



# THE SANCTITY OF RELEASES FROM A CANADIAN PERSPECTIVE

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The best method for determining if a release is valid is to assess the manner in which a release may be rescinded. This paper will outline some of the ways in which releases have been set aside by the Canadian Courts as well as provide some suggestions on how to ensure a release is effective in concluding a claim.

### 1. WAYS IN WHICH RELEASES ARE SET ASIDE

A litigant may attempt to have a release set aside by demonstrating one of three positions:

- (a) Incorrect Terms;
- (b) Mutual or Unilateral Mistake of Fact;
- (c) Unconscionable Bargain;

#### (a) Incorrect Terms (*Non Est Factum*)

In order to succeed on this argument, the person complaining must establish that the release should be avoided under the ordinary principles of contract law. The plaintiff must establish that the release is something different than what the parties agreed upon.

In *Clancy v. Lindquist*, a recent decision, the plaintiff successfully argued that her prior release was not a valid action against the second of two drivers. Clancy's spouse was killed in a two vehicle motor vehicle accident and she signed a release in return for ICBC death benefits. She then initiated an action against the other driver, believing that the other driver was insured by someone other than ICBC. ICBC relied upon the release to prevent the continuance of the lawsuit.

Although the ICBC adjuster included a release of the claim, the adjuster did not explain its concept to the claimant. The Court accepted the plaintiff's evidence that she did not fully understand what she was signing and the release was set aside. This decision evidences a heavy onus upon insurance adjusters and their representatives to ensure that a plaintiff fully understands the nature and effect of a release *before* it is signed.



(b) Mutual or Unilateral Mistake of Fact

Also known as a “common mistake of fact on a matter of fundamental importance”, this doctrine will apply to set aside a release if it can be established that the mistake existed at the date the release was agreed upon. It is important to note the Canadian caselaw is clear that the mere fact a plaintiff made a mistake is *insufficient* to set aside a release. The Courts must examine more than the mere mistake to ascertain if the agreement was unjust or inequitable.

Unfortunately, what constitutes an “unjust or inequitable” agreement has not been clearly established by the Canadian Courts. The Courts have essentially blurred the doctrine of “Mistake of Fact” with the principles of “Unconscionable Bargain”.

(c) Unconscionable Bargain

Inequality as between the parties must be shown to have existed. Early Canadian decisions emphasized the importance of a finality of a release. The Ontario High Court (*Hoyer v. Toronto Transportation* (1952) O.W.N. 261) warned of the danger in cases that were settled in the most solemn and formal manner, and then reopened by the mere claim of a plaintiff that he did not realize the seriousness of his injuries at the time of the settlement.

The Saskatchewan Court of Appeal went a step further (*Hurman v. Canadian National* (1957) 23 WWR) by finding that the validity of the release depends not on whether the injured person knew what was wrong with him or her and the possibility of further problems, but whether he or she *understood* that the release covered subsequent and consequential injuries.

Despite judicial enforcement of the validity and finality of a release, as recently as January 1995 the B.C. Supreme Court reinforced the heavy onus upon insurance adjusters to explain fully the extent of the settlement to the Releaser. In *Dickens v. Parker* ([1995] B.C.D. Civ.3389-01) the B.C. Supreme Court found that the Plaintiff did not understand her entitlement to claim damages for pain and suffering and had no concept of future earning capacity. For that reason, the release was rescinded.

The B.C. Supreme Court has stated that a situation where one of the parties is an experienced insurance adjuster and the other a lay person will *not* create an inequality (*Mix v. Cumings* [1990] B.C.D. Civ.1965-01). However, many Plaintiffs have been successful in B.C. in setting aside a release on this basis alone.



For example, the B.C. Court of Appeal in *Smyth v. Szep* ([1992] B.C.D. Civ. 3359-05) concluded that to establish equality among the parties, the insurance adjuster must not make an improvident offer without a true appreciation the value of the claim. The adjuster must have acted fairly if he or she had no factual basis on which to assess the plaintiff's present condition or future prognosis.

The *Smyth* decision also makes clear that, once an inequality of the parties has been established, the defendant then bears the burden of proof to show that the bargain was fair and reasonable. If it cannot be established that the bargain was fair and reasonable, the release will be rescinded.

One of the reasons the Courts are more willing to rescind releases is due to the heavy onus placed upon the public insurer (ICBC) to deal with plaintiffs fairly. Despite the Supreme Court of Canada's decision in *Fletcher v. Manitoba Public Insurance* (1990 74 D.L.R. 4th 636), wherein it held that the public insurer's duty is less onerous than that of a private agent or broker, the Courts continue to assess a release and the facts surrounding the release based on the following principle:

"Was the transaction (involved in obtaining the release) sufficiently divergent from community standards of commercial morality that it should be rescinded?"

Regardless of whether the release was obtained by a broker, agent, private or public insurer, the facts surrounding how the release was obtained is the sole test applied by the Courts in considering whether or not a release should be set aside.

## **2. STEPS TO AVOID A RELEASE BEING SET ASIDE**

There is a stronger probability that a release will be upheld if the following steps are taken:

- (a) Let the plaintiff seek the settlement

In cases where the insurer has sought out the plaintiff and offered a figure to resolve a claim, the Courts appear to consider this step as coercing the plaintiff to settle when they otherwise might not have. However, as insurers wish to avoid an ongoing claim that could and should be settled, perhaps the more appropriate approach would be to advise the plaintiff that the insurer wishes to settle when the plaintiff is prepared to do so. This approach allows the plaintiff to "seek out" the insurer when they wish to settle.



(b) Allow the plaintiff an opportunity to consider the settlement

Resist the pressure to obtain a plaintiff's signature on a release at the first settlement meeting. Even if the plaintiff does not feel the need to do so, instruct the plaintiff to take the settlement offer away from the meeting to consider it for a period of time before he or she signs the release.

(c) Recommend the plaintiff obtain legal advice

Always advise the claimant of their option to obtain legal advice prior to accepting the settlement. If they refuse legal advice, obtain confirmation of their refusal to obtain legal advice on the release.

(d) Identify all the parameters of the claim

One of the main reasons releases are rescinded is because a claimant subsequently discovers a "new" injury or financial loss that they were not aware of at the time of signing the release. If the claim is such that there is a possibility of ongoing or unknown problems, advise the plaintiff to seek advice from their medical practitioner. Ensure that the terms of the release include reference to the fact that the plaintiff has sought medical advice regarding ongoing and/or unknown problems and is prepared to settle based on the advice sought.

(e) Education of the Plaintiff

While no one in the insurance industry wishes to educate a plaintiff on the merits of his or her claim, a release has easily been set aside when the plaintiff did not understand the essential elements of their claim, such as "pain and suffering" or "loss of future earning capacity" (*Dickens v. Parker*).

If such a plaintiff does not appear to understand these concepts, the insurance representative should make an effort to educate the plaintiff and, preferably, advise the plaintiff to seek legal advice.

### 3. CONCLUSIONS

The Canadian Courts continue to emphasize the heavy onus placed upon insurance representatives to treat unrepresented claimants in a fair and reasonable manner. What constitutes "fair and reasonable" is constantly being tested, based on the merits of each case.



Whether the insurer is a private or public body, the level of inequality at the bargaining table is always assessed against the insurer. In order to “level the playing field”, the insurer must not only establish that it has taken steps to do so, but must be satisfied that the plaintiff fully understood these steps had been taken for their benefit.

There are numerous steps that can be undertaken to level the inequality of bargaining, only some of which have been identified in this paper. The more effort that is undertaken to explain and inform, the reduced probability a release will be set aside.