

# Court shows willingness to order structure

## Investment option ‘best protects’ injured man’s interests: judge

BY MARG. BRUINEMAN  
For Law Times

It’s not every day that a court orders a structured settlement despite a guardian’s wish for a lump sum. But such situations do happen as the courts and legislation recognize some forms of long-term payments, such as annuities, as a guarantee that the injured party will always have some income.

“It raises all kinds of interesting issues, on money management particularly,” says Craig Brown, who acted for Glenda Ann Melvin, guardian for her son Thomas, in *Melvin v. Ontario (Correctional Services)*. “The whole settlement of the case was empowering his mother to take care of him. The idea is to help your client live a life of dignity and value and not run out of money.”

In 1997, Melvin was serving time at the district jail in Thunder Bay, Ont., when two fellow inmates assaulted him. He suffered serious injuries, including a closed head injury. The parties settled the action against the province at mediation in 2012. Glenda initially agreed to a structured settlement but then changed her mind.

For Brown, the concept of a lump sum presented a conflict. His duty, he adds, was to both the guardian and her injured son. Brown is a litigator and partner at Thomson Rogers, a firm that has a policy to present structured settlements in any case in which the client is incompetent. The approach is to negotiate the amount of the award and then determine how it will meet the client’s needs.

With the support of the public guardian and trustee, Brown presented the situation to the judge who, after “a very thorough canvassing,” ultimately decided a structured settlement was the way to go. The difference in this case, adds Brown, is that the judge presented his decision for approval of the motion in writing while most are resolved in chambers.

The advantages of structures include the fact they require no maintenance and are tax-free with guaranteed payments for life.

“I have an obligation to protect Mr. Melvin’s interests because of his disability. I am satisfied that a structured settlement best protects those interests,” wrote Justice Douglas Shaw of the Ontario Superior Court of Justice in Thunder Bay.

He pointed out that a structured settlement would enable the injured man to request that he retain his Ontario Disability Support Program benefits while still receiving the structured payments since his future-care costs would likely exceed the

income from the structure.

By retaining the disability benefits, he also retains health coverage in addition to OHIP.

“The courts have been very much in favour of structured settlements generally,” says Ralph Fenik, president of McKellar Structured Settlements Inc., a company that dates back more than 30 years and helped to encourage the widespread acceptance of structures as tax-free, guaranteed payments in personal injury cases.

“Structures are recognized as a viable alternative to a lump sum and in catastrophic cases are preferred to the lump sum,” especially in situations involving children, he adds.

“You cannot out invest a tax-free investment without taking a risk. You cannot support guaranteed tax flow with equity.”

Fenik and Rita Levato of

McKellar’s legal department say *Melvin* is an example of a case where a structured settlement was clearly in the best interest of the injured party. And they point to other cases involving catastrophic injuries that resulted in structured settlements.

The common elements leading to structures include the competency and age of the plaintiffs as well as the fact that they suffered catastrophic injuries, aren’t employable, require community support to live, and could suffer an adverse impact if a lump sum runs out, according to Levato.

In 2000, the Ontario Court of Appeal adopted the trial judge’s reasons in *Roberts v. Morana*. In that case, the



*Melvin ‘raises all kinds of interesting issues, on money management particularly,’ says Craig Brown.*

trial judge ordered the bulk of the settlement, more than what was requested, into a structure

for future care with a portion paid out in a lump sum.

But there are also situations in which the courts support and prefer lump-sum payments. In *Wilson v. Martinello*, the Court of Appeal upheld a decision to award a lump sum. It found in favour of a lump sum because the plaintiff had proven he was still employable and had no responsibilities to his family as his wife and daughter had died.

“There was a risk to him but he could afford to take the risk,” says Fenik.

Even so, the lack of volatility in a structure has attracted wide appeal, particularly when the injured party is a child. Kyla See **Structures**, page 20



### McKellar’s Slide Rule App... easy access with just one touch.



Scan this QR-Code  
with your smartphone  
to visit our mobile site.

No matter where you are, the McKellar Slide Rule is never out of reach. In addition to the printed version, it is always available for BlackBerry®, iPhone® and Android™. Free from McKellar, all you have to do is visit [www.mckellarmobile.com](http://www.mckellarmobile.com) and download the McKellar Slide Rule App today.

*McKellar. Leaders in innovation and efficiency.*

iPhone® is a trademark of and owned by Apple Inc. BlackBerry® is a trademark of and owned by BlackBerry Limited. Android™ is a trademark of Google Inc. McKellar Structured Settlements Inc. is not endorsed, sponsored, affiliated with or otherwise authorized by Apple Inc., BlackBerry Limited or Google Inc.

**McKellar** STRUCTURED  
SETTLEMENTS

*Now you’re sure.*

GUELPH 1.800.265.8381

HALIFAX 1.800.565.0695

EDMONTON 1.780.420.0897

USA 1.800.265.2789

[www.mckellar.com](http://www.mckellar.com)