Memo To: Doble & Doble LLP, Mark Dobl
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Jurisdiction: Ontario, Canada
Date: July 21, 2020
Regarding:

Issue

Does the settlement of an action arising from a negligently drafted contract prevent the client from being able to bring a solicitor's negligence claim against the lawyer who drafted a contract?

Conclusion

Only two decisions could be identified that discuss whether the settlement of a contractual dispute prevents the client from bringing a solicitor's negligence claim against the lawyer who drafted the contract.

In *Roberge v. Huberman*, the defendant was a lawyer who had drafted a separation agreement for the plaintiff when she separated from her husband. The separation agreement provided that the husband was to sell his interest in the matrimonial home for $30,000, and that the plaintiff was to receive 50 percent of the net proceeds of litigation involving the family company. Upon divorce, there would be no further claims by either spouse. The litigation involving the family company resulted in an award of $165,817. However, the proceeds were paid to the company. The husband ignored his obligation under the separation agreement to divide the proceeds equally with the plaintiff. The plaintiff initiated divorce proceedings against her husband, seeking a compensation order in respect of her 50 percent of the litigation proceeds. The husband counter-petitioned, claiming maintenance and alleging that the settlement agreement was unfair. The plaintiff and the husband settled the divorce proceedings. The settlement provided that the plaintiff would

indemnify the husband against any award relating to the litigation proceeds. The plaintiff then sued the defendant, alleging solicitor's negligence in preparing the separation agreement. She sought to recover from the lawyer an amount equivalent to 50 percent of the litigation proceeds. At the close of the plaintiff's case, the defendants brought a non-suit motion, arguing that the plaintiff had not adduced sufficient evidence in order to make out a claim. The British Columbia Supreme Court framed the issue as whether or not the plaintiff could prove a loss after having "bargained away" her claim. The Court found that once the plaintiff had released all her claims against the husband, she was no longer in a position to prove a loss as a result of the negligence of her lawyer. She had bargained away her claim for a share of the litigation proceeds by negotiating a settlement with her husband.

However, the British Columbia Court of Appeal reversed the dismissal of the plaintiff's action and remanded the matter back to trial. The Court of Appeal found that the trial judge had encroached on the jury's function by finding that the concessions in the divorce settlement were equal in value to one half of the litigation proceeds because it required the trial judge to assess the quality of the evidence presented by the plaintiff, which is not permitted on a non-suit motion. The Court of Appeal's judgment is focused solely on the limitations of a judge in a non-suit motion and made no comments on the merits of the finding that the settlement with the husband precluded the plaintiff's claim against the lawyer. (*Roberge v. Huberman*).

In *Ieradi v. Gordin*, the Ontario Superior Court of Justice refused to dismiss a negligence action against a law firm who had drafted an agreement where earlier litigation between the parties to the agreement had settled. The defendant lawyers had represented the plaintiff in an agreement to purchase shares of a corporation. The transaction failed to close. The plaintiff argued that it failed to close because the defendants had failed to tender. However, the plaintiff brought an action against the vendors before initiating the action against the lawyers. The plaintiff settled the action against the vendors, and signed a release stating that he would not sue any person that may claim over for relief, indemnification or contribution from the vendors. The plaintiff then brought the action against the lawyers for negligence. The lawyers commenced a third party claim against the vendors. The vendors brought a motion to have the third party claim stayed or dismissed, which was granted as a result of the "no action" clause of the release. The lawyers also brought a motion to have the main action against them stayed, also relying on the "no action" clause. The Court dismissed the lawyers' motion, holding that the negligence action against the lawyers was

not contemplated by the release. The Court made no mention of the arguments raised in *Roberge* that the settlement eliminated the client's ability to prove damages.

No further decisions could be identified that discuss whether the settlement of a dispute over a contract precludes an action for solicitor's negligence against the drafter of the contract. However, decisions involving an adjudication of the contractual dispute, as opposed to a settlement, are also relevant, as settlements are the same as court orders for the purposes of *res judicata*. (*Coady v. Boyle*).

Law

In *Roberge v. Huberman*, 1995 CanLII 819 (BC SC) ("*Roberge*"), the defendant was a lawyer who had drafted a separation agreement for the plaintiff when she separated from her husband. The separation agreement provided that the husband was to sell his interest in the matrimonial home for $30,000, and that the plaintiff was to receive 50 percent of the net proceeds of litigation involving the family company. Upon divorce, there would be no further claims by either spouse. The litigation involving the family company resulted in an award of $165,817. However, the proceeds were paid to the company. The husband ignored his obligation under the separation agreement to divide the proceeds equally with the plaintiff. The plaintiff initiated divorce proceedings against her husband, seeking a compensation order in respect of her 50 percent of the litigation proceeds. The husband counter-petitioned, claiming maintenance and alleging that the settlement agreement was unfair. The plaintiff and the husband settled the divorce proceedings. The settlement provided that the plaintiff would indemnify the husband against any award relating to the litigation proceeds. The plaintiff then sued the defendant, alleging solicitor's negligence in preparing the separation agreement. She sought to recover from the lawyer an amount equivalent to 50 percent of the litigation proceeds. At the close of the plaintiff's case, the defendants brought a non-suit motion, arguing that the plaintiff had not adduced sufficient evidence in order to make out a claim. The British Columbia Supreme Court found that once the plaintiff had released all her claims against the husband, she was no longer in a position to prove a loss as a result of the negligence of her lawyer. She had bargained away her claim for a share of the litigation proceeds by negotiating a settlement with her husband:

[41] The crucial issue is whether or not the plaintiff can prove a loss now that she has bargained away her claim against Bernie and the Company. I have concluded that she cannot. Thus, despite the plaintiff's argument that she "recovered nothing" from Bernie and the Company at the time of the divorce settlement, I find that she cannot establish any damages arising from Huberman's breach of duty (assuming such a breach could be established here).

[42] The plaintiff's action against Huberman cannot succeed for two reasons. The first, even assuming that Huberman breached the standard of care applicable in the circumstances as they existed on August 29, 1988, is that once Donna released any claim against Bernie and the Company on February 8, 1993, she was no longer in a position to prove a loss as a result of that alleged negligence on Huberman's part. Except in a claim based on negligent misrepresentation (see, *Howard v. Cunliffe* (1973), 36 D.L.R. (3d) 212(B.C.C.A.), at p. 221; and *Rieger v. Croft & Finlay* (1992), 69 B.C.L.R. (2d) 288 [[1992] 5 W.W.R. 700] (S.C.), at p. 299), the burden of proving damages always remains on the plaintiff.

[43] It is not enough for the plaintiff to simply establish that she did not receive the share of the Hansen litigation proceeds to which she was entitled under the separation and share purchase agreements and then argue that Huberman is responsible. It was up to her to prove what steps could and should have been taken, that she would have taken one or more of those steps, and that the loss would thereby have been avoided (see, *Haag v. Marshall* (1989), 39 B.C.L.R. (2d) 205 [[1990] 1 W.W.R. 361] (C.A.), at pp. 215-16).

[44] Donna's counsel in the divorce proceedings did what she could to preserve her claim for 50 percent of the net proceeds to the Company of the Hansen litigation. But her conclusion that if Bernie was judgment proof, as he appeared to be, no claim over by either Einarsson or Huberman was practical or likely, was simply wrong.

[45] Donna bargained away her claim for a share of the proceeds of the Hansen litigation in order to preserve the separation agreement and avoid the real danger of

> a permanent maintenance order against her in Bernie's favour. She fixed the value of that exposure at the amount of her claim to the Hansen litigation proceeds. While the defendants may have been exposed until February 8, 1993, that exposure ended with her inability to prove any damages flowing from their alleged negligence.
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> [46] In *The Law of Torts*, Fleming, 8th ed. (1992), these words appear at p. 258:
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> ... a claimant may not have more than full satisfaction for his injury and therefore satisfaction, partial or complete, from one tortfeasor (whether pursuant to judgment or settlement) discharges pro tanto the liability of all others. The rule ... applies ... to all concurrent tortfeasors alike, be they joint or several.
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> [47] By discharging her claim against Bernie for valuable consideration, Donna released both Huberman and Einarsson from any claim she may have had against either or both of them up to that time.

The second reason the Court dismissed the plaintiff's claim was because of the plaintiff's agreement that she would indemnify her ex-husband for any possible claim over. The defendant lawyers had third partied her husband. Therefore, granting her judgment against the lawyers would result in her having to indemnify her husband for the same amount:

> [51] I find, on the evidence of Tova Kornfeld, counsel for Donna in the divorce proceedings and her witness on this trial, that Bernie insisted on being protected against any possible claim over, as well as being released by Donna directly. Donna so agreed, in exchange for Bernie dropping his claim for maintenance and his effort to have the separation agreement set aside.
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> [52] Thus, the circle is complete. If Donna recovers against the defendants, they are entitled to contribution and indemnity from Bernie under their third party proceedings. He, in turn, is entitled to indemnity from Donna under his third party notice, based on the settlement terms agreed to by her counsel on settlement of the corollary issues in the divorce proceeding.

However, in *Roberge v. Huberman*, 1999 BCCA 196 (CanLII), the British Columbia Court of

Appeal reversed the dismissal of the plaintiff's action and remanded the matter back to trial. The plaintiff argued on appeal that the trial judge had erred in concluding that the benefit she received under the settlement agreement fully satisfied her claim to half of the litigation proceeds, as well as in concluding that she could not prove a loss because she was ultimately responsible for any judgment she might obtain. Specifically, the plaintiff argued that both conclusions required findings of fact not permitted on a non-suit motion. The Court of Appeal found that the trial judge had encroached on the jury's function by finding that the concessions in the divorce settlement were equal in value to one half of the litigation proceeds because it required the trial judge to assess the quality of the evidence presented by the plaintiff, which is not permitted on a non-suit motion:

> [36] The question of whether there is any evidence on which a jury acting reasonably could find for the plaintiff is one of law. I consider the trial judge crossed the thin line, encroached on the jury's function, and thus erred in law when he assessed Ms. Roberge's case as wanting for proof of a loss to which Huberman's negligence, if any, had contributed.
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> [37] At the root of the trial judge's finding that Ms. Roberge suffered no damage from Huberman's alleged negligence is his assumption that the value of the concessions she obtained in the February 1993 settlement equaled the amount of her claim to the Hansen action proceeds. This conclusion may have flowed from Huberman's pleading that "the doctrine of accord and satisfaction have operated to discharge the plaintiff's alleged entitlement to the proceeds of the [Hansen] litigation...". Comments were made on behalf of Huberman during the trial that 'as a matter of law' Ms. Roberge has no loss because 'she bargained away her rights' under the agreement in settlement of something else of value, that is the matrimonial actions. Counsel did not seek to uphold that view of the law on this appeal.
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> [38] No direct evidence was presented to the court about the value of Mr. Roberge's maintenance or reapportionment claims. Counsel for Huberman submits that the indemnity provision in the settlement agreement supports the conclusion that the two values are the same. That is true. Indeed, that might well be the finding of fact.

> [39] However, a finding that the concessions in the divorce settlement were equal in value to one half the Hansen proceeds is not a necessary inference from the plaintiff's evidence. Ms. Roberge clearly thought otherwise. She testified that she had received no money in satisfaction of her claim to one half the Hansen action proceeds; she gave the indemnity to a person who said he was broke, although she did not believe him; she settled so she could sue Mr. Huberman because he did not protect her from a person whom he knew she did not trust.
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> [40] The finding that Ms. Roberge had received full satisfaction for her claim against Mr. Roberge, and thus against Huberman, required the trial judge to assess the quality of the evidence presented by Ms. Roberge. This assessment is not permitted on a no evidence motion.

The Court of Appeal's judgment is focused solely on the limitations of a judge in a non-suit motion and made no comments on the merits of the finding that the settlement with the husband precluded the plaintiff's claim against the lawyer.

However, in *Ieradi v. Gordin*, 2007 CanLII 48637 (ON SC), the Ontario Superior Court of Justice refused to dismiss a negligence action against a law firm who had drafted an agreement where earlier litigation between the parties to the agreement had settled. The defendant lawyers had represented the plaintiff in an agreement to purchase shares of a corporation. The transaction failed to close. The plaintiff argued that it failed to close because the defendants had failed to tender. However, the plaintiff brought an action against the vendors before initiating the action against the lawyers. The plaintiff settled the action against the vendors, and signed a release stating that he would not sue any person that may claim over for relief, indemnification or contribution from the vendors. The plaintiff then brought the action against the lawyers for negligence. The lawyers commenced a third party claim against the vendors. The vendors brought a motion to have the third party claim stayed or dismissed, which was granted as a result of the "no action" clause of the release. The lawyers also brought a motion to have the main action against them stayed, also relying on the "no action" clause. The Court dismissed the lawyers' motion, holding that the negligence action against the lawyers was not contemplated by the release:

[24] In the main action, the claim against the defendant solicitors, particularly the defendant, Philip Gordin, is for negligence in failing to act on the instructions of the plaintiff to tender for the closing of the transaction. As noted earlier, the third party claim is a claim over by the defendants against the third parties. By its nature, it proposes that if the solicitors were negligent, that negligence is the fault of the third parties. The defendant solicitors cannot pass their negligence over onto the third parties. In *Owen v. Zosky*, [2000] O.J. No. 4838 (Ont. C.A.), the plaintiff sued her dentist for negligence arising out of his participation in an implant procedure. Part-way through the prosecution of the action, she discharged her lawyer and then proceeded to settle the case. She signed a release protecting the dentist and any third party who might claim contribution or indemnity from the dentist. The plaintiff then commenced a second action against the lawyer for negligence in the conduct of the first action. She also sued a second dentist who had played a role in the implant procedure for negligence in his advice and care. Both the lawyer and the second dentist instituted third party proceedings against the first dentist claiming contribution and indemnity for any damages to the plaintiff for which they might be liable. This raised the issue of the effectiveness of the release. The Court noted:

[The lawyer's] third party claim is questionable on its face as [the first dentist] is clearly not responsible for [the lawyer's] professional negligence. However, [the second dentist's] claim appears to potentially fall within what was contemplated by the release, in affording protection to those who may have third party claims against the [first dentist].

(*Owen v. Zosky*, *supra*, at para. 4)

[25] In the case before the Court, if the solicitors were negligent, it is their actions or failure to act which created the liability. The third parties cannot be liable for the professional negligence of the lawyers. If the defendant solicitors were unable to tender because the vendors could not provide clear title and, as a result, the necessary financing was not available, the solicitors were not negligent. This does not lead to a claim over in which the third parties, the vendors, are liable for the negligence of the defendant solicitors. The proposition that the solicitors were

unable to tender as a result of the failure of the third parties to provide clear title is a defence to the plaintiff's claim. The problem for the defendant solicitors is that, as a defence, it does not result in a third party action and does not attract the protection offered by the release.

[26] On this basis, it is appropriate for the third party proceedings to be stayed to ensure that the third parties are provided with the benefits of the settlement they made, but that the main action be sustained and allowed to proceed. Where a third party has no exposure in contribution and indemnity to any successful claim by a plaintiff, the court need not dismiss or stay the main action pursuant to a covenant not to sue. In *Holthaus v. Bank of Montreal* (2000), 131 O.A.C. 119 (Ont. C.A.), the plaintiffs suffered damages through the improper cancellation of certain share certificates. Accordingly, they commenced an action against a brokerage firm claiming damages for the loss of the shares. The action was settled. As part of the release, the plaintiffs agreed not to make any claim against "any other person, or corporation, who might claim contribution or indemnity from the Release by virtue of the said claim or proceeding". The plaintiffs then commenced a second action claiming damages against the bank. The bank, in turn, issued a third-party claim against the brokerage seeking contribution and indemnity. The motions judge dismissed a motion to strike the statement of claim and struck out the third party notice. The Court of Appeal confirmed the decision to strike out the third-party claim. The statement of claim expressly limited the damages sought to those attributable to the bank's negligence. The Court observed that in view of the limitation, the bank could have no claim over against the brokerage:

Moreover, since the damages claimed are limited to those attributable solely to the Bank's negligence, RBC could not be liable for all or any part of the respondents' claim within the meaning of rule 29.01(a) or (b). To be successful at trial, the respondents will have to show not only some fault on the part of the Bank but the extent of that fault.

The motions judge did not err by refusing to exercise his discretion to permit the third-party claim to stand so that the Bank could obtain declaratory relief. On the

> facts of this case, there can be no prejudice to the Bank from this decision. It was conceded on appeal that the Bank was not seeking declaratory relief.
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> (*Holthaus v. Bank of Montreal*, *supra*, at paras. 10 and 11)
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> [27] In the case before this Court, the third parties cannot be held accountable for the negligence of the defendant solicitors. The defendant solicitors cannot claim over against the third parties. There is no prejudice to the defendant solicitors. They are still able to rely on the proposition that it was not possible to tender since clear title had not been provided by the third parties. The defendant solicitors have to respond to the claim and prove the defence. Accordingly, the main action will not be struck out.

The Court made no mention of the arguments raised in *Roberge* that the settlement eliminated the client's ability to prove damages.

No further decisions could be identified that discuss whether the settlement of a dispute over a contract precludes an action for solicitor's negligence against the drafter of the contract. However, decisions involving an adjudication of the contractual dispute, as opposed to a settlement, are also relevant, as settlements are the same as court orders for the purposes of *res judicata*. In *Coady v. Boyle*, 1997 CarswellOnt 6317, O'Connell J. of the Ontario Court of Justice (General Division) stated:

> [34] While the matrimonial dispute and the prior champerty claim were settled, for purposes of *res judicata*, settlements are the same as court orders. In *Ontario Sugar Co., Re* (1911), 24 O.L.R. 332 (Ont. C.A.), at 337, Moss C.J.O. states:
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> Lord Herschell, L.C., said: "The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end." He added: "I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action." A passage well worth bearing in mind in dealing with a question of this nature.

[35] More recently Ground J. confirmed in *Reddy v. Oshawa Flying Club* (1992), 11 C.P.C. (3d) 154 (Ont. Gen. Div.), at 159 that consent orders are just as final as Court orders. "The case law seems to be clear that a consent order which ends an action is of the same effect for purposes of the *res judicata* doctrine as a judgment issued by the court on completion of a trial or hearing."

Authorities

Roberge v. Huberman, 1995 CanLII 819 (BC SC)

Roberge v. Huberman, 1999 BCCA 196 (CanLII)

Ieradi v. Gordin, 2007 CanLII 48637 (ON SC)

Coady v. Boyle, 1997 CarswellOnt 6317