Dutton Brock LLP

Due to CASL (anti-spam legislation), this is the last E-Counsel that will be mass emailed. You can find this edition and all future E-Counsels at our website, www.duttonbrock.com. We publish quarterly so look for it in early July.

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E-Counsel Quotes

For the lawyers:
We were not born to sue, but to command.
~ William Shakespeare

For the baseball fan:
The first principle of contract negotiation is don't remind them of what you did in the past; tell them what you're going to do in the future. ~ Stan Musial

WHAT IF PERSONAL INJURY CLAIMS WERE NEGOTIATED BASEBALL STYLE

In major league baseball there is a defined market and signing period, which opened on November 8, where teams can negotiate with free agents. Usually it creates a "feeding frenzy" where teams desperate to appease their fan base, overpay for the top players available.

This past off-season, however, experienced something new. The market for power hitters, once the most in demand position players, entered a vacuum loud enough that you could hear the air being sucked out of not only the fan base, but also the typically talkative Joey Bats, who went into stealth mode until he eventually resigned with the Jays.

This got Elie and I thinking, what if we could negotiate in civil claims the way they do in major league sports. We put on our Blue Jays team wear and asked the $80 million dollar question: "Could a personal injury claim follow a similar path as we saw in baseball free agency?"

Of course, baseball, like other major sports, has an extended but not limitless number of free agents each year. The Blue Jays did sign Jose Bautista, Kendrys Morales, and Steve Pearce. There is an adjunct lesson that could be learned from Bautista's re-signing in terms of waiting until the end of the day to make serious settlement proposals does not always work in the Plaintiff's favour.

As is well documented, the team's first offer to Edwin Encarnacion was made a few days before free agency opened. That offer was for a four year contract totalling $80 million, with an option for a fifth year for a further $20 million.

Encarnacion and his agent were told that if the offer was not acceptable, the Blue Jays would be "moving on". Imagine if you could arrange three mediations at once and tell each claimant here is what we'll pay, total. If you don't accept it, we'll be taking that money to door #2.

When the Jays' management told Encarnacion and his agent that they would move on, no one took them seriously. Time limited offers happen frequently in settlement discussions as both sides would prefer not to incur additional costs and expenses, but they aren't always stated with that kind of clarity of consequences.

For whatever reasons, the offer with a deadline is frequently ignored in personal injury claims. Perhaps it is simply because one side thinks that if the other side offers "x" dollars on day one, why would they not settle for that amount later on. The better question when presented with a time limited offer is to ask why does the other side feel the deadline is necessary in the first place.

Obviously, that is what transpired for the Blue Jays. Their initial offer was, in fact, the highest value of any offers Encarnacion would receive. Before the player's agent could figure out he was dealing with a dwindling market, the Blue Jays signed a slightly inferior player limited to the designated hitter position, Kendrys Morales, for 3 years and $33 million on November 11.

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Other teams were locking up other power hitters for a lot less than had been paid in past years. On November 29, the New York Mets signed free-agent outfielder, Yoenis Cespedes, on a $110-million, four-year deal. Then the Yankees reached an agreement with Matt Holliday on a one year deal for $13 million. The power hitter market started to decline.

As if to prove a point as to where the power-hitter market was positioned, on December 4, the Jays signed Steve Pearce, a utility-man par excellence who could fill in at a number of positions, but most likely first base and left field. Pearce signed a $12.5 million, two year contract.

Under the multi-file settlement model, we have proposed tongue firmly in cheek, that would be akin to leaving the larger-valued cases to stew, while resolving a multiple number of smaller sized claims (all the while telling the larger-valued claim that "The money in the pot is dwindling". For this to work, the Plaintiff with the higher-valued case has to be made cognizant of the other settlements being reached around him.

We can picture this now, holding a meeting in the mediation lobby, or better yet, the servery where everyone goes to eat away their anxiety. The claims handler then announces - "We have a settlement to announce. Mrs. Jones has accepted a deal from bit-time insurer worth "x" dollars. I'll now take questions."

Keep in mind that it was not until December 22 that Encarnacion chose to sign with Cleveland. There was no offer on the table from Toronto, who the only other option Edwin had was from Oakland. The deal signed with Cleveland was for three years at $60 million, with an option that could push the package up to $80 million over four. The Jays' offer, remember, was for the same money over 4 years guaranteed with an option for a fifth year.

From the fans' perspective, Encarnacion was the loser in this play of Shakespearian proportions. The Jays, unlike the Mounties, may not have "got their man" but they did fill their off-season needs, albeit arguably taking unknown quantities rather than what they did know they had in the co-MLB RBI leader. While not overtly thrilled with the eventual re-signing of Bautista, alongside adding in Morales and Pearce, Jays' fans remain hopeful of another play-off run and hopefully a World Series appearance for the first time in almost 25 years.

David Lauder and Elie Goldberg are defence-sided lawyers specializing in insurance and personal injury matters, not to mention long-suffering Blue Jay fans.

Case Finding Liability Against a Car Theft Victim to Be Heard By Supreme Court

The Supreme Court of Canada has granted leave to appeal the Ontario Court of Appeal's October 2016 decision in *J.J. v. C.C., 2016 ONCA 718*, which upheld a jury verdict in which a garage owner who left keys in an unlocked car was found liable for a teenage joyrider's catastrophic brain injury.

This case arises from a series of bad decisions on a summer night in the small town of Paisley, Ontario (near Walkerton). On July 8, 2006, three teenage boys, aged 15 and 16, split a case of 24 beers that the boy C.C.'s mother D.C., bought for them to drink. They drank beer for several hours, then (after D.C. went to sleep) switched to vodka, then for good measure split a marijuana cigarette. One boy went home, but the remaining two, C.C. and J.J., walked around town looking to steal from cars. They found a Toyota Camry outside at Rankin's Garage. The car was unlocked with the keys in the ashtray.

Despite not being licensed and never having driven, C.C. decided to drive the Camry to a nearby town. J.J. got in as passenger and suffered serious injury when C.C. crashed the car. C.C. was convicted of a number of criminal offences including theft and dangerous operation of a motor vehicle causing bodily harm. His mother, D.C., was convicted of supplying alcohol to minors. J.J. was not convicted of any offence, but it appears to have been accepted that he participated in stealing the car.

There was some dispute at trial over security practices at Rankin's Garage. The jury found that the garage owner made a habit of leaving keys in cars left outdoors, and not in a safe as he claimed. The jury found as a fact that on the night in question the garage owner left the keys in the car, left the car unlocked, and had very little security.

The trial judge instructed the jury that the garage owner owed the injured boy a duty of care "because people who [are] entrusted with the possession of motor vehicles must assure themselves that the youth in their community are not able to take possession of such dangerous objects". Essentially, an unlocked car was being treated as a loaded gun.

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Remarkably, the jury apportioned the largest share of liability for J.J.'s damages to the garage at 37%. The mother who supplied alcohol was found 30% liable. The drunk teenage driver was found only 23% liable. Finally, the injured boy, J.J., was found 10% contributorily negligence for having participated in the joy ride.

The Court of Appeal found that the judge had erred in ruling that the case law showed a duty of care already existed in such circumstances. However, applying the *Anns* test, the Court proceeded to find a new duty of care did exist in the circumstances of this case.

As Justice Huscroft put it: Could the garage owner owe a duty of care to someone who stole from him? In answering "yes", the Court found that there were cases where a seemingly innocent party should owe a duty of care to someone who stole from him.

In finding that the loss in this case ought to have been reasonably foreseeable to the garage owner, the Court of Appeal relied on the limited and rather vague evidence at trial that there had been a history of vehicle theft in the town and on the earlier finding, that the garage operated with few security measures befitting its status as a commercial operation. Based on this, the Court ruled that it was foreseeable that minors might choose to take a car joyriding, particularly when impaired by alcohol or drugs.

It should be stressed that the fact that the plaintiff in this case was a teenager who, however foolish his actions, suffered a catastrophic brain injury, presumably with heavy care needs and costs, cannot be ignored. However sympathetic the injured plaintiff's situation may have been in this case, the Supreme Court will have to carefully consider the implications of letting this ruling stand, and allowing such a broad duty of care to become established.

The practical effects of imposing tort liability on innocent victims of crime for injuries suffered by those stealing their property could enable untold numbers of bizarre claims. For instance, one wonders if the duty of care found in this case would extend to adults taking an unlocked vehicle for a drunken joyride, or had the car been stolen from a residential driveway. Certainly both such events are foreseeable.

At its heart, this case will come down to proximity, or what is reasonably foreseeable. Do the courts insist that the answer to the old question "who is my neighbour? include "criminals hurt while stealing from me", If so, one suspects the legislature may be forced to extend the protection found in the *Occupiers' Liability Act* against liability for persons hurt in the commission of criminal acts to other types of negligence claims. This would make it clear that it is not reasonable that innocent crime victims have a duty to perpetrators."

Chad Leddy is an associate at Dutton Brock who has a general tort defence practice. His favourite Blue Jay and Viking is Josh Donaldson. Chad predicts JD will hit 35 home runs this year.

A Recipe for Failure: Negotiating with the Court on what Evidence Might Be Required on a Summary Judgment Motion

In *Hew v. Sharman, 2017 ONSC 1482*, the court granted summary judgment and dismissed the defendant's third party claim. The allegation made by the defendant, Sharman, against the third party, Page, was that Page had stopped abruptly on a rural portion of Highway 12 and that this abrupt stop caused the defendant, Sharman, to rear end the Plaintiff.

Sharman never denied that he was liable for the accident, but alleged that Page had contributed to the accident. The facts were fairly straightforward. A number of vehicles were travelling westbound on Highway 12 in Orillia. There was one lane going in each direction and there were no stop signs or traffic lights on that stretch of the highway. Page was returning home and started braking when he was approximately 100 meters from his driveway. He was aware that there were three vehicles behind him. There was a black pickup truck operated by MacDonald, followed by a blue van operated by the Plaintiff, and a red pickup truck towing a trailer operated by Sharman. The evidence from Page was that he came to a gradual stop and that the two vehicles behind him (MacDonald and the Plaintiff) had no trouble in bringing their vehicles

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to a complete stop behind him. Unfortunately, Sharman violently rear ended the Plaintiff's vehicle.

The police investigated the accident. They spoke to Page, MacDonald, the front seat passenger in the MacDonald vehicle, and the Plaintiff. The police did not speak to Sharman because his passenger was injured and he was preoccupied with her condition. After investigating the scene and speaking to all parties and to the witnesses, the police charged Sharman with careless driving. The police drafted a police report which made no reference to Page.

Sharman defended the action and obtained the complete police file. The police file contained statements by MacDonald, the MacDonald passenger, and the Plaintiff. All of these statements contradicted the evidence from Page and indicated that Page had made an abrupt stop.

At the examination for discoveries, the Plaintiff acknowledged that Page had made an abrupt stop but testified that she "managed to stop" and was able to "control" her vehicle. The Plaintiff never sued Page and chose not to add Page as a defendant following the discoveries. Sharman all but accepted fault for the accident at his discovery and had no evidence against Page because he had not seen Page before or after the accident. Sharman maintained his third party claim after the completion of the discoveries and relied on the statements made by MacDonald and his passenger found in the police file.

Given that the evidence from all parties did not implicate Page, a summary judgment motion was scheduled. After the summary judgment was scheduled, counsel for Sharman made a few phone calls to the MacDonald residence and sent them one letter asking for their cooperation. Counsel for Sharman never spoke to MacDonald directly. He filed an affidavit from his clerk indicating that MacDonald was not cooperating with his investigation and he then proceeded to obtain an engineer's opinion that was partially based on the statement made by MacDonald in the police file.

Interestingly, the engineer's opinion found that all vehicles behind Page were following one another too closely. During the cross-examination of the engineer, the engineer accepted that all vehicles behind Page (MacDonald, Plaintiff and Sharman) were driving three times as close to one another as they should have. The engineer classified those following distances as "dangerous". The engineer also accepted that Sharman should have kept an even greater distance between his vehicle and the Plaintiff given that he was the only one towing a trailer, was significantly older than the other drivers and that Sharman accepted that his the road had been compromised moments before the accident.

Notwithstanding these findings, the engineer's opinion was that Page could have done a number of things to avoid the accident. This included slowing down less abruptly or tapping his brakes to warn the drivers behind him of his intention to stop.

At the motion, Page argued that the statements contained in the police file were hearsay and asked the court to draw an adverse inference for the failure of Sharman to obtain direct evidence from MacDonald. The court did not draw an adverse inference (if it did, it was not obvious from the reasons) but reiterated that parties to a summary judgment motion must put their best foot forward.

The Court criticized the assumptions made by the engineer and commented that the findings were not based on the evidence before the court. The court also indicated that the vehicles behind Page would have labelled his stop as "abrupt" because they were following him too closely. A vehicle that rear ends another like Sharman did will be presumed negligent and the case law indicates that very few cases will find a lead vehicle liable for a rear end collision.

Although summary judgment was granted in this case, it is questioned if the outcome would have been different if the Court had heard from MacDonald and his passenger at the motion. Presumably, a lot of weight would have been placed on the evidence of MacDonald and his passenger because they were directly behind Page. The Court is entitled to weigh the evidence at summary judgment and what better reason to put additional weight on the MacDonald evidence than the fact that they were travelling directly behind Page. They would have been the star witnesses for Sharman.

Parties must put their best foot forward at a summary judgment motion. This case confirms this

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principle yet again. If you have a witness that helps your case, you must put their direct evidence before the court, or risk losing the motion. It can be dangerous to simply go through the motion and obtain engineering evidence without first trying to contact important witnesses. In this case, Sharman should probably have done more to try to obtain the MacDonald evidence. A few phone calls is not enough. It would have been a lot simpler (not to mention cheaper) to send someone to knock on the door of MacDonald and obtain their evidence instead of hiring an engineer.

Alexandre Proulx is an associate at Dutton Brock. His practice focuses on motor vehicle and occupiers liability litigation. He was called to the Bar in 2010. Alex grew up a Blue Jay fan until they let Carlos Delgado sign with the Mets in free agency. His favourite player as a kid was Devon White.

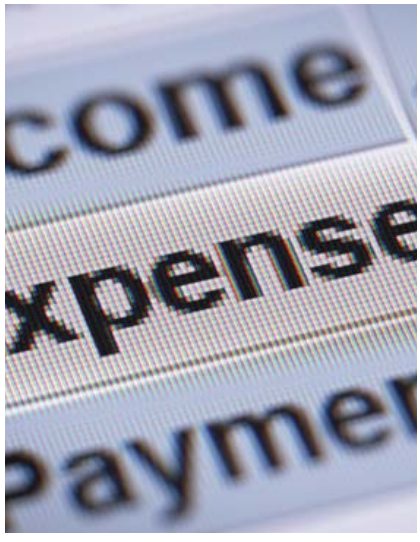
Rule 49 Offers, Costs, and Disbursements: Should Lawyers Negotiate what is "Fair and Reasonable"?

A recent statement of the law concerning Rule 49 offers, costs apportionment, and disbursements was set out in the decision of Justice *Edwards in Kirby v. Andany, 2017 ONSC 301.* The plaintiff's actions arising from two motor vehicle accidents were tried consecutively. One set of defendants offered the plaintiff $60,000 inclusive of interest, plus partial indemnity costs to be assessed or agreed upon. The other or "second" defendant offered $10,000, inclusive of interest, plus costs to be assessed or agreed upon.

The plaintiff accepted both offers on the eve of trial. The Court had to determine appropriate costs and the proportion of those costs to be paid by each defendant. His Honour held that because the defendants did not specifically stipulate in their offers that, if accepted, costs would be paid only until the date the offer was made, they had to pay costs to the date the offer was accepted. His Honour noted that neither of the defendants included a provision that would have limited their costs exposure.

His Honour stated that by including a provision in their offers that allowed the Court to assess costs, the parties by implication deemed that costs would be assessed in the manner required by the *Rules of Civil Procedure* and case law. Therefore, his Honour held that the Court was not bound to apply the 15% of the damages "rule of thumb" costs valuation on settlement.

With respect to the apportionment of costs, his Honour noted that neither defendant proposed a formula for the Court to apply in allocating costs to each defendant. He noted that it was open to the defendants to have provided for this in their offers. His Honour found that while the "second" offer was substantially less than the "first" defendants; both defendants were exposed to a substantial claim. Therefore, his Honour rejected the "second" defendant's argument that each defendant should pay their proportionate share of the plaintiff's costs based on the totality of their respective offers. He stated that such an approach would not be fair and reasonable. His Honour concluded that the fair and reasonable approach in the circumstances would be for the defendants to share equally the plaintiff's costs.



His Honour addressed the issue of the plaintiff's disbursements, specifically those claimed after the defendants served their respective offers. In reducing the plaintiff's disbursements to $45,000 (from $62,000), his Honour relied upon his earlier decision in *Hamfler v. Mink*, where he held that to be recoverable, a disbursement must be reasonable, not excessive, and must have been charged to the client.

His Honour also addressed how to determine whether disbursements for experts' fees were reasonable. He deemed two factors relevant for the Court to consider in making its determination are whether the cost of the expert(s) was disproportionate to the economic value of the issue at risk, and whether or not the evidence of an expert was duplicated by other experts.

Justice Edwards observed that before incurring expert costs, counsel needs to ask the fundamental question whether there is a reasonable probability that the plaintiff will succeed with respect to the heads of damages claimed. His Honour stated that where there is little to no prospect that a plaintiff will recover an award of damages, plaintiff's counsel cannot expect that the court will "rubber stamp" the disbursement cost of an expert retained to address claims that have little prospect of success.

In closing his Honour noted that all too often, unrealistic disbursements that have been incurred by plaintiff's counsel are one of the major impediments to settlement. As such defence counsel should pursue a negotiated costs result even when their offers to settle are accepted by the Plaintiff on the verge of trial.

Emily Densem is an articling student at Dutton Brock LLP who graduated from Bond University in Queensland Australia, in 2015. Prior to attending law school, Emily received a BSc. and MBA from Florida Institute of Technology, where she attended on an athletic scholarship for softball. Unfortunately her favourite baseball player when she was a kid was Derek Jeter.

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UPCOMING SPEAKING ENGAGEMENTS

If you can negotiate some time away from the office, you may want to look up the following who will be speaking at or participating in the seminars listed below.

You may have missed Philippa Samworth at the Oakley-McLeish program guide to MVA Litigation at the Donald Lamont Center on March 30, but you can find her again on April 7 at the LAT Advocacy for the Advocates Society at 250 Yonge Street or speaking at BDO Canada's 21st annual Accident Benefits conference at the Liberty Grand.

Paul Tushinski will have spoken at the Oakley-McLeish program guide to MVA Litigation at the Donald Lamont Center on March 31 and at the Osgoode Professional Development program on April 4, but you still have time to see Paul at Advancing or Defending Invisible Injury Cases on April 19.

Donna Polger will be one of the teaching faculty in an Intensive Workshop program on April 11, titled (apropos for this issue) "Negotiation Skills & Strategies for Litigators."

Susan Gunter will be speaking at the DRI Regional meeting in New Jersey on May 19 and then speaking at the International Association of Defence Counsel annual meeting in Quebec City on June 12.

WEB CONTEST

For this E-Counsel quiz, match up the quote on negotiations with the actual author.

Quote

A. You can get much farther with a kind word and a gun than you can with a kind word alone.

B. When a man says that he approves something in principle, it means he hasn't the slightest intention of putting it in practice.

C. It's just as unpleasant to get more than you bargain for as to get less.

D. Sometimes one pays most for the things one gets for nothing.

E. If you don't get what you want, it's a sign either that you did not seriously want it, or that you tried to bargain over the price.

F. I do not hold that we should rearm in order to fight.I hold that we should rearm in order to parley.

G. We cannot negotiate with people who say what's mine is mine and what's yours is negotiable.

Author

Albert Einstein
Otto Von Bismarck
George Bernard Shaw
Al Capone
Winston Churchill
John F. Kennedy
Rudyard Kipling

Email your answers to dlauder@duttonbrock.com and we'll give you the answers. Winners will be announced in the next E-Counsel.

Only one person correctly answered our last quiz on Murphy's Law so if you want to test yourself, go to our firm website (www.duttonbrock.com) and download any past editions of E-Counsel.

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