

Case Name:

Nery v. Nery

**Between
Gavina Nery, Plaintiff, and
Felipe Nery, Defendant**

[2012] A.J. No. 792

2012 ABQB 484

29 C.P.C. (7th) 41

219 A.C.W.S. (3d) 308

2012 CarswellAlta 1297

Docket: 1003 15736

Registry: Edmonton

**Alberta Court of Queen's Bench
Judicial District of Edmonton**

B.R. Burrows J.

Heard: June 7, 2012.

Judgment: July 25, 2012.

(41 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations Settlements -- Releases -- Setting aside, grounds -- Trials -- Summary trials -- Application by plaintiff by way of summary trial to strike defence based on release allowed -- Plaintiff injured in motor vehicle accident as passenger in car driven by husband -- Plaintiff accepted payment from insurer and executed release -- Plaintiff argued release was unconscionable and should be set aside -- Release under-compensated plaintiff and ignored actual and potential losses -- Plaintiff lacked independent legal advice -- Overwhelming imbalance of bargaining power between plaintiff and insurance adjuster based on plaintiff's inexperience resolving personal injury claims, lack of English proficiency and mistaken belief adjuster acting on her behalf.

Application by the plaintiff by way of summary trial to strike the defence allegation that her claim was barred by a release. The action was the result of a motor vehicle accident in September 2008. The plaintiff was a passenger in a vehicle driven by her husband. The plaintiff dealt with an insurance adjuster who offered her \$8,567 in full settlement of her claims. The plaintiff accepted this payment and executed a release in June 2009. In September 2010, the plaintiff commenced an action seeking damages for the accident. The defendant argued the plaintiff was precluded from recovering judgment on the basis of the release. The plaintiff argued the release was unconscionable and should be set aside.

HELD: Application allowed. The release was grossly unfair and improvident. It undercompensated the plaintiff for her calculable lost wages by half, ignored the possibility of a very serious injury and was finalised despite significant uncertainty about whether the plaintiff's condition stabilized or whether there was a loss of future earnings claim. English was not the plaintiff's first language and she lacked independent legal advice. There was also an overwhelming imbalance in bargaining power between the plaintiff and the insurance adjuster based on the plaintiff's lack of experience resolving a personal injury claim and the fact that the plaintiff was dealing with her own insurer and was operating under the belief that the adjuster was acting in her best interests.

Counsel:

Sharon Hollohan, for the Plaintiff.

John R. Carlson, for the Defendant.

Reasons for Judgment

1 B.R. BURROWS J.:-- In this summary trial the parties seek a determination of whether a release signed by Gavina Nery prior to her commencing this action provides Felipe Nery with a complete defence to the action.

2 The action arises out of a motor vehicle accident which occurred on September 20, 2008. The Plaintiff, Ms. Gavina Nery, was a passenger in a vehicle driven by her husband, Mr. Felipe Nery. Ms. Nery alleges that Mr. Nery negligently turned left across the path of a vehicle with the right of way, that there was a collision, and that she was injured as a result.

3 A doctor who examined Ms. Nery on March 20, 2009 diagnosed her injuries as follows:

1. Whiplash Associated Disorder Type II
2. Possible thoracic outlet syndrome of the right upper extremity
3. Strain/sprain to the right SI joint [a joint in the pelvis]
4. Possible bursitis to the hip
5. Right shoulder sprain/strain specifically to the AC joint [a joint in the shoulder]
6. Possible depressed mood related to disruption of normal life activities
7. Not presently working full duties.

Mr. Nery also lost a tooth as a result of the impact.

4 Ms. Nery's job was as a seamstress performing alterations to wedding dresses. She was off work from the date of the accident until early March 2009. She then returned to work, part time and then full time, but was unable to continue and was off work again from August 2009.

5 Ms. Nery dealt with an adjuster employed by Allstate Insurance, Ms. Tina Moligian, with regard to compensation for her injuries and losses. She dealt with a second Allstate adjuster with respect to her Section B benefits. The medical examination referred to above was conducted in connection with the Section B claim. However, Ms. Moligian, obtained a copy of the report for use in adjusting the loss with which she was concerned.

6 Ms. Moligian concluded on the basis of the information she held around the end of May 2009 that it was a reasonable time to settle Ms. Nery's claim. On June 6, 2009, Ms. Moligian offered Ms. Nery \$8567.80 in full settlement of her claim against her husband. She explained that this was made up of \$4400 for general damages and \$4176.80 for loss of wages.

7 On June 22, 2009, Ms. Nery requested Ms. Moligian to send her the check. Ms. Moligian sent a form of release. On June 25, 2009 Ms. Nery executed the release and sent it back to Ms. Moligian. Ms. Moligian sent her a cheque for \$8567.80 on July 3, 2009.

8 Ms. Nery commenced this action more than a year later, on September 16, 2010. Mr. Nery defended on the basis, amongst other things, that the settlement and release preclude Ms. Nery from recovering judgment.

9 Ms. Nery takes the position that the settlement was unconscionable and that the release should therefore be set aside. Mr. Nery takes the opposite position. Of course Mr. Nery is involved in these proceedings in name only. The positions said hereafter to be Mr. Nery's positions are in fact positions taken by Allstate Insurance, his insurer.

10 Counsel agree that the law to be applied in this situation is that stated by the Alberta Court of Appeal in *Cain v. Clarica Life Insurance Company*, [2006] 7 W.W.R. 111. After citing the leading authorities on unconscionability Côté J.A. said: (para. 32)

Those authorities discuss four elements which appear to be necessary for unconscionability. ... The four necessary elements are

1. a grossly unfair and improvident transaction; and
2. victim's lack of independent legal advice or other suitable advice; and
3. overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. other parties knowingly taking advantage of this vulnerability.

Was the settlement grossly unfair and improvident?

11 Ms. Nery submits that four features of the settlement made it grossly unfair and improvident.

- a) ***Loss of wages grossly under compensated***

12 First, the portion of the settlement which was ascribed to Ms. Nery's loss of wages was about half of the amount she had actually lost as at the time of the settlement. It appears Ms. Moligian knew this to be the case.

13 Ms. Moligian provided the following explanation as to how she arrived at the \$4176.80 for loss of wages in her affidavit:

After Mrs. Nery told me she had gone back to work full-time, I calculated her loss of income as follows:

- a. She was off work for 25 weeks, from September 20, 2008 to March 20, 2009. Since she earned \$720.00 per week, she suffered a loss of income during this period of \$18,000.00.
- b. Mrs. Nery worked 24 hours a week from March 20, 2009 to May 4, 2009. Since she suffered a loss of \$360.00 per week for 6 weeks, her total loss during this period was \$2,160.00.
- c. I estimated Mrs. Nery's loss of income to be \$4,176.80.

14 On cross-examination Ms. Moligian supplemented this somewhat incomplete explanation. The total loss Ms. Nery incurred to May 4, 2009 was \$20,160. Ms. Moligian testified that she estimated that Ms. Nery would have received \$400 a week income replacement benefit under her Section B coverage for 30 weeks (there is no payment for the first week) - a total of \$12,000. After deducting that recovery, Ms. Nery's loss was \$8160. This would be further reduced by the amount of income tax that Ms. Nery would have paid on that amount had she received it - because it is her net loss that is recoverable. Ms. Moligian reduced the gross amount by 25% to arrive at the net amount. That works out to \$6120. She offered \$4176.80 - or \$1943.20 less than the loss which, by her own calculations, she recognized.

15 In fact at the point of the settlement Allstate had paid Ms. Nery \$7200 in Section B benefits - not the \$12,000 Ms. Moligian estimated. (I understand Allstate never paid any further Section B benefits.) Information from the Section B file was available to Ms. Moligian though she does not remember having information as to the actual payment made. But on the basis of information available to Ms. Moligian, whether referenced or not, Ms. Nery's actual loss at the time of the settlement was \$9720 or \$5543.20 more than she received in the settlement.

b) General damages paid on basis of the cap

16 At the time of the settlement the Minor Injury Regulation had been declared unconstitutional by the Court of Queen's Bench and the appeal of that declaration to the Court of Appeal (which later held the regulation constitutional) was pending. Allstate took the position that it would settle claims limited by the regulation as if the regulation applied and if the claimant was not content to accept that position they could wait until the Court of Appeal made its determination. Allstate advised Ms. Nery of this position in writing and further told her that limitation periods would continue to run in the meantime.

17 Ms. Moligian's offer was on the basis that the Minor Injury Regulation applied to Ms. Nery's injuries. Ms. Nery submits that it would not apply to all her injuries - in particular the possible thoracic outlet syndrome, the depression and the lost tooth. The settlement offer ignored the possibility that these injuries, one of which at least, thoracic outlet syndrome, can be serious and can attract

very significant damages, (see *Meehan v. Holt*, 2010 ABQB 287; *Couillard v. Waschulewski Estate*, May 11, 1988 AB QB, [1988] A.J. No. 409, Edmonton 8503-25087 per Dea J.) were not or were arguably not capped. This renders the settlement grossly unfair and improvident.

c) The settlement was premature

18 At the time she determined that it was a reasonable time to settle Ms. Nery's claim, Ms. Moligian had to hand a three-month-old medical opinion obtained by Allstate in connection with Ms. Nery's Section B claim in which the doctor:

- noted that though Ms. Nery's symptoms had improved with physiotherapy she continued to have ongoing problems in her right shoulder and right arm, numbness and weakness in her hands, pain in her right lateral thigh, swelling in her neck, and daily headaches.
- noted that Ms. Nery was emotionally distressed at the disruption the injury had caused to her life.
- noted on physical examination objective evidence of her subjective complaints.
- recommended immediate therapy in relation to the SI joint, corticosteroid injection to the AC joint to be done under either ultrasound or fluoroscopy guided by a radiologist.
- recommended further investigation in the form of a cervical spine MRI "to decipher why there is some soft tissue swelling over the right anterior side of her neck and to assess her right brachial plexus" [network of nerves in the neck and shoulder].
- stated, "The prognosis is guarded, as she is not back to full work duties", that she was partially disabled from her present work activities because of limitations of her right shoulder and right SI joint, and at the time of the report could only work part time.

19 Ms. Nery's position is that at the time the settlement was offered the treatment and further diagnostic investigation recommended by the doctor had not been done. (It was never done.) The doctor had ordered it but Allstate, as the section B insurer, had not authorized it. There was no medical determination that she had improved to the point where the guarded prognosis was no longer appropriate. In these circumstances it was a good time for settlement only from Allstate's point of view. The settlement was improvident in the sense that it was precipitous - premature.

d) No inclusions for obviously relevant heads of damage

20 Finally, Ms. Nery's position is that the settlement was grossly unfair and improvident because it contained nothing for at least three heads of damage which were obviously relevant: special damages, loss of future earnings, and cost of future care.

The Defendant's Position

21 Mr. Nery's position is that these features of the settlement do not render it grossly unfair and improvident.

22 As to the wage loss offer being less than the calculable wage loss and the general damages offer ignoring injuries not, or arguably not, covered by the Minor Injury Regulation, Mr. Nery observes that the offer was an offer. Ms. Nery was not obliged to accept it. Further, Mr. Nery submits, the amounts in question are not large enough that any unfairness in the numbers could accurately be described as "grossly" unfair.

23 As to the offer being made before clarity existed as to Ms. Nery's recovery and condition, Mr. Nery observes that three months had passed since the doctor's opinion had been obtained and Ms. Nery had returned to full time work - a point which she had brought to Ms. Moligian's attention in a phone call. It was not therefore unreasonable for Ms. Moligian to proceed to discuss settlement with Ms. Nery who clearly was anxious to resolve her claim.

Conclusion

24 In my view Ms. Nery has succeeded in establishing that the settlement was grossly unfair and improvident. The question is not, at least at this point, whether or not Ms. Moligian's actions can be explained or whether they would be properly characterized as commercially immoral. The question is whether the result of the dealings was so unfair that a reasonably informed observer would consider it offensive.

25 In my view a settlement which under-compensates calculable loss of earnings by half, ignores the medically recognized possibility of a very serious injury not affected by the Minor Injury Regulation, is finalized despite significant uncertainty as to whether the injured party's condition has stabilized and as to whether there has been a loss of future earning capacity, is grossly unfair and improvident.

Did Ms. Nery lack independent legal advice or other suitable advice?

26 Ms. Nery did not have any independent legal advice. Correspondence from Ms. Moligian indicated that if she did not understand the position Allstate was taking with regard to the Minor Injury Regulation she should seek legal advice. She did not do so.

27 Ms. Nery's evidence is that Ms. Moligian told her there was a "government law" that she could not recover more than \$4000 for her injuries. She understood that. She did not question it.

28 She did speak to an acquaintance who she understood to have considerable business experience. He told her she should talk to a lawyer. She told Ms. Moligian of that recommendation and was told, according to her evidence, that a lawyer would take a portion of her recovery, which would not, because of the "government law", be more than \$4000 in any event. She understood Ms. Moligian's advice to be that talking to a lawyer would result in her receiving a lesser recovery. She took this as advice against talking to a lawyer whether it was intended as such or not.

29 This element of the test is established.

Was there an overwhelming imbalance in bargaining power?

30 Ms. Nery was born in Manila in the Philippines in 1955. She came to Canada in 1974 and to Edmonton in 2001. She has worked as a nursing assistant and for several years prior to the accident as a seamstress. Her husband is a cook in a local restaurant. She has raised three children. It appears obvious that Ms. Nery is of limited financial means and that maintenance of employment is very important to her financial security.

31 She has reasonable capacity in English though it is not her first language and she conducts many daily social interactions in her native tongue. The evidence included an audio recording of a telephone interview of Ms. Nery conducted by Ms. Moligian about two weeks after the accident. I have listened to it. It is clear that on more than one occasion, Ms. Nery's comprehension of English is an impediment to her understanding Ms. Moligian's questions.

32 There clearly was an imbalance in bargaining power between Allstate as represented by Ms. Moligian and Ms. Nery. It was caused in part by Ms. Nery's lack of facility in English but I am not of the view that this was a major contributing factor.

33 In my view the major cause of the imbalance was Ms. Nery's lack of experience in dealing with the resolution of a personal injury claim. The materials do not indicate that she had any prior experience.

34 Further the resolution of this particular claim had at least two confusing complications. First was the applicability or non-applicability of the Minor Injury Regulation. Second, and perhaps more significant, was the fact that Ms. Nery was dealing with her own insurer and misunderstood the nature of their relationship.

35 Ms. Moligian testified that she attempted to make it clear to Ms. Nery that her function was different from the Section B adjuster but she conceded that Ms. Nery frequently called one adjuster with questions or concerns that ought properly have been addressed to the other. Ms. Moligian further confirmed that she did not explain to Ms. Nery that it was not her role to look out for Ms. Nery's interests. Ms. Nery's evidence is clearly to the effect that she did not understand that - she believed that Ms. Moligian was there to help her.

36 In these circumstances, Ms. Nery was operating under a very heavy disadvantage. Her lack of experience with a complicated situation caused her to incorrectly believe that Ms. Moligian was acting in her interests. The imbalance in bargaining power that such a misunderstanding brought about is properly characterized as overwhelming.

Did Ms. Moligian knowingly taking advantage of Ms. Nery's vulnerability?

37 The evidence supports the conclusion that Ms. Moligian knew the information which in my view justifies the conclusion that the settlement was grossly unfair and improvident, that she knew that Ms. Nery did not have independent legal advice or any reasonable substitute for it, (and in fact had suggested that Ms. Nery would not benefit from talking to a lawyer), that her facility in English was such that she would sometimes misunderstand what was said to her and not know that she had misunderstood, and that there was an overwhelming imbalance in bargaining power.

38 Further Ms. Moligian knew that Ms. Nery was of limited financial resources and that she had not received the Section B income replacement funds in a timely manner (I do not ascribe fault for that fact) and that she was anxious to settle and receive the settlement funds.

39 I infer from these features of the circumstances that Ms. Moligian knowingly took advantage of Ms. Nery's vulnerability.

Conclusion

40 In my view the tests outlined by Côté J.A. in *Cain* have been satisfied.

41 I dismiss the defence plead in paragraph 2 of the Statement of Defence.

B.R. BURROWS J.

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