Setting Aside a Release Given to an Insurance Adjuster

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Introduction

It is a common occurrence for personal injury clients to present themselves at a lawyer's office after they have signed an improvident release at the request of an insurance adjuster. Frequently these releases have been signed before any medical reports have been prepared. After they have received a full diagnosis or more complete prognosis, feel that they have been treated unfairly or been taken advantageous of, or perhaps because their injuries have taken a turn for the worse, they seek legal counsel. What can personal injury counsel do to set aside the release?

General Principles

In law, a full and final release is a valid contract. Thus, as it is a long held principle of contract law that parties should be held to their freely negotiated bargains, the courts generally presume that parties should be held to what they have promised under a release.[i]

According to the *Canadian Encyclopedic Digest* – Actions (Western), VIII.2,

> "**§217** Although the law encourages settlements and will uphold them even if the consideration is plainly inadequate, it is a necessary corollary to that principle that both parties understand their rights and appreciate what they are conceding. Inadequacy is not sufficient on its own to set aside a settlement, but it becomes significant evidence when advantage is taken of the incapacity of the release. Where the bargain is improvident in the extreme and [in the context of insurance settlements] an experienced adjuster does not advise the plaintiff to seek independent legal advice, it will be set aside. It is a matter of public policy that the Courts encourage parties to settle their differences amongst themselves if possible.
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> **§218** There is inherent authority in the court to interfere with negotiated settlements where there has been a failure to disclose material prior to the

> settlement if it can be established that the material was relevant and significant to the resolution of the issues raised in the action and that the existence of the material was or could reasonably have been within the knowledge of the party seeking to rely upon the settlement agreement. While a trial court has jurisdiction to set aside consent judgments, it is reluctant to do so with regard to a negotiated settlement on the basis that it turned out to be a bad economic decision for one side or the other.
>
> **§219** If the release does not match the intention of the parties, it is voidable and cannot be used to bar a claim. However, if the agreement is intended to settle all matters then in dispute between the parties, no subsequent claim will be allowed in respect of a matter arising prior to the date of the agreement, of which the party claiming has knowledge at that date."[ii]

Further:

> "**§629** A release will not be set aside because the claimant was mistaken as to the extent of his or her injuries, because the amount is inadequate, or because of improvidence. Where, however, the claimant's incapacity has been used to the defendant's advantage to obtain a release for an inadequate settlement amount, all the circumstances together may be sufficient to set aside the release." [iii]

In ***Richmond v. Matar***, 2009 NSSC 113, 276 N.S.R. (2d) 221 (SC), Robertson J summarized the law with respect to the setting aside of a release in the following terms:

> "Absent fraud or other exceptional circumstances, an executed release is given its full and intended effect. *Van Patter v. Tillsonburg District Memorial Hospital et al*, [1998] O.J. No. 1700 (Ont. Ct. Gen. Div.):
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> > The many cases in the law report dealing with settlement releases may seem to have sharp edges but their thrust is that absent fraud, overreaching or some similar equitable consideration, the release must be given its due. Typical of these cases is *Athabasca Reality Co. v. Foster* (1982), 18 Alta. L.R. (2d) 385 at p. 394, 132 D.L.R. (3d) 556 (C.A.) Where, Laycraft, J.A. says this:
> >
> > > While a settlement extends only to subjects which the parties have in contemplation, a settlement may not be avoided because the damages arising under one of the headings contemplated is greater than expected. Where, for example, a party settles a claim for personal injuries and

> later finds he was injured more seriously than he thought, a settlement is binding: *Thornburn v. Danforth Bus Lines Ltd.,* [1955] O.R. 494, [1955] I.L.R. 1-188, and *Tucker v. Moerman,* [1970] 2 O.R. 775, 12 D.L.R. (3d) 119.

> The Nova Scotia Court of Appeal summarized the principles relating to setting aside a release. Hallett J. in *Stephenson v. Hilti (Canada) Ltd.* [1989] 93 N.S.R. (2d) 366 (T.D.) stated at paras. 13-14:
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> > To summarize the principles set out in the foregoing cases, it seems to me that a transaction may be set aside as being unconscionable if the evidence shows the following:
> >
> > (1) That there is an inequality of bargaining position arising out of ignorance, need or distress of the weaker party;
> >
> > (2) The stronger party has unconscientiously used a position of power to achieve an advantage; and
> >
> > (3) The agreement reached is substantially unfair to the weaker party or, as expressed in the *Harry v. Kreutziger* case, [1978] B.C.J. No. 1318, it is sufficiently divergent from community standards of commercial morality that it should be set aside.
> >
> > To put it even more succinctly, is the transaction so unconscionable that it requires the intervention of the Court considering all the circumstances surrounding the making of the agreement." [iv]

Later, in ***Federation of Newfoundland Indians v. Canada***, 2011 FC 683, 390 F.T.R. 294 (FC), Heneghan J referred to ***Richmond v. Matar*** and expanded upon the principles highlighted there, saying:

> "The law relating to setting aside an executed release is succinctly stated in the decision *Richmond v. Matar*, 276 N.S.R. (2d) 221. In that case, the Supreme Court of Nova Scotia held that an executed release will be enforced unless the party wishing to set it aside establishes fraud or other circumstances; see paragraphs 14 through 16 …
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> A fraudulent representation is another basis for setting aside a release; see *Rick v. Brandsema*.

> Coercion of a party may also be a ground for setting aside an agreement. …*Wagg v. Minister of National Revenue (Customs and Excise)* (2003), 308 N.R. 67…
>
> Finally, the subsequent repudiation of an agreement by one party may also invalidate a release or consent order. In *Fieguth v. Acklands Ltd.* (1989), 59 D.L.R. (4th) 114 (B.C.C.A.) at page 122, the British Columbia Court of Appeal said the following:
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>> 45 The law in this connection has recently been restated by this court in *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 16 B.C.L.R. (2d) 349, [1987] 6 W.W.R. 273, 18 C.C.E.L. 238, 43 D.L.R. (4th) 56 (C.A.), where Wallace J.A., speaking for the court, reviewed a number of authorities. At p. 357 he quoted from the opinion of the House of Lords in *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, where Lord Selborne L.C. said at p. 438:
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>>> 'You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what the conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.'"[v]

In ***Howell v. Reitmans (Canada) Ltd.***, [2002] N.J. No. 194, 215 Nfld. & P.E.I.R. 240 (TD), Chief Justice Green of the Newfoundland and Labrador Supreme Court (Trial Division) described a prevailing view:

> "As a general rule, the courts are slow to set aside or refuse to enforce a release and settlement agreement made between parties for valuable consideration where there is no evidence of *non est factum*, duress or undue influence. Exceptionally, a court will set aside a release or refuse to enforce it if the circumstances demonstrate that the bargain arrived at was unconscionable…."[vi]

The authorities therefore suggest that:

(a) A release is a contract that bars any subsequent claims in exchange for valuable consideration.

(b) An overarching consideration in the enforcement of releases and settlements is the principle of finality. Thus, any attempt to reopen matters that are the subject of a final disposition will be carefully scrutinized by the court.

(c) The fact that a settlement agreement may not have been a desirable one from the point of view of one party, that the party may have received poor legal advice, or that the party may later change their mind cannot provide grounds for setting aside a release.

(d) A release can be set aside based on general principles of contract law (eg. misrepresentation, fraud, duress, undue influence, mistake of fact, lack of capacity, and unconscionability and inequality of bargaining power).

(e) A transaction may be set aside as being unconscionable if the evidence shows:

> (1) That there is an inequality of bargaining position arising out of ignorance, need or distress of the weaker party;
>
> (2) The stronger party has unconscientiously used a position of power to achieve an advantage; and
>
> (3) The agreement reached is substantially unfair to the weaker party or, as expressed in the *Harry v. Kreutziger* case, [1978] B.C.J. No. 1318, it is sufficiently divergent from community standards of commercial morality that it should be set aside.

(f) When a court evaluates whether a release or settlement is substantially unfair, it must look at the circumstances known to the stronger party or those he ought to have known (or those which were foreseen or foreseeable), at the time of the settlement.[vii]

Selected Jurisprudence

In ***Williams v. Boston***, 2001 ABQB 1105, 313 A.R. 264 (QB) the plaintiff settled with an adjuster 10 days after having been involved in an accident. Significantly, neither she nor the adjuster had any medical report concerning her prognosis or expected time of recovery.

The plaintiff told the adjuster she wanted to await further medical evidence before settling her claim. She testified that she felt pressured into accepting the offer as the adjuster told her she was unlikely to receive a settlement that exceeded his offer, it was his opinion her injuries would resolve within one month, and if she did not settle that day, she might not receive any compensation later and would have to pay fees of future medical reports. The plaintiff never cashed the cheque.

After confirming that parties are generally bound by their agreements unless they establish one of the grounds recognized in law which will result in relieving the party of his or her contractual responsibility, Feehan J went on to discuss the principles of unconscionability and undue influence as they might apply to the case before the court:

> "… In a much quoted case dealing with unconscionable transactions, the British Columbia Court of Appeal formulated the test as follows in Morrison v. Coast Finance Ltd. (1965), 54 W.W.R. 257 at p. 259, [hereinafter Morrison]:
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> > The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. ... A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. *On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of these*

> *circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable. ... or perhaps by showing that no advantage was taken*. . . . [Emphasis added.]

> In Harry v. Kreutzinger (1978), 9 B.C.L.R. 166 (BCCA), the test of an unconscionable transaction was alternatively formulated by Lambert J.A. at 177 as "whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded".

> The decisions in Morrison and Harry have been cited with approval in this province: see Canadian Imperial Bank of Commerce v. Ohlson (1997), 209 A.R. 140 (C.A.),…; Ellis v. Friedland, [2001] 2 W.W.R. 130 (Alta. Q.B.). The test in Morrison was approved of by LaForest J. in Norberg v. Wynrib, [1992] 2 S.C.R. 226,…at para. 30. However, as unconscionability remains an equitable doctrine, Courts must guard against being overly rigid in applying any particular test as "flexibility, rather than precision, is required when determining whether a claim for intervention has been demonstrated": Ohlson, at para. 25. Nevertheless, the test provided by the Court in Morrison provides a good starting point."[viii]

Mr. Justice Feehan then continued:

> "Applying the test in Morrison to the case at bar, it may be that the Plaintiff was in some distress due to the pain that she continued to suffer at the time that she signed the Release. However, there is little evidence about the degree and effect of this pain, hence distress cannot be relied upon to prove the first arm of the Morrison test.

> What is evident is the inequality of bargaining power between the Plaintiff and Mr. Schmidt. While Mr. Schmidt has been involved in such negotiations for the better part of ten years, the Plaintiff has only a limited degree of experience in negotiations (mostly related to her work experience in sales) and certainly none of it in the realm of personal injury claims. Mr. Schmidt used his expertise in the area of personal injury claims to persuade the Plaintiff to accept his offer. At that time, the Plaintiff had no idea what her claim was worth, whereas Mr. Schmidt had knowledge about the range of potential settlements open to her.

> It is not hard to see that these circumstances led to an inequality in the relative positions of the parties. The Plaintiff's ignorance of this type of negotiation and of the potential outcomes of personal injury claims put her at a decided disadvantage. Mr. Schmidt sought to utilize this disadvantage

> by persuading the Plaintiff that he had knowledge about the likely outcome of her injuries when, in fact, he had no such knowledge. Therefore, he overcame the Plaintiff's resistance to settling her claim that day. This situation involved an "overwhelming imbalance in the power relationship between the parties": Norberg at para. 30, per LaForest J.
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> The second element in the Morrison test is that of the substantial unfairness of the bargain. The knowledge of the parties is to be assessed at the time at which the agreement was entered into: Cougle v. Maricevic (1983), [1992] 3 W.W.R. 475 (BCCA). It is not proper to look into events subsequent to the agreement unless, on the basis of facts known at the time, the subsequent event could be regarded as a reasonable possibility: McCullogh v. Hilton (1998), 63 B.C.L.R. (3d) 272 (C.A.). It is this aspect of knowledge which is especially pertinent to this case and which may distinguish it from the ordinary insurance situation."[ix]

As noted by Feehan J, it was significant that the plaintiff had no knowledge about her prognosis or about the timeframe of her recovery. Equally significant was the fact that she had informed the adjuster that she wished to await further medical advice before settling her claim.

In light of those facts, Feehan J stated that it was unfair to base the agreement upon an acknowledged lack of pertinent information:

> "… The words of the majority in [***Smyth v. Szep***, [1992] B.C.J. No. 37; 8 C.C.L.I. (2d) 81 (CA)] at p. 93 are relevant to the case at bar:
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>> There was obvious disparity of bargaining position. There was also, in my view, obvious unfairness in the bargain, in that the plaintiff was persuaded to give up her claims at a time when the adjuster knew she had been receiving treatment for some 8-1/2 months, and had no reason to believe that she had recovered, when he had no current or relevant medical report, and when neither he nor she had any means of assessing for how much longer it was reasonable to expect that she might suffer pain or disability, and require treatment. Having in mind both what was known with respect to the plaintiff's history and what was not known - and, in the absence of investigation, would therefore have to be valued on the basis of a wide range of possibilities with respect to the future - a fair final settlement, if it had to be reached at that stage, would clearly have to be in an amount

> several times that of the settlement offered by the adjuster in this case.
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> . . .
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> As was pointed out by the Defendant, an insurance adjuster does not owe a duty of care to an individual such as the Plaintiff. However, an insurance adjuster in a situation such as that here may well be obliged to await some medical information before a Court will pronounce that a signed Release is fair. It is for this reason that the agreement in question can be said to be sufficiently divergent from community standards of commercial morality.
>
> Because the Plaintiff has met the first two requirements of the Morrison test (i.e., that of inequality and that of substantial unfairness), the burden shifts to the Defendant to show that the agreement in question is fair, just and reasonable. No credible reason has been offered to uphold the fairness or reasonableness of the Release. Given that this opinion was not based on any medical evidence and was based merely on unfounded speculation, the mere fact that the adjuster believed that the injuries would clear up quickly is not an indication of the fairness of the agreement."[x]

In the result Mr. Justice Feehan found the settlement agreement concluded between the plaintiff and an insurance adjuster was unconscionable and that it was thus unnecessary for him to address the issue of undue influence.

In the Ontario case of ***Jones v. Jenkins***, 2011 ONSC 1426, [2011] O.J. No. 955 (SC), the defendant brought a motion for summary judgment seeking to enforce a release signed by the plaintiff in relation to damages and injuries sustained in a motorcycle accident. The issue before MacPherson J was whether the release was valid or whether there existed grounds to set it aside.

Mr. Justice MacPherson described the manner in which the release was negotiated and executed in the following passage:

> "The Release came about after discussions between the ING insurance adjuster, Paul Smith, and the Plaintiff. The Plaintiff was instructed by the adjuster to make a proposal for settlement including the heads of damages such as disfigurement, pain suffered, future pain and future loss of employment. He did as instructed and made a proposal totalling

$241,300.00. In response to this, the Adjuster made a counter-proposal which was set out in correspondence dated October 5, 2006. This correspondence indicated that the Plaintiff had one year from the date of loss (October 12, 2005) to proceed with a claim. A deductible of $30,000.00 was applied to the general damages. Based on the Plaintiff being 75% responsible for the accident, the General Damages ($35,000 net of the deductible) and Future Economic Loss ($22,500) were reduced by 75%. Prejudgment interest of $525.00, Costs of $3511.00 and Disbursements of $1,000 were then added to arrive at a total proposal of $19,411.00.

The letter confirmed that if this Offer was accepted it was a final release and that the Plaintiff was free to consult with a lawyer. This letter ended with "look forward to working with you towards a fair resolution on this file".

… [T]he Plaintiff communicated to the adjuster that this offer was acceptable and they met to review the correspondence at which time it was clarified and corrected on the face of the letter that the time limitation was in fact two years from the date of the accident."[xi]

He continued, saying this about the plaintiff:

"It is very clear from the evidence that the Plaintiff was unsophisticated. Although he had attained his Grade 12 diploma, it is evident from the initial proposal which was fraught with spelling and grammar errors and as indicated by the Plaintiff, he is not good with words; he is good with his hands. It is also clear that at the time the Release was signed, the Plaintiff had been unemployed for one year, he was in difficult financial circumstances - living out of his car; using a food bank; the birth of his third child was imminent; and he had debts of $15,000.00. There was some dispute as to how much knowledge the adjuster had of the specific circumstances of the Plaintiff.

It is clear from the transcript of the Cross-examination of Paul Smith that he knew the Plaintiff was relying upon him to be fair; that the Plaintiff had the impression that the adjuster would be unbiased and impartial; that the adjuster was not an adversary and that the Plaintiff felt that he could trust the adjuster.

It is evident that the Plaintiff was anxious to return to work to the point that he had stated to the person who completed the SOMA report that he had recovered and was able to return to work. A reduced work load was not an option and the Plaintiff could only return to work if it was on a full-time basis. The Plaintiff did not have a copy of the SOMA report or his

> Accident Benefits file. This crucial information was available to the adjuster and had been reviewed by him. This confirmed that the Plaintiff had suffered severe and acute radial nerve damage, a much more serious injury than set out in the SOMA report. Although it was suggested by the Defendant's counsel that there was no obligation to provide a copy of the reports to the Plaintiff, there was certainly an obligation to convey the information as it related to the extent of the injuries sustained as that was relevant to the general damages and future loss of income awards. **It should also be noted that in his cross-examination the adjuster confirmed that it was his understanding from his review of all of the medical information that the injury may not have been resolved at the time the Plaintiff was agreeing to the terms in the Release.**" [xii] (emphasis added)

MacPherson J then discussed the test for setting aside a release on the ground of unconscionability:

> "The test to determine whether or not a Release should be set aside as unconscionable is: "Whether or not the transaction is so unconscionable that it requires the intervention of the Court considering all of the circumstances surrounding the making of the agreement?" (*Stephenson v. Hilti* (1989), 63 D.L.R. (4th) 573 (N.S.T.D))
>
> Other cases have used a three part test to determine whether a Release should be set aside based on the evidence:
>
> a) That there is an inequality of bargaining power arising out of ignorance, need or distress of the weaker party;
>
> b) That the stronger party has unconscientiously used the position of power to achieve an advantage; and
>
> c) That the agreement reached is substantially unfair to the weaker party or is sufficiently divergent from community standards of commercial morality that it should be set aside.
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> (*Woods v. Hubley*, [1995] N.S.J. No. 459; *Coleman v. Bishop* (1991), 103 N.S.R. (2d) 265 (N.S.T.D.))" [xiii]

Upon applying the foregoing test, Mr. Justice MacPherson ruled that the defendant's application had to be dismissed. He stated:

> "The fact that the information concerning the extent of the injuries was withheld from the Plaintiff is significant. This could certainly have formed the basis for a higher award of general damages. This was compounded by the fact that the $30,000.00 deductible was not applicable to general damages in excess of $100,000.00 and that this was not communicated to the Plaintiff.
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> Although it was submitted by the Defendant that the Plaintiff could have consulted with a lawyer and as set out in the October 5, 2006 letter was told to do so, it was clear that the Plaintiff had the impression that the adjuster would be fair and would look out for his interests as well as the interests of the insurance company.
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> Most troubling is the fact that the adjuster reduced the general damages and the future economic loss claim by 75% purportedly on the basis of the Plaintiff being 75% responsible for the accident. There was no evidence that this was the case. There was also no reason to apply Fault Determination Rules as they were guidelines which were only applicable as between insurers and not as between a Plaintiff and a Defendant.
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> The Plaintiff's counsel submitted that the reference to a short limitation period was a significant misrepresentation by the adjuster, but I do not consider that error to be a material misrepresentation as prior to signing the Release the Plaintiff was aware that he in fact had one more year to pursue a claim.
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> **I find that there was an inequality of bargaining power as between the adjuster for ING insurance and the Plaintiff and that the adjuster used his position of power to achieve an advantage and that the agreement reached was sufficiently divergent from community standards of commercial morality to be unconscionable and that it should be set aside."**[xiv] (emphasis added)

Sandstrom v. Hornsby, 2002 BCSC 680, 38 C.C.L.I. (3d) 313 (SC), is a judgment of Hutchison J where the impugned settlement was found to be substantially unfair in light of the fact that the insurance adjuster knew that the plaintiff was having ongoing problems and the plaintiff had advised the adjuster that she did not feel she was fully recovered.

In addition, the evidence disclosed that the plaintiff's doctor had suggested that more time was required for a proper diagnosis and the adjuster knew that the plaintiff could not be expected to undertake a proper monetary assessment of her complaints.

Mr. Justice Hutchison's reasons for deciding that the settlement was not a fair bargain were:

> "In the case of Harry v. Kreutziger, (1978) 9 B.C.L.R. 166 (B.C.C.A.), McIntyre J.A. (as he then was), after an exhaustive review of the cases, has this to say at page 173:
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> > From these authorities, this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable. [My emphasis]
>
> **The unfairness in this bargain was the knowledge of Ms. Edwards that there were ongoing problems, which if they materialized, could, and would, make the proposed settlement unfair. She had the medical reports and knew full well that the plaintiff could not be expected to fully appreciate their contents nor what would be a proper monetary assessment of her complaints. … The adjuster, Ms. Edwards, knew that she was being relied on, and from Dr. Prout's letter, knew that the injuries had not yet settled. She also knew she had the plaintiff to her economic advantage. Herein lay "the inequality in the position of the parties due to ignorance, need or distress of the weaker party", leaving the plaintiff in the power of the adjuster.**"[xv] (emphasis added)

Hutchison J continued, saying:

> "All that having been said, the defendants take the position that there was at that point no substantial unfairness in the settlement reached. The unfairness, the defendants contend, only arose after the settlement when the injuries failed to settle down and subsequent diagnosis led to the requirement of surgery.
>
> Should the letter from Dr. Prout have alerted a skilled adjuster to this possibility and in fairness settlement should have been delayed? Similarly, should she have pointed to a computer printout of cases designed to support her offer of $8,000.00 "new money"? Finally, should the dominant party, knowing the subservient party is unadvised and

unrepresented, suggest a final settlement be entered into in these circumstances?

One of the relevant circumstances here is whether the reasonableness of the agreement is affected by evidence of subsequent events that could have been reasonably foreseen by the adjuster at the time of settlement. As I read Ward v. Zackon, [1999] B.C.J. No. 828 (S.C.) aff'd [2001] B.C.J. No. 346; 2001 BCCA 58, if the plaintiff "by virtue of ignorance, need, or distress, [...] was not on an equal footing with the adjuster", and "judged on the circumstances existing at the time the settlement was made, it was sufficiently unfair, unjust, and unreasonable, or sufficiently divergent from community standards of commercial reality" then the settlement may be set aside.

Subsequent events may be considered in some cases. As was said by Esson J.A. in McCullogh v. Hilton, [1998] B.C.J. No. 1928 at paragraph 27:

> ... That is not to say that there will never be cases when events subsequent to the settlement will have some relevance. But that can be so only if the events are of a kind which, on the basis of the facts known at the time of settlement, could be regarded as at least a reasonable possibility.

In the case at bar there was a reasonable possibility that the plaintiff's injuries would become worse over time."[xvi]

After referring to the decisions of ***Smyth v. Szep***, [1992] B.C.J. No. 37, 2 W.W.R. 673 (CA), and ***Gindis v. Brisbourne***, [2000] BCCA 73, 72 B.C.L.R. (3d) 19 (CA), and confirming the obligation borne by ICBC adjusters to carefully assess all the information available and, in some cases, delay settlement until adequate information is obtained upon which to assess proper compensation, Mr. Justice Hutchison stated:

"In a situation somewhat analogous to the present, in Chavarria v. Antoniuk, [1998] B.C.J. No. 2410, Skipp J. applied Smyth to set aside a release based upon what that adjuster knew, or should have known about the plaintiff's condition as of the settlement date.

Smyth will not apply to every case where a plaintiff seeks rescission of a release. In McCullogh v. Hilton, supra, at paragraph 29, Esson J.A. distinguished Smyth by the facts surrounding the settlement:

> [29] I do not take that case as laying down a general principle that no valid settlement can be reached directly between the corporation and an injured person at a time when the injuries are not fully resolved. The injuries in Smyth, supra, as indicated by the facts known at the date of settlement were much more significant than those sustained by this plaintiff as known at May 17, 1994. Here, the adjustor had, in the form of the information given him by the plaintiff, a reasonable basis on which to assess the present condition and future prognosis. The plaintiff had sought a settlement in the sense of initiating contact with I.C.B.C. before leaving on her vacation and being in touch with Mr. Vetter in early May to make it clear that she wished to advance a claim. As a result, he went to see her on May 17. In this case, the plaintiff was offered an opportunity to consider the offer and get advice but chose not to do so. She took advantage of the settlement by cashing the cheque and there was no element here of her being overborne by the adjustor as was found to be the case in Smyth. The future possibilities referred to in Smyth were all ones based upon the facts known at the date of settlement. In this case, had it not been for the subsequent events which were neither foreseen nor reasonably foreseeable at the date of settlement, there would be no basis for suggesting that this settlement was unreasonable."[xvii]

He concluded with these observations:

> "When judging the fairness of the bargain thus made as the only means for the subservient party to obtain needed funds, and a predicted exacerbation of the plaintiff's injuries materializes, can the court look at the ultimate damage when assessing whether the early settlement was fair? Put another way, when a doctor suggests the possibility of future difficulties and they become reality, can the trier of fact take the reality into account?
>
> I conclude that in assessing the fairness of the settlement I may look at all the surrounding circumstances as to how it was entered into and I may look only at the future developments reasonably foreseeable when settlement is made. When deciding whether it was appropriate for the adjuster to in effect urge the plaintiff to settle, the trier of fact may consider reasonably foreseeable developments. Thus, when I look objectively at the surrounding circumstances and the reasonably foreseeable developments, the settlement here was not only unfair but also sufficiently divergent from community standards of commercial morality that it should be rescinded.

> The settlement was arrived at by the adjuster's use of her dominant position and the trust she had instilled in the plaintiff. Such behaviour is unfair. The adjuster herself recommended a re-opening of the file but was rebuffed by her manager.
>
> In his argument, Mr. Scherr suggests that $9,000.00 all in was fair and reasonable and thus, the test in Kreutziger, supra, of proof of substantial unfairness in the bargain is missing in the case at bar. I disagree. Even in his argument, Mr. Scherr takes refuge in suggesting that payment of $9,000.00 "without the need to go through discoveries, trial or any litigation, and incur legal fees is frankly fair and reasonable". Put another way, Mr. Scherr is suggesting that the court should look at wholesale prices, not retail prices, when judging the monetary worth of the bargain.
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> He went on in his argument to say a disc injury was not diagnosed until July 1999. "If all the treating physicians missed this diagnosis until 2 full years after the settlement of this claim, how is it reasonable to conclude that an insurance adjuster should have foreseen such diagnosis?" he asks.
>
> Of course the adjuster should not be expected to foresee such a diagnosis, but is it fair to the plaintiff knowing she is anxious for money, to show her a computer printout to justify her offer and then urge her to settle for $8,000.00 "new money"? Not, I find, when the doctor knows of an abnormality in her cervical spine and is suggesting that more time should be taken before a proper diagnosis can be made and that the future may hold further damages occurring. That substantial possibility made the present value of future damages coupled with her past known damages worth a sum substantially in excess of $9,000.00. Thus, I find the settlement to have been substantially unfair."[xviii]

In the result Hutchison J found that the settlement entered into between the parties should be rescinded.

In ***Blackburn v. Eager***, 2002 NSCA 41, 203 N.S.R. (2d) 77 (CA), Blackburn was injured in an automobile accident and she commenced an action for damages. At issue however, was whether a full and final release previously executed by her was valid.

The evidence indicated that Blackburn, who was 42 years old, had a grade 7 education. Shortly after the accident, the insurance adjuster contacted Blackburn with an offer of $3,500 which was later increased to $7,000, an amount which did not take into account

Blackburn's loss of employment as a result of the accident. Blackburn did not seek legal advice prior to accepting the offer.

Based on the medical reports, the adjuster suspected that Blackburn's injuries were far more significant than she realized, but the adjuster decided not to share that information with Blackburn. Significantly, Blackburn subsequently discovered that her injury would be with her for the rest of her life.

The trial judge set the release aside as an unconscionable transaction. He found that it was unconscionable for an insurance adjuster to settle a claim with an unrepresented and unsophisticated party having had no legal advice in circumstances in which the adjuster knew, but the insured did not know, that the prognosis was uncertain and that the claim should not be settled given that uncertainty. He concluded that the adjuster had unconscientiously used Blackburn's ignorance to achieve the advantage of an early and unconscionable settlement.

On appeal, the Nova Scotia Court of Appeal stated:

> "In the present case, the trial judge found as a fact that the adjuster knew but the plaintiff did not know that her recovery would take in excess of six months and that the adjuster used this knowledge in conjunction with the plaintiff's ignorance of this fact, which was central to the value of the plaintiff's claim, to achieve the advantage of an early and substantially unfair settlement. This finding must be viewed in the context of the particular transaction and the particular parties. The transaction was the settlement of a personal injury claim; the parties were an insurance adjuster experienced in handling such claims and the respondent who was a person with little formal education, limited means and, so far as we know, no relevant experience. The judge did not err in finding that the respondent's ignorance of her true prognosis is the sort of ignorance on which a finding of inequality of bargaining position may be based in a case like this one involving the settlement of a personal injury claim between an unsophisticated plaintiff and an experienced insurance adjuster.
>
> . . .

We turn first to the judge's findings concerning what Ms. Scott knew about Mrs. Blackburn's prognosis. …

The tenor of the trial judge's reasons, read as a whole, is that Ms. Scott understood upon reading the medical reports which she obtained in mid December that this was no longer a fairly minor cervical spine case and that the plaintiff's injuries were at least potentially much more serious than Ms. Scott had previously realized. At the very least, she recognized that the case had gone from being one in which the injury had largely resolved to one with many unanswered questions and uncertainties. This inference is supported in the record by the text of the medical reports themselves and by Ms. Scott's haste to effect settlement upon receiving these reports in the few days before Christmas even though her file was incomplete and she had apparently made no attempt to calculate the value of the claim. ...

A trial judge's findings of fact, particularly those based on findings of credibility, should not be interfered with on appeal unless there is some palpable and overriding error. The conclusions reached by the trial judge on this point are reasonably supported by the record before him and this Court would not be justified in setting them aside."[xix]

The court continued:

"The appellants' next point is that the trial judge erred in finding that the settlement was substantially unfair to the respondent.

. . .

… In a case like this one, the basic point is that the settlement was improvident because the prognosis and even the question of causation were too uncertain. …

In Woods v. Hubley (1995), 146 N.S.R. (2d) 97 (C.A.), this Court unanimously upheld the decision of a trial judge, [1995] N.S.J. No. 128, to set aside a release in a personal injury action. On the question of what constitutes a substantially unfair transaction, the Court stated as follows:

> [30] While I agree with counsel for the appellants that the relevant time to evaluate the bargain is the time of the settlement, I do not agree that it is a useful exercise here to look at cases dealing with injuries similar to those described in the medical reports in the adjuster's file. To anybody with the slightest experience in dealing with claims, it would be clear that on November 15, 1989, the respondent was facing an uncertain

> prognosis. While an early and complete recovery was a possibility, chances of long-term problems were so high that the only sound advice to the respondent would be to not settle the claim at an early stage. Only when the true extent of the disability was finally measured by expert medical persons after the effect of the operation and the progress of convalescence became known could one seriously entertain the possibility of settlement. It is really for this reason that the bargain was improvident, substantially unfair and divergent from community standards of commercial morality. No informed person would countenance settlement at such an uncertain stage.
>
> This is the reasoning which underpins the trial judge's conclusion in the present case. The trial judge did not err in law in concluding that, in the circumstances of this case, he could find the transaction to be substantially unfair to the respondent without undertaking a comparison of what damages would have been payable to her at the date of the settlement.
>
> In the result, we see no error of law nor any reviewable error of fact in the decision of the trial judge to set aside the release as unconscionable..."[xx]

The jurisprudence also contains judgments with a contrary view. For example, in ***Kassian v. Hill***, 2002 ABQB 106, 305 A.R. 148 (QB) the plaintiff, who had been rear-ended, settled her personal injury claim 2 days after the accident for $2,000.00. Immediately after the accident, she felt shaken, developed headaches and felt sore in her shoulders and arms. Her doctor suggested anti-inflammatory medication and exercises and suggested she return in two weeks if she was not well. The plaintiff thought the doctor had diagnosed a concussion, but the doctor said he diagnosed a strained neck.

The plaintiff accepted the settlement the first time she met with the adjuster. Neither party had a medical report but Ms. Kassian had advised the adjuster that she was sore and had a headache. Ms. Kassian never cashed the settlement cheque, and two days later her lawyer advised that they took the position the settlement was unconscionable.

The plaintiff Kassian testified that she suffered from headaches, neck, shoulder and back pain, depression, anxiety and fibromyalgia for years following the accident, and that she never was able to return to work.

With respect to the question of whether there was a legally binding settlement and release, Kenny J first examined the evidence and found that the plea of *non est factum* was not applicable in the case as the document that Ms. Kassian intended to sign and the document that she did sign were not radically different.

Then, turning to the defence of unconscionability, Madam Justice Kenny stated:

> "The test outlined in *Morrison* appears to be the test that most Courts utilize. In *Morrison* the party invoking the document must show proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. The Supreme Court of Canada has indicated that there must be an overwhelming imbalance in the relationship between the parties.
>
> I feel it is appropriate to utilize the original form of the *Morrison* test and incorporate into the second step of the test the community standards of commercial morality test. In utilizing *Harry*, it is necessary for the Court to examine other Canadian cases with similar fact patterns and relevant legislation to determine whether or not there has been an improvident bargain.
>
> . . .
>
> In looking at whether or not in this particular case there is an overwhelming imbalance in the relationship between Ms. Kassian and the insurance adjuster, I note her age, education level, business experience, the fact that she previously had settled a personal injury claim, her lack of dire financial need and her intelligence. These factors indicate to me that she was capable of understanding the settlement negotiations and the consequences of signing the release and I do not find, therefore, that there was an overwhelming imbalance in the relationship between the parties.
>
> [With respect to whether the bargain can be said to be an improvident one] I look to the events that took place prior to the meeting between Ms. Kassian and Mr. Schmidt as well as to the factors surrounding that meeting and particularly the time the release was signed.
>
> Ms. Kassian did not indicate to Mr. Schmidt that she had already seen a doctor. He asked her how she was feeling and she indicated that she was feeling stiff and sore. He indicated to her that this would likely continue for a few more weeks. She did not indicate to him that she had been to the

> Medi Centre and had been told that she had a strained neck. She simply indicated that she was sore and had a headache.
>
> . . .
>
> In determining whether or not the bargain was unreasonable one must look at the amount of the settlement. Here the amount paid was $2,000. A review of the case law around 1998 would indicate that a settlement of $2,000 for prescriptions, loss of time from work (which turned out to be significantly less than the time indicated by Ms. Kassian to Mr. Schmidt) general inconvenience, pain, soreness and a headache was not unreasonable. There is no question that, in hindsight, it is at the low range of compensation for such injuries. The key is in looking at the matter as it stood at the time of the signing of the release, not looking forward as the conditions in the future were unknown to both Ms. Kassian and the Mr. Schmidt. Subsequent information would show that the injuries were somewhat more serious than contemplated either by Ms. Kassian or Mr. Schmidt at the time of signing of the release."[xxi]

In light of all of the foregoing, Madam Justice Kenny concluded that the doctrine of unconscionability should not apply in the case as the plaintiff Kassian had not proven that there was an inequality in bargaining positions between herself and the adjuster. Moreover, she found that the bargain itself was not improvident:

> "…Ms. Kassian had been seen by a physician who had identified her injury as a neck strain. She told the adjuster about her injuries. Although the adjuster made the offer only two days after the accident based on limited information, the settlement was a reasonable amount for her injuries and could not be said to be an improvident bargain on the facts as they stood at that time. The adjuster told Ms. Kassian that the settlement was for lost wages, prescriptions and inconvenience. He did not mislead her about the terms of the agreement. I therefore find that the bargain does not diverge from the community standards of morality test."[xxii]

Fountain v. Katona, 2007 BCSC 441, [2007] B.C.J. No. 639 (SC), is a decision in a similar vein. There, Fountain was injured when his vehicle was struck from behind by Katona's vehicle. The Insurance Corporation of British Columbia ("ICBC"), the insurer of Katona's vehicle, concluded that he was entirely responsible for the accident and paid over $6,000 to have Fountain's vehicle repaired.

In addition, Fountain claimed compensation for personal injuries suffered in the accident, which included a concussion, a whiplash injury to his neck, and some stiffness and pain in his lower back. About four months after the accident, Fountain resolved his claim with ICBC and accepted $3,060 in full and final settlement.

As a condition of settlement, Fountain signed a release of all claims against both Katona and ICBC. However, the day after he signed the release Fountain contacted Dyke, the adjuster assigned to handle his claim, to advise that he had changed his mind, that he no longer believed that $3,060 was sufficient compensation and would not be cashing ICBC's cheque. The adjuster said it was too late for Mr. Fountain to change his mind.

Fountain later retained counsel and sued Katona for damages arising out of the accident. His medical prognosis had also been reassessed and it now appeared that his probability for recovery was slim and that he was likely a future chronic pain sufferer.

The case was heard as a summary judgment application and the validity of the release was in issue. Fountain maintained the release was void because it was either an unconscionable bargain or because it was obtained through undue influence by the ICBC adjuster. He also argued that the validity of the release should be left to the trial judge, and not dealt with by way of a summary judgment proceeding because there were material facts in dispute that had to be resolved on the basis of the credibility of the witnesses.

Bruce J reviewed the facts giving rise to the application and ruled that the matter could be resolved using the summary judgment process. The Justice then said with respect to the allegation that there was an inequality in bargaining positions:

> "Although the disparity of bargaining positions in this case is not as obvious as in the circumstances before the court in ***Smyth v. Szep*** (1992), 63 B.C.L.R. (2d) 52, [1992] 2 W.W.R. 673 (C.A.) or ***Cougle v. Maricevic*** (1983), 64 B.C.L.R. (2d) 105, [1992] 3 W.W.R. 475 (C.A.), I am satisfied that Ms. Dyke possessed clear advantages over Mr. Fountain in the assessment and negotiation of his claim for insurance benefits.

> Mr. Fountain was intelligent and well educated, but he had no knowledge of insurance claims and had no understanding of the kinds of damages he could claim. Ms. Dyke, on the other hand, was a very experienced and knowledgeable adjuster who had the resources of a large insurance corporation at her disposal. Mr. Fountain had no real understanding of the nature of his injury. He had not sought advice from a lawyer and had been to one physician on a single occasion since the accident. While Mr. Fountain was not desperately in need of money, he had minimal income at the time and had apparently misunderstood Ms. Dyke's advice that medical and rehabilitation expenses could be billed directly to ICBC. Thus, I find there was a disparity in their bargaining positions in terms of available resources, knowledge, experience, and information."[xxiii]

Bruce J concluded that, based upon the circumstances known to the adjuster at the time of the settlement, as well as the facts she ought to have known, the settlement was not substantially unfair or the transaction was not sufficiently divergent from community standards of commercial morality that it should be rescinded:

> "While it is true that Mr. Fountain continued to be symptomatic, a settlement with an unrepresented claimant will not necessarily be invalid simply because all of the symptoms stemming from any injuries have not been fully resolved: ***McCullogh v. Hilton*** (1998), 63 B.C.L.R. (3d) 272 at para. 29, 110 B.C.A.C. 293 (C.A.). Prior to concluding the settlement discussions on January 18th, Ms. Dyke asked Mr. Fountain how he was and received a response that was unlikely to have raised any suspicion that his injury was more than a mild to moderate whiplash. … Thus, I find that Ms. Dyke did not act improperly or unfairly when she settled Mr. Fountain's ostensibly mild or moderate whiplash injury before all of the symptoms had subsided.
>
> Looking at this matter in retrospect, Mr. Fountain acknowledged in his e-mail to Ms. Dyke on January 19th, the day after he signed the release, that he had been too busy with work since the accident to seriously investigate his injuries or to seek treatment. He also acknowledged that he had failed to consider the possible long term consequences of his injuries before accepting the settlement. Mr. Fountain's words are clearly born out by his conduct. After seeing Dr. Adilman a few days after the accident, he had one massage therapy session, which was not disclosed to Ms. Dyke, over a period of four months. Further, Mr. Fountain was either travelling or working throughout this entire period. He also made very little effort to contact Ms. Dyke to discuss his recovery or his desire to obtain treatment

for ongoing symptoms. Ms. Dyke initiated almost all the communications after the initial call setting up the claim.

There is evidence that Mr. Fountain's injuries turned out to be more serious than a mild to moderate whiplash. This evidence only came to light, however, after he signed the release and began seeing Dr. Surka. I have the greatest sympathy for Mr. Fountain in these circumstances; nevertheless, this is not a case where he was rushed into an unfair settlement by an overbearing adjuster. Nor is this a case where Ms. Dyke misled Mr. Fountain about his injuries or his right to claim compensation for pain and suffering. It was Mr. Fountain's lack of attention to the matter of his injuries and the treatment of those injuries that led to his decision to accept the settlement offer. Absent proof that the bargain struck was unconscionable, the Court must enforce the contract. There is an obvious need to maintain consistency and predictability in commercial transactions." [xxiv] (emphasis added)

Finally, and with respect to Mr. Fountain's contention that the release had been obtained as the result of undue influence, Bruce J stated:

"Mr. Fountain argues that he was induced into signing the release by an adjuster who took advantage and assumed dominion over him through his vulnerability and diminished capacity with respect to his financial and residential insecurity, his ignorance as to his rights, his ignorance of his medical condition, his groggy and unclear mental state, and his desperation for therapy to assist with his recovery.

For the reasons outlined above, I do not accept Mr. Fountain's submission. Mr. Fountain clearly admitted that he understood the agreement he was signing and that his settlement was full and final. There is no evidence capable of attacking the sufficiency of his consent to this settlement.

Further, a claim of undue influence requires some form of oppression, coercion or abuse of power or authority: ***Geffen v. Goodman Estate***, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211. If Mr. Fountain was aware of Ms. Dyke's superior knowledge and power as an ICBC adjuster, there is no evidence that she abused this power by overbearing his will and thereby compelling him to accept the settlement. …

. . .

Mr. Fountain also claims that the decision to accept the offer was in part due to Ms. Dyke's failure to provide him with information about his legal

> rights. While the fraudulent withholding of material facts may amount to undue influence, there is no evidence that Ms. Dyke deliberately kept Mr. Fountain in the dark about either his medical condition or his right to claim compensation for pain and suffering. Significantly, it was Mr. Fountain who downplayed his symptoms to Ms. Dyke. …"[xxv]

In the result, Bruce J found no reason to set aside the release and the plaintiff Fountain's claim against the defendant and the insurance company was dismissed.

Two final judgments in a similar vein:

Townsend v. Hull, 2000 BCSC 1552, [2002] B.C.J. No. 2175 (SC), involved an action by Townsend to set aside a settlement made with the Insurance Corporation of British Columbia ("ICBC") with respect to damages claimed as a result of injuries Townsend sustained in a motor vehicle accident.

At the time of the accident, Townsend was 18 years old. She met with the insurance adjuster, Benson, on several occasions prior to the settlement and was anxious to conclude the settlement. Benson reviewed all of Townsend's medical reports. The reports indicated that she had suffered soft tissue injuries that continued to cause her some difficulty, but that a full recovery was likely within several months.

The settlement, made six months after the accident, took into account the injuries, recovery period, and the fact that Townsend had returned to work shortly after the accident. Interestingly though, both her mother and her boyfriend had urged Townsend to wait until her injuries were healed and to see a lawyer prior to executing the settlement agreement.

Townsend later sought to set aside the settlement on the ground of undue influence.

In dismissing Townsend's action, Catliff J confirmed that it could not be said that the adjuster Benson and Townsend were in positions of inequality. While Townsend was a young woman and Townsend was an experienced insurance adjuster, Townsend was also

found to be an intelligent, independent-minded, mature young woman, fully capable of making decisions concerning her own welfare. Catliff J thus concluded that the adjuster did not take advantage of his knowledge or experience while attempting to settle the matter fairly.

Catliff J further concluded that based on the medical information available at the time of settlement, and the factors surrounding the reduction of the claim for contributory negligence, it could not be said that the settlement was substantially unfair.

In ***Burkardt v. Gawdun***, 2004 SKCA 128, 254 Sask. R. 271 (CA), the 21-year-old plaintiff had suffered injuries in three separate motor vehicle accidents in three separate years. She settled the first claim prior to her second accident.

In her second accident she injured her lower back. She called the adjuster to suggest settling that claim, but the adjuster told her settlement was premature. She then had her third motor vehicle accident. Shortly thereafter the adjuster called her to settle her claim for neck pain. The matter was settled and paid.

The plaintiff Burkhardt then sued the insurer asking that the settlement be set aside on the ground it was an unconscionable transaction. The trial judge accepted her evidence that the adjuster had indicated she could not receive benefits from the third claim until the second had been settled, found that Burkhardt had been misled, and declared that the settlement was unconscionable.

On appeal Sherstobitoff JA (for the court) concluded that the trial judge had erred in accepting Burkhardt's evidence over that of the adjuster. According to the appellate court, inequality of bargaining power was not established on the facts. Though the release to insurer was signed before maximum medical improvement had been reached, that did not render the bargain improvident. There was no misuse of power to induce the settlement. It was reasonable to settle for the amount agreed upon based on the

information that was available and the standard insurance formula that would be used for any claimant with similar injury.

END

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[i] ***Pitcher v. Downer***, 2013 NLTD(G) 82, 338 Nfld. & P.E.I.R. 39 (SCTD), QL at para. 59; ***Davis v. Cooper***, 2010 ONSC 4230, [2010] O.J. No. 3309 (SC), QL at para. 11

[ii] Carswell at paras. 217-219

[iii] *Canadian Encyclopedic Digest* – Damages, VIII.4.(a), Carswell at para. 629

[iv] QL at paras. 14-15

[v] QL at paras. 64-67

[vi] QL at para. 21

[vii] ***Hanna v. Polanski***, 2012 ONSC 3229, [2012] O.J. No. 2459 (SC), QL at paras. 27-30; ***Floyd v. Couture***, 2004 ABQB 238, 349 A.R. 1 (QB), QL at paras. 111-122; ***McCullough v. Hilton***, [1998] B.C.J. No. 1928, 63 B.C.L.R. (3d) 272 (CA), QL at paras. 26-30

[viii] QL at paras. 5-6

[ix] QL at paras. 7-10

[x] QL at paras. 12-14

[xi] QL at paras. 5-7

[xii] QL at paras. 8-10

[xiii] QL at paras. 11-12

[xiv] QL at paras. 14-18

[xv] QL at paras. 8-9

[xvi] QL at paras. 10-14

[xvii] QL at paras. 17-18

[xviii] QL at paras. 19-24

[xix] QL, at paras. 45-53

[xx] QL at paras. 56-61

[xxi] QL at paras. 37-44

[xxii] QL at para. 45

[xxiii] QL at paras. 13-14

[xxiv] QL at paras. 32-34

[xxv] QL at paras. 35-39