NOVA SCOTIA COURT OF APPEAL

Citation: *MacKean v. Royal & Sun Alliance Insurance Company of Canada*, 2015 NSCA 33

Date: 20150410
Docket: CA 424628
Registry: Halifax

Between:

Cindy L. MacKean and Dalton Holley, through his litigation guardian Cindy L. MacKean

Appellants

v.

Royal & Sun Alliance Insurance Company of Canada

-and-

Joseph Allen Goodall

Respondents

Judges:	Farrar, Oland, and Bryson, JJ.A.
Appeal Heard:	October 15, 2014, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson, J.A.; Oland and Farrar, JJ.A. concurring
Counsel:	C. Patricia Mitchell and Leah Grimmer, for the appellants Cindy MacKean and Dalton Holley Royal & Sun Alliance Insurance Company of Canada, respondent (not participating) Joseph Allen Goodall, respondent (not participating)

Reasons for judgment:

Introduction:

[1] It is a common place of litigation that insurers settle claims for their insureds and then seek recovery from a third party who has caused the loss to their insured. This is such a case.

[2] In undefended cases involving uninsured defendants, a practice has arisen that insurers who have settled with their insured file with the court proof that the settlement was reasonable. In most cases, the defendant does not oppose the insurer's claim for recovery, and often such claims have been approved by the court, if the settlement amount is reasonable.

[3] In this case, the motions judge declined to be so accommodating. The Honourable Justice Michael Wood found that the reasonableness of settlement was irrelevant. Rather, the insurer had to demonstrate its insured's – the plaintiff's – loss on a balance of probabilities regardless of any settlement, (2014 NSSC 33). The interesting question here is whether a reasonable settlement can be ignored in assessing damages in such cases.

The Facts:

[4] The respondent, Mr. Goodall, struck the motor vehicle owned and operated by Cindy MacKean. She and her passenger, Dalton Holley, were both injured. Mr. Goodall had no insurance. Ms. MacKean and Mr. Holley sued Mr. Goodall. They also sued Ms. MacKean's own motor vehicle insurer, Royal & Sun Alliance Insurance Company of Canada, in accordance with Section D of the standard automobile insurance policy. Royal settled the claim of Ms. MacKean and Mr. Holley for $505,000. Their action against Royal was dismissed. They assigned their action against Mr. Goodall to Royal.

[5] Royal's payment of its insureds' loss also subrogated Royal to their claim against Mr. Goodall. Although Ms. MacKean and Mr. Holley are nominal appellants, it is Royal that is seeking to recover what it paid to its insured. So Royal will be referred to as if it were the appellant. Counsel on this appeal were Royal's counsel throughout the proceedings.

[6] The motions judge describes the relation of the parties in his procedural history of the motion before him:

> [10] On June 3, 2008, Cindy MacKean and her son, Dalton Holley, commenced this proceeding against Royal & Sun Alliance Insurance Company of Canada ("RSA"). The statement of claim says that Ms. MacKean and Mr. Holley were injured in a motor vehicle accident in July, 2007, which was allegedly caused by Mr. Goodall who was driving without the required insurance. The basis of the action against RSA was an insurance policy issued in favour of Ms. MacKean which included the statutorily mandated Section D coverage for damages suffered as a result of the actions of an uninsured motorist. In accordance with the applicable regulations under the *Insurance Act*, R.S.N.S. 1989, c. 231 and the standard automobile policy in Nova Scotia, the limit of that insurance coverage is $500,000.00.

[7] The position of Royal was that the measure of damages should be the settlement paid to Royal's insureds, provided that the settlement was reasonable. The judge readily dispensed with that argument:

> [21] At a hearing for assessment of damages, a party must prove their losses on a balance of probabilities using admissible evidence. It does not matter whether the assessment takes place by way of motion, application or a trial. In this case the plaintiffs do not seriously contest this proposition but say that the facts to be proven to these standards relate to the reasonableness of the payment by RSA to the plaintiffs. The logical extension of that position is that if Ms. MacKean and Mr. Holley have not been paid by RSA, they would have to prove their actual damages, but because of the payment they need only prove that their insurer was reasonable in coming up with the amount to be advanced under the insurance contract. If this is correct, then the case which Mr. Goodall would have to meet if he wished to oppose the assessment differs depending upon whether it is a subrogated claim after compensation by an insurer or not. Logically this makes no sense and I have not seen any legal authorities which support such an approach.

[8] The judge also found that the loss must be calculated as of the date of the hearing, not the date of settlement:

> [38] As a result of the plaintiffs' interpretation of the test to be applied, the evidence which they have filed is not sufficient to engage in any meaningful analysis of the plaintiffs' actual damages. I would also note *Civil Procedure Rule* 70.05 which requires that the assessment of damages be done as of the date of the

> hearing. None of the information in the record indicates anything about the plaintiffs' circumstances over the last four years.

[9] Royal now appeals, arguing that the motions judge erred in law by:

(a) adopting a standard of strict proof on a balance of probabilities, rather than the standard based on the reasonableness of settlement;

(b) by determining that the plaintiff's damages should be assessed as of the date of the motion for assessment of damages rather than the date of settlement.

[10] In view of Royal's submissions, I would restate the first ground of appeal as follows:

> The motions judge erred by holding that the settlement reached between Royal and the plaintiff was irrelevant to the assessment of damages against the at fault defendant.

Leave to Appeal

[11] Royal expressed uncertainty about whether this appeal was interlocutory, requiring leave. The grounds of appeal raise arguable issues. Assuming leave were necessary, it should be granted.

Standard of Review:

[12] Both issues attract a legal correctness standard of review. The relevancy of evidence is a question of law: *R. v. Mohan*, [1994] 2 S.C.R. 9, per Sopinka, J. at p. 20. Similarly, determining whether the cause of action was a "continuing cause of action" within the meaning of *Civil Procedure Rule* 70.05 is a question of law, involving, as it does, interpretation of the rules of court, which in Nova Scotia have the force of law, (per C.J. MacDonald in *Central Halifax Community Association v. Halifax (Regional Municipality)*, 2007 NSCA 39 at ¶ 49).

Discussion:

[13] Before Justice Wood and this Court, Royal relied heavily on the English Court of Appeal decision *Biggin & Co., Ltd. v. Permanite, Ltd.*, [1951] 2 K.B. 314. That was a case where the Dutch government sued the plaintiff for damages arising

out of defective goods purchased from Biggin, which settled with the Dutch government and then brought legal proceedings against Permanite from whom Biggin had purchased the goods for resale to the Dutch. Biggin submitted the settlement amount as the measure of damages against the defendant. The trial judge disagreed, finding that Biggin must prove the loss on a balance of probabilities. The Court of Appeal found otherwise:

> ***I think that the judge here was wrong in regarding the settlement as wholly irrelevant. I think, though it is not conclusive, that the fact that it is admittedly an upper limit would lead to the conclusion that, if reasonable, it should be taken as the measure.*** The result of the judge's conclusion is that the plaintiffs must prove their damages strictly to an extent to show that they equal or exceed 43,000£; and that if that involves, as it would here, a very complicated and expensive inquiry, still that has to be done. ***The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter.*** The question, in my opinion, is: what evidence is necessary to establish reasonableness? I think it relevant to prove that the settlement was made under advice legally taken. The client himself could do that, but I do not think that the advisers would normally be relevant or admissible witnesses. I say "normally". It may be that in special cases they might be. ***The plaintiff must, I think, lead evidence, which can be cross-examined to, as to facts which the witnesses themselves prove and as to what would probably be proved if, as here, the arbitration had proceeded, so that the court can come to a conclusion whether or not the sum paid was reasonable.*** The defendant may, by cross-examination, as was done here, seek to show - and perhaps successfully show - that it was not reasonable. He may do so, or call evidence which leads to the same conclusion. He might in some cases show that some vital matter had been overlooked. In the present case, of course, Sir Walter Monckton relies, rightly, on the judge's finding with regard to the first head of damage, on the fact that the evidence showed that too much was bought, and so on; but if there is evidence at the end of the matter of the kind which I have indicated, on which the court can come to the conclusion that this was a reasonable settlement in the circumstances, then I think that it should be the measure. Parties, Bowen, L.J., said, have been held to contemplate litigation in the sort of circumstances which have arisen here. It would, I think, be unfortunate if they were not also held to contemplate reasonable settlements in the type of circumstances which have arisen here.
>
> [p. 321, Emphasis added]

[14] The motions judge distinguished *Biggin* because it did not involve a subrogated or assigned insurance claim. He characterized it as completely different from a claim by an insurer seeking recovery of a subrogated loss paid to

its insured. In the judge's view the insurance settlement amount was irrelevant to the claim for recovery against Mr. Goodall. He buttressed that point with comment that in civil litigation, the existence, amount or payment of insurance was irrelevant and was routinely withheld from juries in jury trials.

[15] With all due respect to the motions judge, that an insurer paid the settlement does not change the nature of what occurred. The insurer was liable to its insureds for damages they suffered at the hands of an uninsured motorist. It paid an amount in settlement of that claim. By the assignment and subrogation under s. 149 of the *Insurance Act*, Royal is entitled in law to recover from the wrongdoer. The fact of subrogation does not distinguish *Biggin*. *Biggin* settled with a party it was legally obligated to pay, and sought to recover from a third party who was obligated to it. Whether the obligation of the third party arises by tort, contract or statute does not change the analysis. To the extent that there are other cases that suggest differently, I would choose not to follow them.

[16] Further, it is the existence of the insurance that is usually withheld from the jury. Even so, there is no strict rule that the disclosure of insurance is fatal. Rather, the potential prejudice must be weighed: *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092 at paras. 16-17. Most Nova Scotians would know that universal automobile insurance is mandatory for owners and operators of motor vehicles in Canada. Whether it is now anachronistic to discharge a jury when insurance is disclosed remains for another day. However, where the amount of an insurance payment may be relevant to the determination of the reasonableness of a settlement there is no principled reason why it should be withheld from a jury.

[17] The motions judge distinguished other cases relied upon by Royal as involving third party indemnity cases not relevant to a subrogated insurance claim. He relied on *General Accident Assurance Co. of Canada et al. v. Kloc*, (1985) 53 O.R. (2d) 353 and *Grosvenor Fine Furniture (1982) Ltd. v. Terrie's Plumbing & Heating Ltd.*, [1993] S.J. No. 439, (Sask. C.A.), neither of which agreed that a settlement with one's insured was relevant to the measure of damages against a third party.

[18] Relying upon the foregoing cases (discussed further below), the motions judge concluded:

> [34] I agree that the assessment of damages ought to be carried out by the judge based upon the evidence presented. No deference should be given to the amount

> that the insurance adjuster has decided should be paid in settlement of their insured's claim on the insurance contract. There may be contractual terms that entitle the party to money which could not be recoverable damages and there may be economic factors, such as risk assessment and litigation costs, which may factor into the adjuster's analysis. The defendant who may be called upon to reimburse the insurer through the subrogated action should be entitled to insist on strict proof of actual damages caused by his negligence, and not have the onus of establishing that the insurer's decision was not reasonable.
>
> [35] In this case the plaintiffs' claims were assigned to RSA. This does not alter the nature of the cause of action against Mr. Goodall, it is still the plaintiffs' proven damages that are being sought. The only significance of the assignment is where damages in excess of the insurance payment are established. In that case, RSA would be entitled to the surplus where there is an assignment, but the plaintiffs would receive it if there is not.
>
> [36] Having concluded that the agreement by RSA to settle the plaintiffs' Section D claims is irrelevant, I want to comment briefly on the significance of the fact that Mr. Goodall had a default judgment entered against him as a result of his failure to defend the proceeding. Counsel for the plaintiffs argued he should not be entitled to "a full trial" on damages requiring strict proof of the plaintiffs' losses. Despite his failure to defend, Mr. Goodall was entitled to notice of the assessment motion pursuant to Rule 70.04(2). Whether the motion is ultimately converted to a trial or application in court will depend upon the complexity of the case and the extent to which Mr. Goodall chooses to participate. None of this has anything to do with the standard of proof required upon the assessment hearing.

[19] In the end, Justice Wood was not satisfied that the evidence adduced could support the loss claimed. While acknowledging that it might be satisfactory for proving the reasonableness of settlement, it was not adequate for establishing the insured plaintiffs' loss against the defendant, Mr. Goodall. Much of the evidence led would be inadmissible to prove loss in a direct claim against Mr. Goodall. Royal's motion was dismissed, without prejudice to Royal's right to later adduce proper evidence of the loss.

Assessment of Damages:

[20] Royal argues that the Chambers judge erred in his analysis and in particular:

- That the distinction between indemnity and subrogation is unprincipled.
- Analogous cases provide a principled basis for recovery in this case.

- The judge placed too much weight on fairness to the defaulting defendant.
- The decision encourages needless litigation and may compromise reasonable accommodations between insurer and insured.
- The decision ignores the default judgment context in which the issue arose.
- The decision fails to respect access to justice and proportionality principles.

[21] In the very special circumstances of this case, both principle and policy support Royal's submissions.

[22] Mr. Goodall was driving without insurance. He caused an accident and fled the scene. He injured Royal's insureds and made no effort to meet his obligations to them. He failed to defend liability or damages. Despite being served, he never appeared in court. Ms. MacKean and Mr. Holley obtained default judgment against Mr. Goodall "with damages to be assessed". Owing to Section D coverage, Royal met Mr. Goodall's obligations to the injured plaintiffs and pursued a subrogated claim for damages against Mr. Goodall. Royal would like a judgment against Mr. Goodall in the amount it paid on his behalf to Ms. MacKean and Mr. Holley.

[23] The unique character of Section D coverage renders reasonable settlements relevant to quantification of the loss in such cases. That is also consistent with access to justice principles, particularly in undefended cases such as this.

Section D Coverage:

[24] Section D coverage is a creature of 1996 amendments to the *Insurance Act*, R.S.N.S. 1985, c. 231. Section 139(2) of the *Act* provides:

> (2) Every contract evidenced by a motor vehicle liability policy shall provide for payment by the insurer of all sums that
>
> > (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;

> (b) a person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile; and
>
> (c) a person insured under the contract is legally entitled to recover from the identified owner or driver of an uninsured automobile as damages for accidental damage to the insured automobile or its contents, or to both the insured automobile and its contents, resulting from an accident involving an automobile,
>
> subject to the terms, conditions, provisions, exclusions and limits prescribed by regulation.

[25] As a general rule, the fact that a party may carry insurance is irrelevant to issues of liability and quantum between that party and a third party defendant. In automobile accident cases, relations between the plaintiff and defendant are typically governed by tort; relations between the plaintiff and his insurer are a matter of contract. But in cases such as this, public policy unites the two.

[26] Both as a matter of contract and as a matter of statute, the liability of the insurer to its insured under Section D coverage is linked to the third party tortfeasor's conduct. The insurer has no obligation to pay anything to its insured other than an amount reflecting damages caused to its insured, by the third party wrongdoer, up to the limits of coverage. This statutorily mandated contractual obligation of the insurer connects the amount paid to the plaintiff insured by his insurer with the damage caused by the third party wrongdoer.

[27] The foregoing addresses the motion judge's concern that contractual terms may afford coverage to an insured for which the third party is not responsible. Section D coverage is limited to what the insured "…is legally entitled to recover…" from an uninsured driver, (s. 139(2) of the *Insurance Act*, para. 24 above). This coverage links the insurer's obligation of indemnification to the fault of Mr. Goodall.

[28] As for concerns about economic and other factors that might influence the insurer to settle with its insured – they should not affect assessment of the reasonableness of settlement, which is dependent upon the likelihood of recovering damages in the range of the settled amount. In any event, such considerations will not prevail if the settlement is not reasonable because it fails to reflect what the plaintiff is likely to recover. However, it must be acknowledged that the costs of

litigation in a three party context like *Biggin* could not be relevant to a subrogated claim like this, where the expenses of settling between insured and insurer are not relevant to the damages caused to the insured by the third party defendant.

[29] The motions judge described the use of settlement in assessing damages as illogical. He reasoned that if a plaintiff did not settle with its insurer and pursued the third party to judgment, then the plaintiff would have to prove damages in the ordinary way. In contrast, if a plaintiff settled with her insurer, the defendant would face a different case – the settled amount. But with respect, that is not what *Biggin* and cases that follow it say:

> If, upon the evidence, the judge is satisfied that the damages would be somewhere around the figure at which the plaintiffs had settled, he would be justified in awarding the settlement figure.
>
> (p. 325)

The settled for amount must reflect likely recovery, or it will not be reasonable. Enough evidence needs to be led for the court to make that assessment.

[30] Section D creates a conflict of interest for the insurer, (see for example, *Waterloo Insurance Co. v. Zurbrigg et al.*, [1983] I.L.R. 1-1707 (Ont. C.A.)). Such coverage means the insurer wears two hats. In terms of its obligation to pay its insured, the insurer has a common interest with the third party wrongdoer in resisting or limiting payment. Conversely, as a subrogated or assignee claimant against the third party, the insurer assumes the position of its insured, seeking to maximize its recovery. But the first precedes the second. Without payment to its insured – which the insurer is motivated to keep as low as reasonably possible – there will be no subrogated action against the wrongdoer.

[31] It is especially unlikely that an insurer would overpay its insured in Section D cases, because of the doubtful prospect of any recovery from the defaulting third party (see for example, *Somersall v. Friedman*, 2002 SCC 59, para. 71). This circumstance is additional incentive for an insurer to pay no more than it must – i.e. no more than would be reasonable. As well, in limits cases where coverage is almost always exceeded, settlement at the insurance limit is further assurance that the settlement amount is reasonable. All these factors favour the reasonableness of settlement in such cases.

[32] The *Insurance Act* does not require that an insured obtain judgment against a defaulting third party before a claim can be made for reimbursement from a

Section D insurer. Section D coverage is mandated by the S.P.F. No. 1 Standard Automobile Policy (Owner's Form) for Nova Scotia, implemented by regulation under the authority of s. 139 of the *Insurance Act*, and provides:

> **5. Determination of Legal Liability and Amount of Damages**
>
> (1) ***Issues as to whether or not a claimant is legally entitled to recover damages and as to the amount of such damages shall be determined***
>
> (a) ***by written agreement between the claimant and the Insurer***,
>
> (b) at the request of the claimant and with the consent of the Insurer, by arbitration by
>
> (i) one person, if the parties are able to agree on such person, or
>
> (ii) where the parties are unable to agree on one person, three persons, one of whom is chosen by the claimant, one of whom is chosen by the Insurer and one of whom is selected by the two persons so chosen, or
>
> (c) subject to subsection (3), by the Supreme Court of Nova Scotia in an action brought against the Insurer by the claimant.
>
> (2) The ***Arbitration Act*** applies to an arbitration under paragraph (1)(b).
>
> (3) ***An Insurer may***, in its defense of an action referred to in paragraph (1)(c), contest the issue of
>
> (a) ***the legal entitlement*** of the claimant to recover damages, ***or***
>
> (b) ***the amount of damages*** payable,
>
> ***only if such issue has not already been determined in a contested action in the Supreme Court of Nova Scotia***.
>
> [Emphasis added]

[33] The legislation contemplates agreement between the insured and the Section D insurer with respect to the amount of reimbursement. If this agreement were irrelevant to a claim by the insured for recovery against the wrongdoer, why would an insurer facilitate such an agreement? Why not insist that the matter be decided

by the court, so that it only needed to be decided once? In this connection, it is interesting to observe that if the insured obtains a judgment against the third party tortfeasor in a contested hearing, the amount of the judgment is binding on the insurer. In other words, there will not be two proceedings, (Standard Automobile Policy, s. 5(3)) (para 32, above).

[34] As previously described, the motions judge relied upon two earlier cases to dismiss Royal's motion, (para. 17 above). In *Grosvenor*, a furniture merchant was reimbursed for soot damage to furniture by its insurer who then brought a subrogated claim against the alleged wrongdoer, relying upon the settlement as the measure of the insured's loss. The Saskatchewan Court of Appeal rejected the trial judge's reliance upon the settlement for assessing loss and determined that the amount of the insurance settlement was irrelevant:

> 75 The trial judge held "in reality the claim is between the insurers for each party to the action" and further concluded "the amount actually paid by the insurer should be regarded as prima facie proof of the amount that should be paid by the wrongdoer". ***He then determined the amount paid by the plaintiff respondent Grosvenor Fine Furniture's insurer to Grosvenor was the amount properly payable by the insurer for the defendant appellant Terrie's Plumbing and Heating Ltd. The trial judge took the insurance payments as prima facie evidence of actual loss. In my view by doing this, the trial judge has shifted the onus of proof from the plaintiff to the defendant***:
>
> […]
>
> 77 The rules with respect to the proof of damages are designed for the mutual benefit of the plaintiff and the defendant. ***To take the insurance adjuster's claim as gospel is to acknowledge the insurance policy assessment rules as those of the Court, and thus deprive the defendant of his right to proof of loss.***
>
> 78 I have a second concern with regard to the determination by the trial judge that "***the amount actually paid by the insurer should be regarded as prima facie proof of the amount that should be paid by the wrongdoer". Taking this statement at face value means the assessment of damages has been delegated by the court to the insurer.*** The assessment of damages may be extremely complicated but the trial judge must do his or her best on the information available. "... the evidence of accountants, while admissible, and useful in many cases cannot be conclusive. Assessment of damages is a task for the court, not for accountants" (Waddams, *The Law of Damages* (2nd ed.) p. 13-3). For these reasons I am of the view the trial judge committed an error in law.
>
> [Emphasis added]

[35] The amount payable by Royal to its insured in this case is unlike the coverage afforded the plaintiff in *Grosvenor*, where the obligation of the property insurer is not contractually or statutorily tied to what the claimant "is legally entitled to recover" from the third party. Moreover, the subrogation rights of the Section D insurer depend upon fulfilling its statutorily mandated contractual obligation. In other words, Royal *could not sue* unless it had paid to its insured the loss which was legally recoverable from the third party, Goodall. Accordingly, it makes sense that a Section D insurer seeking reimbursement from a defaulting third party can lead evidence of settlement as relevant to the measure of loss, subject to reasonableness.

[36] Unlike *Grosvenor*, *Kloc,* is similar to this case. General Accident settled a personal injury claim with its insured and then sought recovery from the tortfeasor, Kloc. General Accident tendered evidence of the reasonableness of settlement. The court found that irrelevant:

> [8] From the defendant's point of view, even though the action is undefended, he is still entitled to have the plaintiffs prove the damages of the personal plaintiff in exactly the same way as if there were no insurance element in this case. In other words, the defendant should be quite unaffected by the settlement made by the plaintiffs. The plaintiffs still have to meet the burden of proving the damages of the personal plaintiff and those damages must be proved in the conventional manner.
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> [9] This means that it is not sufficient just to establish that the settlement was fair and reasonable. Instead, properly admissible evidence must be adduced with respect to the personal plaintiff 's injuries, loss and damage and her total damages must then be assessed by me as the trial judge. The amount at which I ultimately assess the personal plaintiff 's damages will not necessarily be the same as the amount of the plaintiffs' settlement plus $440.

[37] Although *Kloc* is like this case, it provides no policy analysis nor authority for favouring an extensive and redundant trial process. The policy reasons supporting expedited proceedings are more pressing now than in 1985 – I would not follow *Kloc*. In paying its insured, a Section D insurer fulfills its statutory and contractual obligation to supply the deficiency of the third party's wrongdoing. *Kloc* does not explain why that resolution of the third party's obligation is irrelevant to quantifying that obligation.

Default Proceedings:

[38] *Rule* 31.12(4) provides that an undefended action constitutes an admission of the plaintiff's claims:

> A party who does not file a notice of defence when required is taken to have admitted, for the purposes of the action, the claims made against the party, and the party making the claim may move for judgment under *Rule 8 - Default Judgment*.

[39] A party who fails to defend a claim for an unliquidated amount of damages is deemed to have admitted both liability and damage. Wright, J. observed in *Colbourne v. MacLean*, 2005 NSSC 324, ¶20:

> 20 The first question brought into focus by these contrary positions is just what the effect of a default judgment is. Counsel for the plaintiff has referred me to the venerable case of *Hill v. Stephen Motor & Aero Co. Ltd.* [1929] 3 D.L.R. 676 (Sask. C.A.) where Haultain, C.J.S. stated:
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> > "... ***the defendant, by allowing judgment to go against him by default in pleading, admitted the causes of action stated in the statement of claim and the right of the plaintiff to some damages in respect of them.***
> >
> > Judgment by default is an implied admission of the action, that is, the admission by the defendant of the plaintiff's right to the relief claimed in the statement of claim.
> >
> > All the plaintiff has to prove, or the defendant is permitted to controvert, is the amount of the damages; for the cause of action itself, as stated in the plaintiff's claim, and the right to some damages in respect of it, is admitted by the defendant, by his suffering judgment to pass against him by default." (case authorities omitted).
>
> 21 This passage was cited with approval in more modern times by the New Brunswick Court of Appeal in *Brunswick Construction Ltee. v. Villa des Jardins Inc.* (1977) 17 N.B.R. (2nd) 107, a mechanics' lien case in which Hughes, C.J.N.B. went on to say (at para. 14):
>
> > "In making an assessment after interlocutory judgment has been signed the trial judge is, in my opinion, justified in treating as admitted by the defaulting defendants any allegations of fact in the statement of claim and the remedy sought, subject only to the assessment of the amount ..."
>
> [Emphasis added]

[40] Under our rules of court, a defendant need not defend but may serve notice that he wishes to be notified of further proceedings. In such a case, a defendant could appear and oppose an assessment of damages. Mr. Goodall did not avail himself of this procedure.

[41] As Justice Wright makes clear in *Colbourne*, a party who does not defend a claim may still challenge an assessment of damages and is entitled to all of the procedural protection associated with resisting any amount claimed and the calculations therefor. But that is not this case. An assessment of damages may go forward by way of motion or full trial. It is hard to imagine any circumstance where a full trial would be required in the case of an undefended assessment of damages.

[42] In cases such as this, the loss has been quantified once already, by the party responsible for paying it, on the basis of what the plaintiffs were "legally entitled to recover" from Mr. Goodall. Automobile insurers are very experienced personal injury litigants, whose routine business is to evaluate accident claims. They are not in the business of liberally distributing largesse to undeserving claimants. The Court should not defer to the insurer's calculation, but because the principle by which settlement is effected is the same as that by which the Court would calculate damages, it is relevant.

[43] The motions judge appears to share the concern in *Grosvenor* that assessing the reasonableness of settlement reverses the onus of proof, (Decision para. 34, quoted in para. 18 above). That is not the case. As in *Biggin*, the applicant bears the burden of establishing that the settlement was reasonable in light of the claim advanced. As Singleton L.J. said:

> ***"The plaintiffs must establish a* prima facie *case that the settlement was a reasonable one. If the defendants fail to shake that case, the amount of the settlement can properly be awarded as damages."***
>
> (p. 325) [Emphasis added]

There is an evidentiary burden for the third party to meet, once the plaintiff establishes, in light of all the evidence, that the settlement was reasonable. That evidentiary shift of burden occurs in most cases. This does not reverse the onus of proof.

Access to Justice:

[44] Rule 1:01 provides that:

> **1:01** These rules are for the just, speedy and inexpensive determination of every proceeding.

[45] It is obvious that proving damages on the standard insisted upon by Justice Wood in this case would be more time consuming, expensive, and slower, than tendering evidence of the reasonableness of settlement.

[46] The Supreme Court has recently endorsed the policy reasons behind settlement. In *Sable Offshore Energy Inc. v. Ameron International Corporation*, 2013 SCC 37, Justice Abella noted:

> 11 Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.J.):
>
> > [T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.
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> This observation was cited with approval in *Kelvin Energy Ltd. v. Lee,* [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

[47] Similarly, in *Hryniak v. Maudlin*, 2014 SCC 7:

> [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible - proportionate, timely and affordable. ***The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.***
>
> [Emphasis added]

[48] In *Garner v. Bank of Nova Scotia*, 2014 NSSC 63, Associate Chief Justice Smith endorsed the comments in *Hryniak* and amplified them:

> 34 During the hearing of this motion, I referred counsel to the recent Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7. In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada. It recognized that our civil justice system is premised upon an adjudication process that must be fair and just. The court went on to say, however, that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes (see para. 24). It further stated that a fair and just process is illusory unless it is also accessible, proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (see para. 28). ***While these comments were made in the context of a summary Judgment motion, in my view, they are applicable to all civil cases in Canada.***
>
> [Emphasis added]

[49] I agree. The principles of accessibility, proportionality, timeliness, and affordability are applicable to all civil cases in Canada.

[50] It could be objected that the comments of the Supreme Court in *Hryniak* relate simply to procedure – they do not extend to substantive areas of law such as means of proof. The response to that is that proof of liability is entirely dispensed with in cases of default judgment. Not only is liability presumed against the defendant, the plaintiff need lead absolutely no evidence to establish liability. In cases involving a claim for a liquidated amount, there would be no proof of that amount either. Upon default, the court would simply issue an execution order in the amount claimed.

[51] So there is nothing wrong in principle with a simpler, quicker, less expensive and proportional basis for assessing damages in undefended cases such as this one, where the damage claimed is based on a settlement whose calculation depends on what is legally recoverable from the defaulting third party.

[52] In situations where the claim is defended, the third party is clearly challenging liability or damages, or both. In such cases, the right to indemnification cannot be assumed. But settlement remains relevant. Its reasonableness will always be measured against what damages the insured would likely recover, (per Singleton, L.J. in *Biggin*, above).

[53] With respect, in light of the foregoing, the motions judge erred in law when ruling that settlement of the plaintiff's Section D claim was irrelevant to the assessment of damages against the defaulting tortfeasor. Royal led a great deal of medical evidence relating to its insureds' personal injuries. That would be appropriate because it would permit the court to assess reasonableness of settlement in light of likely recovery, based on what would "probably be proved" on a full blown assessment of damages, (*Biggin*, para. 13 above). However, not all that evidence was before this Court, and we are not in any position to assess whether settlement was reasonable. I would remit this matter to a hearing before a justice of the Supreme Court to assess damages, which should take into account the settlement amount to determine whether it was reasonable.

[54] The motions judge expressed some concern about the admissibility of some of the evidence tendered by Royal through its own witnesses. Such a practice would accord with assessing the reasonableness of settlement because it describes what Royal knew when it settled. Nevertheless, some admissible evidence from the plaintiffs should be tendered so that the Court can have confidence that settlement was reasonable in light of the likely recovery by the plaintiffs.

Proper Date for Assessing Damages:

[55] The motions judge relied on *Rule* 70.05 for his decision that damages are assessed as of trial.

[56] *Rule* 70.05 provides:

> **70.05 – Damages assessed to date of assessment**
>
> Damages for a continuing cause of action are assessed to the date of assessment.

[57] *Rule* 70.05 is derived from *Rule* 33.04 of the 1972 *Nova Scotia Civil Procedure Rules*, which in turn originates with Order 37, Rule 6 of the *English Supreme Court Practice* (1982). Thus English authorities are apposite.

[58] *Rule* 70.05 has no application here, as there is no continuing cause of action such as trespass or nuisance (for an early example see *Hole v. Chard Union*, [1894] 1 Ch. 293).

[59] To return to Lord Justice Singleton in *Biggin*:

> ***… the duty of the judge at the trial is to determine the damages; and the facts proved before him might be quite different from those known to counsel at the time of his advice to settle for so much. The trial judge must make up his own mind on the facts he finds proved before him***. At the same time, I am far from saying that the settlement ought to be disregarded. No one can think that a person or a company will agree to pay 43,000*l.* damages lightly. It is a matter for consideration that the settlement was arrived at under advice, the more so as the party settling may be quite uncertain as to whether he can recover anything against someone else. If, upon the evidence, the judge is satisfied that the damages would be somewhere around the figure at which the plaintiffs had settled, he would be justified in awarding the settlement figure. …
>
> [Emphasis added]

The emphasised language suggests that the assessment of damages is done as of the motion date. That accords with the general rule.

[60] The assessment of damages is usually done as of the motion because damages are assessed "once and for all" at one time: *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Case. 127, *Andrews v. Grand & Toy Alberta Ltd.*, [19878] 2 S.C.R. 229 at p. 236; *Watkins v. Olafson*, [1989] 2 S.C.R. 750. Specific types of damage may be calculated as of a particular date: *Johnson v. Agnew*, [1980] A.C. 367 (property loss).

[61] In cases where the plaintiff has settled a general damage claim some considerable time prior to the assessment, the court may need more contemporary evidence to assess the reasonableness of settlement. That would not normally be so for special damages and out-of-pocket types of expenses. In this case settlement occurred in December of 2009. The motion for an assessment of damages was not filed until November 2013. That delay warranted some recent evidence on general damages.

[62] I would allow the appeal and remit the assessment of damage to the Supreme Court, as previously described. No costs are requested or ordered.

Bryson, J.A.

Concurred in:

Oland, J.A.

Farrar, J.A.