

BY JESSICA VICKERMAN

UNDERSTANDING STRUCTURED SETTLEMENTS: AN ALTERNATIVE APPROACH TO COMPENSATION

PUT SIMPLY

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What is a structured settlement?

Put simply, a structured settlement is an alternative to the traditional single, lump-sum payment of damages in cases involving personal injuries or death whereby a claimant receives a series of periodic or annuity payments over time (either for life, or for a fixed term).

Where a structured settlement is utilized, a lump sum of damages is used as a premium to purchase an annuity issued by the life company. The terms of the structure are subject to considerable flexibility at inception to allow claimants to design a plan which best responds to their personal circumstances. Payments can be fixed or indexed to keep pace with inflation, and lump sum payments can be incorporated to provide for known

or anticipated future expenses. How and when the payments are received is flexible and can be monthly, annually or at other pre-determined intervals. All payments received by the claimant, including the interest earned on the lump sum investment, are tax-free.

What We Do

As a neutral independent third-party, we provide structured settlement consulting services, free of cost, to claimants, counsel and insurers across Canada. This includes meeting with claimants to advise and educate them on structured settlements; preparing illustrative and evaluative reports to assist in valuing and negotiating claims; and providing real-time consulting

support at settlement meetings, mediations, arbitrations and pre-trials.

Where a structured settlement is utilized, we broker the placement of same, to obtain the best available return for the client. Our in-house legal team prepares the necessary closing documentation, including a draft structure Release or Judgment, as applicable.

Following placement, we provide complimentary ongoing customer service support to clients during the term of their structure.

Evaluative and Illustrative Reports

We prepare both evaluative and illustrative reports to assist counsel and insurers.

An evaluative report is typically used to value accident benefits claims and quantifies what a claim is worth today using structured settlement quotations, considering what coverages are available and what the medical evidence indicates. Evaluative reports can also cost out future loss of income claims, future care costs and, long-term disability entitlements. Evaluative reports can be updated on an ongoing basis as the matter progresses and additional information becomes available.

An illustrative report, on the other hand, details what a payment plan would look like if a lump sum amount was put into a structured settlement. An illustrative report will vary depending on the various parameters of the structure chosen (i.e. funding amount, length of term, whether payments are level or indexed, frequency of payments, lump-sum payments, if any, etc.)

Engaging a Structure Consultant

At the outset of the case, counsel should consider the likelihood that the settlement will involve a structure, either because it is required (such as in the case of a minor or client that has been declared incapable) or, due to the circumstances of your case, strongly recommended. The following is a non-exhaustive list of questions for counsel to consider when making this determination:

- Are there concerns about your client's ability to manage a significant settlement because of cognitive limitations, mental health issues, family issues and/or addiction?
- Is your client unlikely to be able to return to work or generate income such that they have little to no ability

to tolerate financial risk?

- Is your client vulnerable to financial abuse by friends or family members?
- Is your client receiving government benefits such as ODSP, OAS/ GIS or the Canada Child Benefit (among others) where a lump sum settlement could affect their ongoing entitlement or result in a claw back?
- Is your client in a high-income tax bracket or likely to be pushed into one by the interest earned on a conventional lump sum investment?
- Is your client at or near retirement such that the tax-free income and tax deferred growth offered by a structured settlement would complement their existing financial plan?
- Does your matter involve accident benefits and, if so, is the insurer likely to require a structure as a term of settlement of the claim?

If the answer to any one or more of the above questions is yes, or potentially yes, we recommend engaging a structure consultant at an early stage so that the concept of a structure can be introduced to your client well in advance of any settlement.

At a minimum, counsel should contact a structure consultant at least two weeks before any settlement negotiations, mediation, arbitration or pre-trial. This allows the structure consultant time to open a file, obtain impairment ratings,¹ if applicable, and prepare (or, if a file is already open, update) an evaluative and/or illustrative report. As structure rates are only guaranteed for a period of three (3) business days, this also ensures that counsel has an up-to-date quote when entering negotiations.

Information and Documents Required to Open a File

Relatively little information is required to open a file aside from the client's full name, sex, date of birth, date of loss and the name(s) of the involved insurer(s).

If impairment ratings are being sought, the structure consultant will also need two to three medical reports dated within the last two years for submission to the life companies. Reports which summarize the nature of the accident, the medical records and the client's current functioning are preferred over clinical notes and records. It typically takes three to five business days to receive the impairment ratings back from the life companies following submission of medical documentation. Once obtained, impairment ratings are valid for a period of one year.

Where an evaluative report for accident benefits is being prepared, the structure consultant will also need to know the version of the Statutory Accident Benefits Schedule the claim is under (if not evident from the date of loss); whether there are optional benefits available; the benefit(s) and amount(s) counsel would like quoted and any paid to date amounts for medical and rehabilitation and attendant care.

The Fact Scenario Evaluative Report

After reviewing the fact scenario, we would recommend that counsel for Sandra Light consider obtaining an evaluative report calculating Light's accident benefits entitlement. As Light has been determined to be catastrophically impaired ("CAT"), it is likely that Light's accident benefits insurer will obtain an evaluative report from a structure broker to use as a guide for any settlement negotiations. As

such, counsel is well advised to obtain their own costing in advance of negotiations.

We have been provided with Light's date of birth as July 16, 1988, and the date of loss of November 14, 2019. We have assumed that Light is female but would need to confirm this with counsel, as sex can impact life expectancy. If counsel wishes to obtain impairment ratings, we will also need two to three recent medical reports dated 2021 or later. The CAT reports would be a good starting point, assuming they are dated within the last two years.

We have assumed, based on the date of loss, that Light's claim is under the 2016 version of the *Statutory Accident Benefits Schedule (2016 SABS)*. Having been determined to be CAT, Light would, at a minimum, have a combined

limit of \$1 million for medical and rehabilitation benefits and attendant care benefits with no time limitations. We would need to confirm with Light's counsel whether Light has access to optional benefits to increase this limit.

The fact scenario provides that the combined paid to date amount for Light's medical and rehabilitation and attendant care benefits is \$100,000.00. Assuming Light has a combined limit of \$1 million, the remaining limit is \$900,000.00. We would quote medical and rehabilitation at a rate of \$3,000.00/month, indexed at 2% per annum, and attendant care at \$700.00/month, level payments, produced to the extent of Light's expected lifetime, or the available limit, whichever comes first. We would also quote any other amounts counsel requested, as counsel may argue that

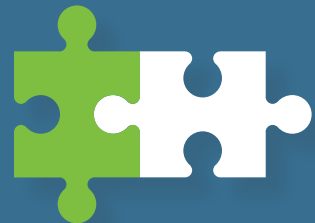
Light is entitled to higher monthly amounts (perhaps the insurer has denied various treatment plans), or that Light's usage rate may increase in the future.

There is no mention of housekeeping and home maintenance benefits in the case study, but given that Light is CAT, they should be entitled to these benefits. We would clarify with counsel whether they want housekeeping and home maintenance quoted. If they do, we quote it at the maximum of \$100.00/week, level payments, for a lifetime, unless another amount or time frame is specified.

Lastly, we would need to confirm with counsel whether they agree with Light's current income replacement benefit (IRB) entitlement of \$0.00 due to the receipt of long-term disability

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(LTD) benefits. If counsel agrees with the calculation, then nothing would be calculated for Light's IRB from now to age 65. If counsel did not agree, then we would quote the weekly amount instructed by counsel. As LTD benefits most often terminate at age 65, counsel is likely to take the position that Light is entitled to IRBs post-age 65 with the post-age 65 ramp down calculation based on an entitlement of \$400.00/week. After calculating the post-age 65 ramp down, Light's IRBs would be quoted from Light's age 65 for life.

At the end of the report, we would total the various calculated entitlements to provide counsel with the overall value of Light's accident benefits claim based on the information contained therein.

Light's counsel could also receive an evaluative report for the tort side of the claim. Any future loss of income that is not covered by Light's Accident Benefits or LTD could be quoted free of charge. Additionally, if the future care costs exceed the Accident Benefits exposure due to either the total limits or hourly limits imposed, counsel could also have the full value of the future care costs quoted by way of a structured settlement report.

Illustrative Report

As this matter moves towards settlement negotiations or a hearing, on both the AB and tort sides, we would strongly recommend that thought be given to structuring a portion, if not all, of any potential settlement or damages award received by Light.

Returning to our list of considerations for counsel earlier in this article, there are several criteria that support the use of a structure in the circumstances. In particular:

- Light is unlikely to be able to return to any form of work given their past two unsuccessful attempts, the physical nature of their previous employment and their limited education and experience. Accordingly, Light has little to no ability to tolerate financial risk as they will not be able to earn back any funds lost through market downturns or financial mismanagement.
- There are concerns about Light's ability to manage a significant settlement given their post-accident impairments, including a traumatic brain injury, cognition issues, memory loss, and issues with impulsivity. This is evidenced by the fact that Light is currently receiving assistance via attendant care with managing their finances.
- Light's post-accident cognitive impairments also make them vulnerable to financial abuse by friends, family members and significant others.

Given the above, Light and their counsel should explore structured settlement options. A structure consultant can prepare an illustrative report setting out what different structure plans would look like, considering Light's current financial situation and future financial requirements, in order to help inform discussions on this topic.

These structure plans can then be refined closer to or after settlement to ensure that Light has a plan in place that best provides for their needs going forward.

Other Considerations

Counsel should consider arranging for a structure consultant to attend any settlement negotiations (mediation,

pre-trial, etc.) on Light's file. Having an independent and neutral structured settlement consultant available during negotiations allows counsel (and insurers) access to real-time calculations as the negotiations progress to allow them to make informed decisions. It also allows clients to visualize the income (monthly or otherwise) that can be generated from a settlement and evaluate it in relation to their ongoing needs.

As Light is a strong candidate for a structured settlement and considering that the availability of a structured settlement rests with the insurer and cannot be obtained without the insurer's consent, counsel should also ensure that the right to structure all or a portion of Light's damages is included as a term of any negotiated settlement.

Common Pitfalls

One of the most common pitfalls on the part of counsel is the failure to introduce the concept of a structure early in the litigation process, especially in situations like Light's, where a structure is likely to be a part of the resolution of the case.

By laying the appropriate groundwork early in the process, it is less likely that the well-intentioned suggestion by counsel (or, in the case of an accident benefits claim, an insistence by the insurer) regarding the use of a structured settlement during negotiations will be met with pushback on the part of the client.

Limitations

Our reports are based on information and instructions provided by counsel. We do not independently verify or

confirm the accuracy or completeness of such information, nor do we offer any opinion on the validity or strength of the position taken by counsel in their instructions to us.



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NOTES

¹ An impairment rating is an acknowledgment by a life company that, based on medical documentation, a person may have a life expectancy that is shorter than normal for a person of the equivalent age and sex. Impairment ratings increase the income on a life annuity or, conversely, reduce the cost required to provide specific lifetime payments as they assume that the claimant will die (and thus payments will stop) earlier than is typical.

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