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Canadian Insurance Law Reporter

July 2011
Number 727

Jones v. Jenkins: Case Comment – Adjusters Beware

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Take heed. An Ontario Court Judge has recently found that a settlement agreement entered into between an adjuster and an injured plaintiff was "unconscionable" and had to be "set aside".

The facts of the case are a bit sketchy. It appears that Jones, who was operating a motorcycle at the time, was injured in a collision with Jenkins in 2005. One year later Jones found himself unemployed, living out of his car and using a food bank. He had debts totalling $15,000 and had not returned to work following the car accident. At that time there was no ongoing litigation as between Jones and Jenkins. It is not known whether Jones had yet consulted a lawyer about his options.

Jones entered into settlement negotiations with the adjuster representing Jenkins' insurance company. He no doubt did this due to his dire financial situation. The adjuster asked Jones to make a proposal for settlement, which Jones did, in the amount of $241,300. The adjuster made a counter-proposal of $19,411. In making this counter-proposal the adjuster applied the $30,000.00 statutory deductible for general damages. He also reduced all heads of damages by 75% to account for Jones' contributory negligence in having caused or contributed to the accident.

Jones accepted the offer of $19,411. Jones and the adjuster met to finalize the settlement. It appears a Release was signed by Jones. The terms of the Release were never disclosed.

Jones subsequently retained a lawyer who commenced a claim on his behalf, arguing that the Release was invalid and that the settlement should be set aside. The insurer for Jenkins brought a motion for enforcement of the Release and settlement.

Inside

The Code of Ethics of the Ontario Insurance Adjusters Association requires adjusters to refrain from any "misrepresentation, dishonest non-disclosure, undue influence or other mischievous practices". The judge in this case found that the adjuster failed to meet this standard.

In making its decision, the Court found that the adjuster had access to important medical information revealing that Jones had suffered "severe and acute radial nerve damage". The Court found that the adjuster had failed to relay this information to Jones. The Court commented that the intentional withholding of this information from Jones was "significant".

Most troubling for the Court was that the adjuster reduced the general damages and future economic loss claims by 75%, purportedly on the basis of Jones being 75% responsible for the accident. The Court concluded that there was no evidence supporting such an assertion. The adjuster had relied upon the *Fault Determination Rules* to apportion 75% responsibility to Jones. The Court correctly pointed out that these Rules are guidelines applicable as between insurers only.

In making its decision the Court determined that Jones was "unsophisticated". The Court held that Jones was relying on the adjuster to be fair, unbiased and impartial.

In the end, the Court found that there was an inequality of bargaining power as between the adjuster and Jones, and that the adjuster used his position of power to achieve an unfair advantage. The Court went on to add that the agreement reached was "sufficiently divergent from community standards of commercial morality to be unconscionable and that it should be set aside".

One has to wonder whether the Court would have rendered the same decision had Jones not been in such dire financial circumstances when the Release was signed. No doubt the adjuster representing Jenkins' insurer was pleased with the terms of the initial Release. The adjuster went so far as to propose to Jones that he consult with a lawyer before signing the Release (which Jones declined).

We can take some solace from this decision knowing that it appears to have turned on two points: the failure of the adjuster to relay important medical information about the nature and extent of the claimant's injuries, and the adjuster's application of a 75% reduction to Jones' damages by applying the *Fault Determination Rules*. Still, this decision highlights the difficult balancing act adjusters face in trying to achieve the most advantageous result for their insurer, and their duty to act fairly and openly with claimants.

Quantum of Damages

Injury	Non-Pecuniary	Total	Paragraph
Personality disorder	$ 125,000	$ 605,000	G-2386

CANADIAN INSURANCE LAW REPORTER

Published monthly as the newsletter complement to the CANADIAN INSURANCE LAW REPORTER by CCH Canadian Limited. For subscription information, contact your local CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

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Recent Cases

Full Text Decisions

The complete digests and full text decisions for the following case summaries are reproduced in the "Full Text Decisions" tab division of the CANADIAN INSURANCE LAW REPORTER *at the paragraph numbers indicated.*

Claim Was Commenced Within One Year of Alleged Wrongful Denial

• • • **Ontario (S.C.J.)** • • • The insurer sought a dismissal of the plaintiffs' claim as commenced outside the limitation period. The insurer and the plaintiff executor were unable to agree on the value of the deceased's vehicle, and the insurer ultimately denied the claim. After the insurer "dumped" the vehicle in the executor's driveway, the executor commenced an action. The Court held that the claim for breach of the duty to deal fairly and in good faith could be an independent actionable wrong. The claim was commenced within one year of the alleged wrongful denial of coverage. There was also a possible

issue of promissory estoppel, given the adjuster's comments. The motion was dismissed.

Whorpole Estate v. Echelon General Insurance Company, [2011] I.L.R. ¶I-5137

Whether Rule 53.03 Applies to Expert Witnesses Retained by Non-Parties

• • • **Ontario (S.C.J.)** • • • The defendant sought a declaration that Rule 53.03 does not apply to expert witnesses retained by non-parties to the litigation. The plaintiff objected to the defendant subpoenaing accident benefit assessors hired by the plaintiff's insurer when assessing her statutory accident benefits claim. The Court held that the use of the word "party" in the Rule was deliberate. The ultimate purpose of the new rules is to limit "hired guns". The Court concluded that Rule 53.03 did not apply to expert witnesses retained by non-parties to the litigation. In the alternative, the circumstances of the case merited relief in the form of non-compliance with the Rule. The motion was allowed.

McNeill v. Filthaut, [2011] I.L.R. ¶I-5138

Benefits Limited to Provisions Chosen by Employer

• • • **British Columbia (C.A.)** • • • The insurer appealed a summary trial order declaring the respondent insured was entitled to disability benefits for occupational disability to age 65. The insurer maintained the benefits were only payable for two years. The Court found that the respondent was not entitled to rely on provisions for which her employer had not opted. The Court found that the summary trial judge erred in refusing to admit certain evidence that clearly set out the parties' intentions. The benefits were limited to two years. The appeal was allowed.

McGarry v. Co-operators Life Insurance Company, [2011] I.L.R. ¶I-5139

Court Allowed Appraisers

• • • **Manitoba (Q.B.)** • • • The plaintiffs sought an order requiring the defendant insurer to nominate an appraiser and proceed to arbitration, pursuant to the policy. The defendant submitted that the plaintiffs waited too long to invoke this clause. The Court agreed that the rights under the clause did not exist in perpetuity, but held that there was no prejudice at this stage of the litigation. Appraisers with expertise are preferable and consistent with the underlying rationale of the policy and the statutory provisions. The motion was allowed.

Winnipeg Regional Health Authority v. Temple Insurance Company, [2011] I.L.R. ¶I-5140

Insurer Not Entitled To Participate in Underlying Litigation of Its Bankrupt Insured

• • • **British Columbia (S.C.)** • • • The issue before the Court was whether a liability insurer can participate in underlying litigation, either as intervener or party or through its own counsel, when it is affording coverage to its bankrupt insured on a reservation of rights basis. This was a case of first instance in the province. The Court found that the insurer did not, in the terms of its policy, avail itself of any "defence" rights in the event of a bankrupt insured. The insurer's reservation of rights was very broad, and it previously declined to involve itself in the proceedings. The Court found that the extraprovincial case law put forward by the insurer was inconsistent with B.C. case law, and concluded that the insurer should not be permitted to "sculpt or sway" the evidence. The application was dismissed.

Re Pope & Talbot Ltd., [2011] I.L.R. ¶I-5141

Master Erred in Finding Pilot Had Required Licence To Fly

• • • **Alberta (Q.B.)** • • • The insurer appealed a Master's decision finding that the deceased pilot had the "required license" to fly a plane. While the pilot had a pilot's licence, at the time of the crash he did not have a valid medical certificate, as required by legislation. The insurer argued that he therefore did not have the required licence. The Court admitted new evidence, the actual licence, and found that the licence was only valid as long as a medical certificate was valid; there was an integral link between the documents. The Master erred in his interpretation. The appeal was allowed.

Gudzinski Estate v. Allianz Global Risks US Insurance Company, [2011] I.L.R. ¶I-5142

Whether Business Actively Polluted Was Irrelevant to Pollution Exclusion Clause

• • • **Ontario (C.A.)** • • • The insurer appealed the dismissal of its application for a declaration it had no duty to defend its insured, a convenience store and gas bar. In an underlying claim, an adjacent property owner alleged gasoline leaked onto its property. The insured's business car-

ried a risk of pollution. The Court held that whether or not the business necessarily created pollution was not the issue. The claim as pleaded fell squarely within the wording of the pollution exclusion clause, and the insurer was not required to defend or indemnify its insured. The appeal was allowed.

ING Insurance Company of Canada v. Miracle o/a Mohawk Imperial Sales and Mohawk Liquidate, [2011] I.L.R. ¶I-5143

No Issues To Resolve After Policy Cancellation Found Effective

• • • **British Columbia (C.A.)** • • • The parties appealed the dismissal of their applications for summary disposition. Prior to the plaintiff's husband's death, he cancelled two insurance policies. After his death, the plaintiff commenced an action alleging the cancellations were ineffective and that the defendant insurers breached contractual and fiduciary obligations owed to her. The judge agreed the cancellation was effective, but found material issues in dispute that could not be resolved summarily. On appeal, the Court disagreed, holding that once the cancellation was determined effective, there were no further issues to resolve. The plaintiff's appeal was dismissed; the defendants' appeals were allowed and the action was dismissed.

Gish v. Hooper Insurance and Financial Services Inc., [2011] I.L.R. ¶I-5144

Defendant's Counsel Not Permitted To Reject Certified Examiner's Medical Opinion Report

• • • **Alberta (Q.B.)** • • • The plaintiff submitted to an examination by a certified examiner, but the defendant rejected the medical opinion on the basis that it did not meet legislative requirements. The Court reviewed the relevant legislation and determined there was only one requirement: the examiner had to conclude whether the plaintiff had one or more injuries that were "minor injuries". The Court found that the prescribed form was advisory only, and that it was inappropriate to permit "doctor shopping". The Court held that medical examiners should be given considerable deference. The plaintiff's application for a declaration that the report met the legislative requirements was granted.

Forth v. Mather, [2011] I.L.R. ¶I-5145

AMA Membership Not a Condition Precedent to a Valid Policy

• • • **Alberta (Q.B.)** • • • The plaintiffs sought indemnity under their policy after a fire destroyed their home. Alternatively, they sought damages for wrongful termination of the policy. The defendant insurer submitted that the policy was not valid or in force, as the plaintiffs no longer had a current Alberta Motor Association membership. The Court concluded, for various reasons, that the insurer had no legal basis for its failure to renew the policy: an AMA membership was not a prerequisite or condition precedent in the policy. The action was allowed.

Lafont v. Alberta Motor Association Insurance Company, [2011] I.L.R. ¶I-5146

Partial Indemnity Costs Awarded Despite Applicant's Failure To Act Reasonably

• • • **Ontario (S.C.J.)** • • • The respondent insurer sought substantial indemnity costs. The applicant submitted that its application had raised a novel issue. The Court held that the applicant failed to act reasonably when it refused to allow the respondent to provide it with a defence, filed its own statement of defence, and commenced third-party proceedings against the respondent for coverage the respondent had agreed to and was attempting to provide. However, the Court declined to award substantial indemnity costs, as the respondent's offer to settle did not strictly comply with Rule 49. The applicant was ordered to pay costs on a partial indemnity scale: $17,000 plus $3,000 for disbursements.

137328 Canada Inc. v. Economical Mutual Insurance Company, [2011] I.L.R. ¶I-5147

Notice Provisions Inapplicable to Motor Vehicle Accident Claims Fund in the Circumstances

• • • **Ontario (S.C.J.)** • • • The insurer appealed an arbitrator's finding that the notice provisions in the *Disputes Between Insurers* regulation did not apply to the Motor Vehicle Accident Claims Fund when conducting an investigation into alternate insurers. The Court found the arbitrator's findings of fact were entitled to significant deference. In *Allstate Insurance Co. v. Motor Vehicle Accident Claims Fund*, the Court of Appeal held that the Fund was an insurer and bound by the notice provisions. In *Ontario (Minister of Finance) v. Progressive Casualty Insurance Co.*, the Court of Appeal held that the *Allstate* decision applied retrospectively, except where there is clear evidence of a detrimental reliance on prior common law rule. The issue

was whether *Progressive* created an exception to the general rule of retrospective application of the common law and whether that exception applied. The Court concluded that the Fund relied detrimentally on existing prior common law authority at the time of the investigation; therefore, the *Allstate* decision did not apply to the Fund in the circumstances. The appeal was dismissed.

Ontario (Minister of Finance) v. Lombard General Insurance Company of Canada, [2011] I.L.R. ¶I-5148

Implied Consent To Drive Existed in the Circumstances

• • • **Alberta (Prov. Ct.)** • • • The defendant was involved in single-vehicle accident with the plaintiff's truck. The owner and the insurer of the truck sought damages. The defendant did not have specific permission to drive the truck on that date, but had received permission on previous occasions. The issue was whether implied consent was sufficient to make the driver an unnamed insured under the policy. The Court concluded that implied consent is determined not by the actual intent of the owner but by the belief of the driver. When looking at the whole of the circumstances, implied consent existed. The claim was dismissed.

RBC General Insurance Company v. Kelly, [2011] I.L.R. ¶I-5149

Mere Possibility That Claim Might Succeed; Duty To Defend Existed

• • • **Nova Scotia (S.C.)** • • • The applicants were a general contractor and a subcontractor. A negligence/breach of contract claim had been commenced against them in relation to a leak in a cold water line of a project. The insurer that provided builder's risk insurance refused to defend them on the basis that the policy had expired by the time the leak was discovered. The Court concluded that the nature of the claim was that either the original installation or the subsequent repair was faulty; a mere possibility existed that property damage occurred at the time the pipe was installed. Accordingly, a duty to defend existed. The application was allowed.

Meridian Construction Inc. v. Royal & Sun Alliance Insurance Company of Canada, [2011] I.L.R. ¶I-5150

Torts – Motor Vehicles

The complete digests for the following case summaries are reproduced in the "Torts – Motor Vehicles" tab division of the Canadian Insurance Law Reporter *at the paragraph numbers indicated.*

Plaintiff's Application for Joint Expert Dismissed

• • • **British Columbia (S.C.)** • • • The plaintiff sought the appointment of a doctor as a joint expert. The defendant opposed the appointment, arguing that proper procedure had not been followed. The defendant also argued that the doctor and the plaintiff had already been notified of the likelihood of the doctor conducting an independent medical examination of the plaintiff. The Court agreed with the defendant: the appointment of the doctor would deprive the defence of a potentially significant trial stratagem. The application was dismissed.

Benedetti v. Breker, ¶M-2507

Partial Stay Granted: Potential Irreparable Harm to Appellants Outweighed Inconvenience to Respondent

• • • **Nova Scotia (C.A.)** • • • The appellants sought a partial stay of the damages order. Both parties appealed the non-pecuniary award, and the appellants also appealed the diminished earning capacity award. The appellants proposed an immediate payment of $275,000; the respondent proposed $325,000, with the remainder in a trust account. The Court held that where a substantial payment is offered, the appellants need to show only that there is a probability of difficulty of repayment if the appeal is successful. The Court concluded that the potential irreparable harm to the appellants outweighed any inconvenience to the respondent. The appellants were ordered to pay $275,000 to the respondent forthwith, and the remainder be placed into an account in trust.

Szendroi v. Vogler, ¶M-2508

Loss of Earning Capacity Award Reduced by $300,000

• • • **British Columbia (C.A.)** • • • The appellants raised three grounds for appeal, including that the trial judge erred in her assessment of lost earning capacity. The respondent suffered from various pre-existing conditions, including cerebrovascular disease. The Court concluded that the trial judge failed to consider the likelihood that the respondent would have been unable to work to age 73 had the accidents not occurred, due to his pre-existing conditions, which were numerous and not mild. The failure to apply a negative discount for the pre-existing conditions

in relation to future earning capacity amounted to an error in law. The Court declined to order a new trial, and instead reduced the award from $900,000 to $600,000, taking into account the respondent's other pre-accident health problems.

Burdett v. Eidse, ¶M-2509

Applications Judge Misinterpreted Legislation; Claim Was Time-Barred

• • • **Newfoundland and Labrador (C.A.)** • • • The defendants in a personal injury action appealed a finding by an applications judge that the plaintiff's claim was not time-barred and was saved by section 14 of the *Limitations Act*. The Court found that the judge incorrectly interpreted and applied section 14 and misapprehended the evidence. The Court concluded that the judge made palpable and overriding errors in finding that the plaintiff did not know she had a cause of action on the date of the accident. The appeal was allowed.

Morgan v. Rogers, ¶M-2510

General Damages Award Not Proportionate to Actual Loss

• • • **British Columbia (C.A.)** • • • The appellant submitted that the jury verdict for non-pecuniary damages and loss of future earning capacity were wholly out of proportion to the actual loss suffered by the respondent in a motor vehicle accident. The Court reduced the non-pecuniary damages award from $300,000 to $200,000, finding that the respondent was not catastrophically injured and the jury's award was not proportionate to his actual injuries. However, the loss of future earning capacity award was not disturbed. The Court held that the jury could have reasonably found a $22,000 per year loss because of the injuries.

Taraviras v. Lovig, ¶M-2511

Court Awarded Advance Payment for Lost Wages

• • • **New Brunswick (Q.B.)** • • • The plaintiff sought an advance payment of $10,000 for loss of wages. The Court held that it was more likely than not that lost wages would be ordered as part of the final judgment. However, it noted that issues of liability, contributory negligence, calculation of salary, and mitigation remained unresolved. The Court held that $7,500 was an appropriate advance payment in the circumstances.

Robichaud v. Gaudet, ¶M-2512

Torts – General

The complete digests for the following case summaries are reproduced in the "Torts – General" tab division of the Canadian Insurance Law Reporter *at the paragraph numbers indicated.*

Disorders Affected Plaintiff's Ability to Realize Potential as Hockey Player

• • • **British Columbia (S.C.)** • • • The plaintiff was sexually abused by his hockey coach, and the province was found vicariously liable for the failure of the hockey coach's probation officer to warn the hockey organization. The plaintiff alleged he was unable to attain his full potential as a result of the abuse. The Court agreed, finding the damage to the plaintiff's career was the loss of a first contract with an NHL team. The fact that the plaintiff likely did not have the ability to play at a higher level did not eliminate the claim for loss of opportunity. There was a reasonable possibility that his disorders were the cause of NHL teams "shying" away from him. The Court awarded the plaintiff a $175,000 signing bonus and a first contract value of $271,500.

D.K.B. v. British Columbia, ¶G-2386

Cost of Future Care Award Reduced by Almost $400,000

• • • **Ontario (C.A.)** • • • The respondent was injured at a hospital when a foldable bed collapsed; she cracked her sacrum and developed chronic pain/fibromyalgia. At trial, she was awarded over $3 million in damages. The appellants appealed on three grounds. The Court rejected the appellants' first ground of appeal that the trial judge erred in rejecting evidence of the appellants' medical experts. The Court also rejected the appellants' submission that the fibromyalgia was not foreseeable because it developed four years after the fall. However, the Court agreed that the trial judge erred in the use he made of two reports to determine damages for cost of future care and his finding that the amount being sought in this regard was not in dispute. The Court reduced the original costs of future care award by $374,640.

Degennaro v. Oakville Trafalgar Memorial Hospital, ¶G-2387

Statutory Immunity Factors to Consider in Determining Duty of Care of Attorney General

• • • **Nova Scotia (C.A.)** • • • The appellant commenced an action against the Attorney General for losses associated with a steel plant's failure, but the action was dismissed. The appellant submitted that the trial judge erred on the issue of negligence. The AG cross-appealed the finding that it owed a duty of care and for the judge's failure to award trial costs. The Court held that the AG owed no duty of care and that the trial judge erred in not awarding costs.

Cherubini Metal Works Limited v. Nova Scotia (Attorney General), ¶G-2388

No Private Law Duty of Care Owed by Daycare Inspectors to Brain Injured Child

• • • **British Columbia (S.C.)** • • • The infant plaintiff suffered a brain injury at the defendant's daycare. The parents sued the defendant operator as well as the Capital Health Region for negligent inspections and/or licensing of the daycare. The CHR applied for summary disposition; the plaintiffs opposed, citing suitability and other reasons. The Court concluded the primary issue was a question of law, making it an appropriate case for disposition under the summary trial rule. The Court concluded there was no relationship formed between the inspectors and the plaintiffs, nor did the inspectors have any direct regulatory control over the plaintiffs. Therefore, no private law duty of care existed. In the alternative, the Court found that any private law duty of care would be negated by overriding policy reasons, given the inspectors exercised both policy and quasi-judicial functions.

Sivertson (Guardian ad litem) v. Dutrisac, ¶G-2389

Concurrent Versus Consecutive Tortfeasors and the Right to Contribution and Indemnity

• • • **Ontario (S.C.J.)** • • • The plaintiff was injured at the defendant restaurant's premises, and two years later was injured at the proposed third party's premises. She brought a claim against the defendant but not the third party. The defendant brought a claim against the third party, which the third party moved to strike, arguing that the right of contribution and indemnity exists between concurrent tortfeasors, not consecutive tortfeasors. The Court held that "concurrent tortfeasors" describes several tortfeasors whose acts combine to produce the same damage, and their actions need not be concurrent in time. It was not plain and obvious that the defendant and the third party were not concurrent tortfeasors because it had not yet been determined that the damages they each caused were separate and divisible. The motion was dismissed.

Sale v. O'Grady's Restaurant, ¶G-2390