated originally on behalf of sexual assault victims. Following these changes, survivors (victims) can take full advantage of all a structure can offer, with far greater flexibility in the design of each plan," said Baxter in an emailed statement. "This can make all the

difference in a sexual assault victim's life."

"We tried to get the minister of community and social services to treat structures in the ODSP context in the same way as the feds treat structures for tax purposes," says Nathan Kikkert, an associate at McKellar. But the Liberals weren't prepared to go as far as Alberta had gone.

While the Liberals agreed that structures would not be treated as assets, they stipulated that the income derived from the structures was exempt only up to the exempt amount of the capital (the amount for pain and suffering and future care). The upshot is that structures are now unique in their ability to preserve ODSP benefits. But it takes a fair amount of work on the lawyer's part.

"You have to carefully consider the amounts allocated to economic loss and whether it applies to past or future earnings as well as making sure you understand the exempt categories under ODSP," says Mary-Anne Strong, a partner at Beckett Personal Injury Lawyers in London, Ont.

"And you have to lay it out to ODSP in a very clear, fair and honest way."

It's also important to be straight up with ODSP about fees, especially contingency fees,

which can significantly reduce the client's take.

"If you do that, you'll find that ODSP will deal with you reasonably and will even consider allowing the fees to come entirely from the non-exempt categories, so that there is more left in the exempt categories," Strong says.

As it turns out, even *inter vivos*, discretionary, non-vesting trusts — sometimes called Henson trusts — set up with a claimant's settlement monies will not work to preserve a claimant's ODSP benefits. The difference is that a plaintiff who creates a Henson trust is voluntarily putting the settlement monies out of reach.

From the profession's perspective, many lawyers are unaware of the effect personal injury settlements could have on ODSP and other benefits.

And that's a problem because lawyers who don't make the impact of settlement on government benefits clear to their clients could well be negligent. Indeed, structured settlement specialists say it's really not very different from ignoring tax gross-up issues.

"Most of our clients who are on or applying for ODSP need ODSP. They also need the safety and security of a structured settlement," says Baxter. **LT**

— with files from Anita Balakrishnan