

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Webber v. Boutilier*, 2016 NSSC 5

**Date:** 20160105

**Docket:** Hfx No. 241129

**Registry:** Halifax

**Between:**

Cindy June Webber

Plaintiff

v.

Arthur Boutilier and Dartmouth Central  
Plumbing & Heating Incorporated, a body corporate

Defendants

**Judge:** The Honourable Justice M. Heather Robertson

**Heard:** October 28, 2015, in Halifax, Nova Scotia

**Counsel:** David W. Richey, for the plaintiff  
Christa M. Brothers, Q.C., and Karen Bennett-Clayton, for the  
defendants

**Robertson, J.:**

[1] The defendants, Boutilier and Dartmouth Central Plumbing and Heating, have made this motion pursuant to Rule 10.04 for the enforcement of a settlement reached at a settlement conference on June 16, 2015.

[2] The plaintiff, Cindy Webber, commenced two personal injury actions. The first action (*Webber v. Happy Harry's Used Building Materials*, Hfx No. 241153) was a claim for personal injuries arising from a slip and fall on February 22, 1999. The second action (*Webber v. Boutilier and Dartmouth Plumbing and Heating Inc.*, Hfx No. 241129), was a claim for personal injuries arising from a motor vehicle accident that took place on February 21, 2003. David Richey represented the plaintiff in both actions.

[3] A judicial settlement conference was held on June 16, 2015 with a view to resolving both claims.

[4] The settlement conference was successful and an agreement was reached. The defendants, Boutilier and Dartmouth Central Plumbing and Heating, forwarded a standard full and final release and consent dismissal order to plaintiff counsel, along with their portion of the settlement funds. Plaintiff counsel was asked to hold the settlement funds in escrow pending acknowledgement of receipt of the executed full and final release and consent dismissal order.

[5] Counsel for the plaintiff returned to counsel for the defendants, Boutilier and Dartmouth Plumbing and Heating, an executed full and final release with a large "X" through the following two paragraphs of the document:

AND FOR SAID CONSIDERATION the undersigned Releasor further agrees that she will not disclose to any person or party, other than required by law, the contents and terms of this settlement in settlement of this claim. In the event that the Releasor violates the terms of this confidentiality clause, she may upon proof of such violation be liable for repayment of the settlement funds.

AND FOR THE SAID CONSIDERATION, the Releasor hereby agrees to pay an amount owing from this settlement to any third party insurer or government agency for benefits received as a result of the incident and further agrees to indemnify and save harmless the Releasees from any claim, demand or cause of action by any third party who claims a right of subrogation on behalf of the Releasor for any benefits paid to the Releasor under any contract of insurance or government program.

[6] These paragraphs were initialled by the plaintiff and plaintiff counsel.

[7] All these matters are deposed in the affidavit of Christa M. Brothers, Q.C., dated September 17, 2015, counsel for the defendant Boutilier.

[8] On July 28, 2015, counsel for the defendants, Boutilier and Dartmouth Central Plumbing and Heating, wrote to plaintiff counsel and advised that the form of the executed full and final release was not acceptable. She noted there was no prior discussion about striking out two important clauses in the release, including the clause require the plaintiff to hold the defendants harmless from any existing and future subrogation claims. Counsel confirmed her clients' position that the settlement agreement reached at the settlement conference was all inclusive of all claims including subrogated claims.

[9] The correspondence between counsel leading up to this application to enforce the term of the settlement agreement is outlined in Ms. Brother's affidavit of September 17, 2015.

[10] In his brief to this Court and in his oral submissions, Mr. Richey agrees that a full and final settlement had been reached. He says the facts are not in dispute as set forth in Ms. Brother's affidavit paras. 1-12 which includes at para. 7 of the affidavit:

This settlement was reached with the Honourable Justice Robertson present and it was discussed amongst all counsel present that the settlement was full and final of any and all claims related to the slip and fall action and the motor vehicle action.

[11] This also accords with my recollection of the settlement conference.

[12] However, Mr. Richey now states that as he was unaware of the provisions of the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, he could not agree to the full and final settlement of the hypothetical subrogated claim.

[13] The relevant terms of the *Act* are as follows:

Right of recovery by injured person

18 (1) Where, as a result of the negligence or wrongful act or omission of another, a person suffers personal injuries for which the person received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment, home-care services, care for a person in a home for special care or child-care facility to

which the Province has made payment, insured professional services under this Act, or any other care, services or benefits designated by regulation, including the future costs of any such care, services or benefits, the person

(a) has the same right to recover the sum paid for the care, services or benefits against the person who was negligent or was responsible for the wrongful act or omission as the person would have had if that person had been required to pay for the care, services or benefits; and

(b) if the person makes any claim for the personal injuries suffered against the person who was negligent or who was responsible for the wrongful act or omission, shall claim and seek to recover the costs of the care, services or benefits.

(2) Where, under subsection (1), a person recovers a sum in respect of insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services received by him under this Act, he shall forthwith pay the sum recovered to the Minister.

(3) Her Majesty in right of the Province shall be subrogated to the rights of a person under this Section to recover any sum paid by the Minister for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services provided to that person, and an action may be maintained by Her Majesty, either in Her own name or in the name of that person, for the recovery of such sum.

(4) It shall not be a defence to an action brought by Her Majesty in right of the Province under subsection (3) that a claim for damages has been adjudicated upon unless the claim included a claim for the sum paid for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment and insured professional services and it shall not be a defence to an action for damages for personal injuries brought by a person who has received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services that an action taken by Her Majesty under subsection (3) has been adjudicated upon.

(5) No release or settlement of a claim or judgment based upon a cause of action for damages for personal injuries in a case where the injured person has received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services under this Act shall be binding upon Her Majesty unless the Minister or a person designated by him has approved the release or settlement in writing.

(5A) Subject to subsection (5C), where, as a result of a claim pursuant to this Section,

(a) the claim is settled or a judgment is obtained; and

(b) insufficient funds are available to provide complete recovery to the injured person for the injured person's losses and injuries and to pay the costs of the care, services and benefits referred to in subsection (1),

the injured person and Her Majesty in right of the Province shall share pro rata in proportion to their respective losses in any recovery in accordance with the terms and conditions prescribed by regulation.

(5B) No person acting on their own behalf or on behalf of another person, shall, without the approval in writing pursuant to subsection (5C) of the Minister, make a settlement of a claim based upon a cause of action for damages for personal injuries in a case where the injured person has received care, services or benefits referred to in subsection (1) unless at the same time the person makes a settlement to recover the same pro rata proportion in respect of the cost of the care, services and benefits referred to in subsection (1) as the injured person is to recover in respect of the person's losses and injuries.

(5C) Where a person who makes a claim pursuant to subsection (1) has obtained an offer for a settlement whereby the same pro rata proportion of the cost of the care, services and benefits referred to in subsection (1) would be recovered as the injured person would recover in respect of the person's losses and injuries but, in the opinion of the Minister or a person designated by the Minister, the offer would not provide sufficient recovery in respect of the care, services and benefits referred to in subsection (1), the Minister or a person designated by the Minister may approve, in writing, a release or settlement whereby the person making a claim pursuant to subsection (1) makes a settlement of a claim in respect of the person's injuries or losses without making a settlement in respect of the cost of the care, services and benefits referred to in subsection (1), but the written approval is not binding on Her Majesty in right of the Province in relation to a claim made pursuant to subsection (5) in respect of the cost of the care, services and benefits referred to in subsection (1).

(5D) Every liability insurer carrying on business in the Province shall provide the Minister, when requested to do so, information relating to

(a) a claim made against an insured person by a person who received any of the care, services or benefits referred to in subsection (1); or

(b) the terms and conditions of any settlement entered into by an insured person and a person who received any of the care, services or benefits referred to in subsection (1).

(5E) Notwithstanding any other provision of this Act, the Minister may, in accordance with the regulations, authorize the payment of a fee to a barrister

and solicitor who makes a claim on behalf of an injured person and recovers a sum in respect of the cost of care, services or benefits referred to in subsection (1) that are received by the injured person.

(6) Where a person whose act or omission resulted in personal injuries to another is insured by a liability insurer, the liability insurer shall pay to the Minister any amount referable to a claim for recovery of the cost of insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment and insured professional services that would otherwise be paid to the insured person and payment of that amount to the Minister discharges the liability of the insurer to pay that amount to the insured person or to any person claiming under or on behalf of the insured person.

...

(10) This Section applies except where personal injury has occurred as the result of a motor vehicle accident in which the person whose act or omission resulted in the personal injury is insured by a policy of third-party liability insurance on or after the date this subsection comes into force.

[14] And the *Health Services and Insurance Act*, S.N.S. 1992, c. 20, s. 12(8) amending s. 18 as follows:

(10) This Section applies except where personal injury has occurred as the result of a motor vehicle accident in which the person whose act or omission resulted in the personal injury is insured by a policy of third-party liability insurance on or after the date this subsection comes into force.

(11) The Minister may impose a levy to be paid by each motor vehicle insurer with respect to each vehicle insured by that insurer for the purpose of recovering insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services pursuant to this Act incurred by third parties as a result of personal injury in motor vehicle accidents.

[15] Mr. Richey's argument appears to be that the full and final settlement he agreed upon on behalf of his client, should be exclusive of any potential subrogated claim that could be identified by operation of these provisions of the *Act* because he was unaware of these statutory provisions. He also argues that inquiry into such claims should be the responsibility of the defendants. In effect he is splitting the plaintiff's cause of action and leaving a portion of the claim in abeyance.

[16] Mr. Richey does acknowledge that settlement agreements are ordinary contracts to which the law of contracts applies, as expressed in *Langthorne v. Humphreys*, 2011 NSSC 44, paras. 24-25.

[17] However, Mr. Richey urges the court to accept that including this potential subrogation claim by operation of the *Act*, would be tantamount to imposing an essential term of the contract never agreed to at the settlement conference.

[18] I disagree. First with respect to who should make the inquiry into subrogated claims. I am of the strong view that it is for the plaintiff counsel to inquire as to all potential subrogated claims, in the course of preparing their pleadings. Such a claim would fall within the category of special damages. These inquiries are regularly undertaken by plaintiff counsel and to include a myriad of potential claims such as payments made through Social Assistance Programs, Blue Cross, Workmen's Compensation or Long Term Disability Insurers. Certainly in the course of seeking a settlement, that is full and final, this inquiry should also be made by the plaintiff. I note that 12 years have now passed since the motor vehicle accident.

[19] In this case, this is at best a hypothetical potential claim. The facts of the plaintiff's injuries portray a complicated medical history with extensive pre-existing injuries and other non-related medical treatments, making the task of identifying any insured services that could relate to the claim against these defendants very demanding if not impossible. Indeed such an inquiry many have been made moot by the operation of s. 18(10) of the *Act*.

[20] Also, practically speaking it is not possible that the defendants could be burdened with making such an inquiry as they would not be able to access the plaintiff's private hospital records or any records relating to insured medical services under the *Act*.

[21] The settlement achieved on June 16, 2015 was full and final and included a clear understanding, that all matters were settled as against the defendants including any subrogated claims.

[22] I conclude that

- (a) The all-inclusive basis of settlement was an essential term of the settlement agreed to at the settlement conference; and

- (b) The plaintiff had the benefit of counsel throughout the settlement conference and at no point objected to, or raised any concerns with, the all-inclusive basis of the settlement.

[23] An order will therefore be granted:

- (a) Declaring that a settlement was reached between the parties on or about June 16, 2015 on the following terms:
  - (i) the defendants shall pay the plaintiff the all-inclusive sum of \$16,500;
  - (ii) and the plaintiff shall release the defendants from all claims relating to the subject matter of the proceeding, including but not limited to all claims any third party insurer or government agency for benefits received as a result of the incident giving rise to the plaintiff's claim against the defendants and further agrees to indemnify and save harmless the defendants from any claim, demand or cause of action by any third party who claims a right of subrogation on behalf of the plaintiff for any benefits paid to the plaintiff under any contract of insurance or government program.
- (b) Enforcing the settlement according to the above-noted terms.

[24] The defendants shall have an award of costs for this application, payable forthwith. In the absence of agreement, I am happy to receive written submissions.

Justice M. Heather Robertson