

CANADA / JUDGMENT

Adams v. British Columbia

2013 BCSC 557

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 557 Adams v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Adams v. British Columbia,

2013 BCSC 557

Date: 20130402

Docket: S134997

Registry: New Westminster

Between:

Larry David Adams

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia

Defendant

Corrected Judgment: The text of this judgment was corrected at paragraph 6 on May 2, 2014.

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

R.A. Wattie

Counsel for the Defendant:

L. Lee

T. Callan

Place and Date of Trial:

New Westminster, B.C.

February 25-28, March 4-6, 2013

Place and Date of Judgment:

New Westminster, B.C.

April 2, 2013

- [1] The plaintiff, Larry Adams, claims he was subject to sexual abuse at the Jericho Hill School for the Deaf and Blind ("Jericho") during his years as a resident student from 1962 until 1975.
- [2] The plaintiff alleges that while attending Jericho, the defendant, as overseer of the school's operation, owed the plaintiff a duty to protect him from sexual and physical assault.
- [3] In May 2000, the plaintiff received \$60,000 from the defendant and executed a release of all claims (the "Release") as against Her Majesty the Queen in Right of the Province of British Columbia ("HMTQ") following his participation in a program known as the Jericho Individual Compensation Plan ("JICP"). The payment and signing of the Release were in respect of the same sexual assaults alleged which is the subject matter of this lawsuit.
- [4] As a preliminary matter, I am asked to determine whether the Release operates as a complete bar to these proceedings.
- [5] The plaintiff says that the Release is ineffective as against him and asserts the doctrine of non est factum vitiates the otherwise binding effect of the Release he acknowledges having signed.

The Background

- [6] The plaintiff was born deaf. He is 55 and is the oldest of three siblings. Neither his father nor his mother learned to sign. When he was 43/4 years of age, he began attending Jericho as a day student.
- [7] The plaintiff was small and slim for his age. He attended Jericho as a day student for 18 months while his parents lived in Richmond. When his father was transferred to the island for work, the plaintiff began boarding at Jericho. He returned home during the summer breaks and during Christmas and Easter holidays.

- [8] Not all of the teachers at Jericho taught using sign language. Some teachers signed, some did not. It was a less than perfect education for the plaintiff. The plaintiff alleges that he began to be sexually abused commencing at age nine. He states thereafter his concentration deteriorated such that his studies were affected. He performed poorly in math, science and English. Instead of providing him with books to read, his teachers gave him picture books with simple words describing their contents.
- [9] The plaintiff asserts in his pleadings that from age nine on, he was both sexually assaulted and physically assaulted by various older students of the school. Abuse continued on, says the plaintiff, until he was 15 or 16 years of age. I should note that these claims remain allegations. Given the narrow focus of this inquiry, the evidence at trial did not detail the allegations of sexual abuse contained in the statement of claim nor have they been proven.

Jericho Individual Compensation Plan

- [10] In the early 1990s, the province of British Columbia retained special counsel, Thomas Berger, Q.C., to investigate allegations of systemic sexual abuse at Jericho throughout the period of the 1980s. In or around 1992, Mr. Berger prepared a report containing recommendations that the province set up an alternate dispute resolution process whereby the province could compensate former students of Jericho for the claims of alleged sexual abuse. In his report, Mr. Berger suggested compensation ranging from \$3,000 to \$60,000.
- [11] In compliance with that recommendation, the province created the JICP. It began intake of claimants in late 1996.
- [12] The program was created with input from the deaf and blind community and sought to resolve disputes arising from the alleged abuse at Jericho in a confidential and supportive setting.
- [13] A protocol was established whereby claimants would attend at JICP's offices and work with a compensation claims consultant fluent in American Sign Language ("ASL") so as to work up the data necessary to present their to the claim to the Compensation Panel (the "Panel"). The claimant and the consultant collaborated to create the claim. The two would meet and the claimant's 'story' would be reduced to writing. The claimant then approved the report and it was presented to the Panel.
- [14] The individuals hired as compensation consultants, and the criteria for their hire, were determined through consultation with individuals in the deaf/blind community. The compensation consultants who were hired had to be fluent in ASL, have excellent interview skills, have experience with the deaf community, not be part of the local deaf community and have experience or education in the field of sexual abuse. Their duties were to act in a neutral fashion assisting claimants present their claims to the Panel.

- [15] Once created, the claim was then submitted to the Panel for consideration. The Panel offered an award which was open for acceptance by the claimant. If unsatisfied with the amount of the award, the claimant could apply for reconsideration upon submission of additional information. At this stage of the process, a claimant often appeared in person before the Panel with his or her consultant. The Panel could, upon reconsideration, increase the award.
- [16] Participation in the program was voluntary; claimants were advised by the consultants that they could participate in the program and, if unsatisfied with the amount suggested as the appropriate award, opt out of the program and continue with any legal action they deemed preferable. Other legal options included an individual suit against the government or, as time progressed, joining a class action which had been initiated against the provincial government (the "class action").
- [17] The JICP had minimal evidentiary requirements to establish a claim. No corroboration was required to prove the claim and the sexual assaults needn't be proven on the balance of probabilities as required in a civil action. Instead, claims were assessed on the basis that they were reasonably likely to have occurred. Of the some 400 claims that were undertaken by the JICP, approximately 360 of them resulted in awards within the recommended range set by Mr. Berger.
- [18] The program offered an additional incentive to claimants with respect to the receipt of social assistance. Normally, the rules governing receipt of social assistance required that any lump sums, including awards for damages for assault, physical or sexual, would be an impediment to the ongoing receipt of social assistance until the award had been spent by the claimant. Money paid out under the JICP was exempt from such consideration. Claimants could receive an award without it affecting their entitlement to receive social assistance.
- [19] Additionally, the JICP provided the claimants with access to independent legal advice, interpreters and financial planners without cost.
- [20] At any time during the process, a claimant was entitled to free legal advice from a lawyer of their choice to explain the legal ramifications of accepting a JICP award. To facilitate access to legal services, the JICP created a list of lawyers for claimants who did not already have a lawyer. The list was made up of lawyers with backgrounds in providing legal counsel to victims of sexual abuse.
- [21] If, after presentation of their claim to the Panel, a claimant was dissatisfied with the award which had been recommended, the claimant had the option of opting out of the program and seeking redress in other forums or, alternatively, to appeal the decision of the Panel. In an appeal the claimant would rework their submissions and appear before the Panel for reconsideration of the amount awarded.

- [22] The JICP went to great lengths to advertise itself in B.C. and outside the province. A website was created and brochures and newsletters were distributed. Information meetings were held and videos in ASL regarding the Berger report were created. These were aired on television and distributed throughout the deaf community.
- [23] According to Jane Morley, a member of the three-member Panel which heard the claims, the JICP was a unique process which allowed complainants to tell their story in their own language in a confidential setting. There was no requirement to face any of the alleged abusers, nor any cross-examination on the submissions they made. Claims were to be treated with respect and dignity.
- [24] Those claimants identified by the consultants as having mental disabilities or communication skills so poor that they could not understand the process, were placed on a special track and dealt with differently than the mainstream claimant.
- [25] Entry into the program didn't require accepting the award the Panel determined was appropriate. If a claimant was dissatisfied with the suggested award or required forms they could opt out of the process before they received any compensation. However, to receive money from the JICP, the claimant was required to sign the Release such that no further proceedings could be brought against the province in respect of sexual abuse which occurred at Jericho. Acceptance of JICP money did not prevent further claims for the same events as against the perpetrators of the sexual or physical abuse.
- [26] Parallel to the JICP, a class action had been commenced in British Columbia against the province. The class action was certified by the British Columbia Court of Appeal in November 1999: *L.R. v. British Columbia*, 1999 BCCA 689. That certification was later upheld by the Supreme Court of Canada: 2001 SCC 69.
- [27] According to Jane Morley, certification of the class action cast doubt upon the future of the JICP. It sought advice from the court.
- [28] In February 2000, Madam Justice Humphries, who presided as case manager over the class action, made a series of orders with respect to the class action. One of those was of particular significance to the JICP. It required that all claimants who participated in and accepted money from the JICP would now have to sign an "Opt-out Form", the effect of which was either to remove themselves as a member of the class or preclude them from joining the class in the future.

The Plaintiff's Participation in the JICP

- [29] The plaintiff made application to the JICP in 1999. He did so by completing, seemingly without assistance, an application form providing personal information.

- [30] After completing his application form, he received correspondence from Dr. Rachelle Hole inviting him to make an appointment with her to begin preparation of his claim. He apparently received the letter and contacted Dr. Hole to begin processing his claim.
- [31] Dr. Hole currently works as an associate professor at the University of British Columbia Okanagan. She has extensive academic credentials in social work and interdisciplinary studies together with broad experience working in the deaf community starting when she began working at the Elks Family Hearing Resource Centre for families of deaf and hard of hearing. She has a level 4 certification in ASL making her fluent in the language in which she communicated with the plaintiff.
- [32] At the time the JICP was being established, Dr. Hole was working at the Deaf Children's Society and was invited to make application for the position of compensation consultant. She underwent training which included watching videos of deaf individuals telling their stories of abuse together with detailed instruction on the creation of claims based on such interviews for presentation to the compensation Panel.
- [33] The criteria for the position of compensation consultant were fluency in American Sign Language ("ASL"), respect for deaf culture and recognition as to the impact of the Jericho experience upon the deaf community. Dr. Hole met all three criteria.
- [34] Over the course of her employment with the JICP, Dr. Hole assisted between 70 and 80 claimants, including the plaintiff. She testified that her background of working with the Ministry of Children and Family Development, specifically interviewing children, assisted her with the interpersonal skills necessary to deal with vulnerable clients opening themselves up to strangers so as to advance a claim.
- [35] Dr. Hole testified at trial. She did not specifically recall working with the plaintiff. However, she made contemporaneous notes to his file of events including the two day period surrounding the execution of the Release and Opt-out Form.
- [36] Dr. Hole testified as to her standard procedure in dealing with claimants from the commencement of a claim to its conclusion.
- [37] She said that when she first met with a claimant, she would give a description of the program and advise the claimant what the program could and could not do for them. Specifically, the program was directed at compensation for sexual abuse; not physical or mental abuse. As part of the standard intake, Dr. Hole advised claimants of other available legal options such as an individual lawsuit against the government or, once it was certified, entry into the class action.
- [38] She advised claimants of the limits on the compensation that the Panel could award; \$3,000 to \$60,000 range based upon the recommendations contained in the Berger report.

- [39] She advised claimants of the exemption of the award from consideration in the continuation of social assistance benefits. She said that all claimants were told they could leave the program at any time before receiving compensation and pursue other legal remedies. But, if the claimants elected to accept JICP funds, then they would have to release the province from future claims arising out of sexual abuse which occurred while they were students at Jericho.
- [40] The next phase of the claim was consultation with the client to craft the necessary report to submit to the Panel. As part of that function, compensation consultants were provided with documents from the Ministry, school records and, where appropriate, police reports. The next, and most important phase, was the taking of a narrative report from the claimant. This could take many hours.
- [41] Dr. Hole described that process as a "back and forth" discussion to facilitate the collection of information through questions and answers. All discussion between Dr. Hole and the claimant were in ASL. The narrative was typed into English and then reviewed with the claimant to see what could be added or what need be subtracted. The claimant was given the opportunity through both reading and signing to expand on the report or clarify items within it. The claimant, not the compensation consultant, decided when the story was complete. Records in evidence demonstrate that Dr. Hole and the claimant spent some 21 hours on the completion of the report that was submitted to the Panel for first consideration. Dr. Hole did not identify the plaintiff as a person requiring placement in the special track.
- [42] The claimant's report was submitted to the Panel in early March of 2000 and supplemented by inclusion of additional information on March 31, 2000.
- [43] The compensation Panel consisted of Jane Morley, a lawyer, Liz Halperin, an academic who was deaf and blind herself and active in the deaf/blind community, and Frank Falzon, also a lawyer.
- [44] The Panel reviewed the plaintiff's material and, on April 28, 2000, wrote to him advising:
- We are the compensation panel for the Jericho Compensation Program. Our job is to decide on compensation for pain and suffering caused by sexual abuse at Jericho Hill School. We have carefully reviewed your claim. You signed the main claim on March 2, 2000 and the additional information on March 31, 2000. We believe that the sexual abuse has hurt you. We have decided that your compensation should be \$50,000.
- [45] Although she had no independent recollection of the same, Dr. Hole testified that she would have been the one to communicate the Panel's finding to the claimant. She testified that based on protocol and policy, she would again, after receiving the Panel's findings, discuss with claimant their options; Those being, according to her evidence, acceptance of the recommended award, application for a reconsideration of the award based on further submissions, or decline the award and pursue redress either by way of an individual action

or by joining the class action which, by this time, had been certified and under the management of Humphries J.

- [46] Dr. Hole testified it was her standard practice to make clear to claimants the implications of accepting the offer. If a claimant took the award they couldn't sue the province in the future for sexual abuse nor could they enter the class action lawsuit. At this stage, individuals were encouraged to seek independent legal advice regardless of whether their inclination was to accept the initial award or seek reconsideration.
- [47] Dr. Hole testified where an individual wanted to take that money right away, she encouraged reflection and independent legal advice because of the long-term implications of what acceptance meant. If their inclination was to refuse the offer, then she said she would respect that choice and the claimant's participation in the JICP would come to an end freeing them to pursue what other remedies they chose.
- [48] Dr. Hole said claimants could withdraw or suspend their involvement at any time. The only time limit that was engaged by the Panel's initial report was a 60 day time period to ask for reconsideration. In the event the 60 days passed without such a request being made then the decision of the Panel was final. That did not require acceptance by the claimant only that there would be no reconsideration upon the expiry of 60 days.
- [49] Dr. Hole testified that upon learning of the \$50,000 award, the claimant expressed dissatisfaction. He wanted more money; presumably the \$60,000 maximum. He was referred by Dr. Hole to Megan Ellis, a lawyer with an extensive background in sexual abuse cases. Ms. Ellis had been approached by the JICP to be one of the lawyers to whom claimants were referred for independent legal advice. Her account was paid by the government but there is no suggestion that she gave anything other than independent advice to claimants referred her without regard to the government's interests.
- [50] Ms. Ellis testified as to the protocol in effect on a referral such as the plaintiff. Where the question was, as was with the plaintiff, the propriety of the original award, Ms. Ellis did not discuss the Release or Opt-out Form with the claimant. Instead she reviewed the claimant's file in advance of meeting with him or her to ascertain whether to advise the claimant to accept the offered sum.
- [51] The meeting between the plaintiff and Megan Ellis took place on May 17, 2000. An experienced ASL interpreter was present. All advice was translated from English into ASL for the plaintiff.
- [52] Ms. Ellis had no specific memory of the plaintiff and testified only as to her standard practice in interviews focused on whether a claimant should accept the government's initial award.

- [53] She testified she would advise claimants of their other options, including compensation from the Criminal Compensation Board, individual lawsuits against the government and/or perpetrators and the class action, after it had been certified in 1999.
- [54] She testified she explained to claimants that the options were mutually exclusive. That is to say, acceptance of JICP money precluded participation in the other options insofar as compensation from the provincial government was concerned.
- [55] Ms. Ellis did not review the Release signed by the claimant on May 24, 2000, or the Opt-out Form signed May 26, 2000, because the claimant had not accepted an offer at the time of their first meeting.
- [56] Ms. Ellis's account, dated March 25, 2001, discloses another half-hour meeting between her and the claimant on June 2, 2000. The subject matter of the meeting is not described. Mr. Adams testified it was to discuss the option of a lawsuit against his father for physical and mental abuse while growing up. Mr. Adams agreed he was free to ask Ms. Ellis at that meeting about the effect of both the Release and the Opt-out Form.
- [57] It's unclear what advice Ms. Ellis provided to the claimant in either meeting. Mr. Adams testified she helped him with additional information to put before the Panel for a reconsideration of the original offer.

[58] When asked in cross examination:

Q: Okay, did Ms Ellis explain to you that you agreed not to sue the province or any of her employees or contractors in connection with any claims of sexual abuse that occurred while at Jericho Hill School if you took JICP money and signed a release?

He replied:

A: She might have explained it. I don't know. I don't remember.

[59] On May 23, 2000, the claimant and Dr. Hole appeared in person before the Panel for reconsideration.

[60] After the reconsideration hearing, the Panel reconvened and increased the award to the claimant to the maximum allowable, \$60,000. This was formalized in a letter from the Panel to Mr. Adams dated May 24, 2000. That letter was delivered by hand to him via Rachelle Hole. It read, in part:

This is our final decision. You may discuss your options with Rachelle Hole. Thank you again for coming to meet with us. We wish you well in the future.

[61] Dr. Hole and the claimant met following the Panel's decision and Dr. Hole made a note to file as follows:

Larry Adams met with the panel today. They increased the initial decision to \$60,000. Larry indicated that he wanted to accept the amount right away. I explained to him that if he accepted the amount and signed the release form then he would not be eligible to participate in the class action. He was adamant about his decision to accept the JIC offer for compensation. I encouraged him to think about the decision over night and set an appointment for the following day.

Larry had already received independent legal advice with Megan Ellis. I recommended that he could go back to Megan regarding his decision to sign the release and recommended that he get a certificate from Megan Ellis. [Certificate of Independent Legal Advice].

He explained to me that he does have another appointment with Megan Ellis regarding his claim for compensation relating to his experiences of physical and educational abuse but that he had already discussed his decision with Megan and was clear that he wanted to accept the JIC offer of \$60,000.

[Handwritten in original.]

[62] The next day, May 24, 2000, the claimant and Dr. Hole met again. Dr. Hole made the following note to file after discussions with the claimant:

Larry came today to accept the JIC offer. I reviewed the implications of signing the release and opt out forms. I also recommended that he again talk with Megan Ellis about the decision but he again reiterated that he had already met with her and discussed his options. He wanted to proceed with the JIC option.

[63] Dr. Hole and René de Vos, one of the program directors, both signed off on the notes. Dr. Hole testified that although she has no specific memory of the discussion with Mr. Adams, her standard procedure as to the matters raised in the aforementioned note to file was to advise claimants that acceptance of JICP money was at bar both to entry into the class action and any further lawsuit against the government for compensation arising from sexual abuse while a student at Jericho.

[64] On May 24, 2000, the plaintiff signed the Release which is the subject of this inquiry. It read:

RELEASE - WHERE NO LITIGATION HAS BEEN COMMENCED

The Province established the Jericho Individual Compensation Program because of the recommendations of Thomas R. Berger as contained in his report submitted in March 1995.

The Compensation Panel set up under this program has offered me the sum of \$60,000 for the pain and suffering that happened to me because of sexual abuse associated with my attendance at Jericho Hill School between 1962 and 1976.

I acknowledge that I have not commenced a civil action against the Crown, related to sexual abuse associated with my attendance at Jericho Hill School.

I accept this compensation payment.

I understand that, by accepting this money and by signing this form, I am agreeing to not sue the Province, and anyone who was an employee or contractor of the Province, in connection with the sexual abuse I suffered when I was a student at Jericho Hill School, except I may bring a civil action against any individual who sexually abused me.

I confirm that I was advised that I have the choice of obtaining independent legal advice respecting whether, in my circumstances, I should sign the release.

I understand this document and I confirm that I have freely chosen to sign this release.

[65] Mr. Adams also signed a separate letter directed to the defendant requesting an apology for the subject abuse. He also signed a form entitling the defendant to make an inquiry with the Criminal Compensation Board as to any claims made by the plaintiff. The intent of that form was to avoid a double payment.

[66] On May 26, 2000, he signed a document entitled "Opt-out Form" which stated, in part:

I do not wish to be part of the class action lawsuit in British Columbia for damages against the defendant for allegedly failing to take reasonable steps to protect me from sexual misconduct of the school. I understand that by signing this form and sending it to you, I will not be allowed to share in any of the compensation which may be recovered in the class action lawsuit.

Mr. Adams' Evidence

[67] The plaintiff testified he did not understand the legal effect of the Release and that Dr. Hole only advised him he could not join the class action if he accepted the \$60,000 offer from the JICP.

[68] The plaintiff acknowledged he was contacted by Dr. Hole after enrolling in the JICP and that they met over a number of occasions before the Panel's first decision. They discussed the incidents of sexual abuse so as to prepare the claim eventually submitted to the Panel.

[69] He acknowledged all communication between him and Dr. Hole was conducted in ASL. Mr. Adams acknowledged that he is fluent in ASL stating "I am pretty good, not superb". He further acknowledged that he can read and write in English, but that ASL; not English; is his first language and that he is "not good at all" in English. He says he can only understand simple words.

[70] As to the documents he signed, including the Release, he acknowledged that Dr. Hole explained the documents to him but said he didn't really understand what he signed and that he told her so. He testified that was the case with all of the documents he signed following the reconsideration. He didn't testify as to any other communication difficulties between Dr. Hole and him over the process leading to the reconsideration.

- [71] He denies that he was told by Dr. Hole that signing the Release precluded him from suing the provincial government for the sexual abuse he says occurred at Jericho. He testified he understood that he could not participate in the class action.
- [72] Nonetheless, in January 2001, Mr. Adams applied to join the class action lawsuit on the advice of a friend. It wasn't until sometime in 2004, that he was advised by letter that he was ineligible to participate in the settlement that had been achieved because of the Opt-out Form signed by him in May 2000. He testified he didn't understand why he was not allowed to be a member of the class action.
- [73] He agreed with the testimony of Wendy Duke, the speech pathologist that he reads at a Grade 4 level.
- [74] When asked in cross-examination as to how he communicated with his doctor on important matters such as his medical health , he noted that he always goes with an interpreter and when he cannot understand something he asks for clarification to make sure things are simplified.
- [75] He agreed with counsel for the province that when he received notification that the original compensation award was \$50,000, he understood well enough that he was entitled to a reconsideration of matters and that he could engage legal assistance, paid for by the government, to assist in making a further presentation to the Panel.
- [76] He agreed that when he sought clarification from Dr. Hole she was forthcoming.
- [77] As to the preparation of the submission itself, Mr. Adams agreed that Dr. Hole would tell him exactly what she was writing and adjust it if it was not quite right. He agrees they went through the whole thing together. He was satisfied with the package at the time it was submitted to the Panel, save for the minor adjustments made with the additional information submitted in late March 2000.
- [78] When he said he was unhappy with the original \$50,000 compensation, he agrees that it was made clear to him he could get independent legal advice paid for by the government. He says Meghan Ellis was suggested by Dr. Hole and he did not understand that other lawyers might be available to him. An interpreter was arranged and he attended at Meghan Ellis' office sometime in mid-May 2000.
- [79] The interpreter who accompanied him was a gentleman by the name of David Still. Mr. Still attended upon Mr. Adams examination for discovery at the request of plaintiff's counsel. Mr. Still was acknowledged by Dr. Russell to be a leading interpreter in ASL.
- [80] The plaintiff said there was no discussion of any other legal options in the meeting with Meghan Ellis. Instead, he says they reviewed the methodology by which to increase the award first offered. He acknowledged Meghan Ellis told him there was a class action, but said she never told him that it was against the government.

- [81] He says he was never told of the requirement that he opt out of the class action in the event that he accepted JICP money.
- [82] When asked specifically by counsel for the province about the Release, he responded, "I can't remember." When asked whether he was told it was a binding agreement and he couldn't get any more money, he responded again, "I can't remember". When asked whether it was explained that by receiving the money he was agreeing not to sue the government or its employees upon signing the Release he said, "she might have, I don't remember".

Expert Evidence

- [83] In support of the contention that the plaintiff failed to appreciate the legal import and meaning of the documents he signed, particularly the Release, Ms. Wendy Duke, a speech pathologist, testified as to her opinion of the plaintiff's capability of reading and understanding the Release and Opt-out Form.
- [84] Ms. Duke administered a number of proficiency tests to Mr. Adams which, in her opinion, disclose that he was incapable of either reading or understanding the Release and the Opt-out Form.
- [85] Ms. Duke acknowledged that she has no training in ASL and was unaware that there was standardized testing available for ASL proficiency. Further, she confirmed that she was not testing the plaintiff's proficiency in ASL but rather his literacy and capacity to understand English when translated into ASL.
- [86] All of the testing was administered via interpretation from the English language into ASL and communicated to Mr. Adams. Ms. Duke acknowledged this procedure is fraught with complications and that the results must be interpreted with caution.
- [87] The testing of the plaintiff was not videotaped such that the quality of the interpretation from English to ASL in the administering of the tests could be validated.
- [88] The test results reveal, according to Ms. Duke, that the plaintiff is functionally illiterate. Of the testing performed, all but one of eight sub-tests was reading tests.
- [89] Only one of the sub-tests was conducted orally requiring interpretation from ASL into English. This test, described as the "Discourse Comprehension Test", was translated into ASL by a qualified interpreter, Ms. Debbie Miyashita.
- [90] The test is comprised of stories being told to the subject who, in turn, answers questions as to the stories' content, express and implied.
- [91] Ms. Duke describes the plaintiff's scores as being in the lowest 5 percentile of others to whom the test was administered. However she acknowledged that the plaintiff scored 8 of 10 on that portion of the testing described as "range for stated main ideas" and 8 of 10 on that portion of the testing described as "range for comprehending details stated."

- [92] Where his scores dropped dramatically were in his requirement to understand implied ideas within the framework of the stories that were translated to him. His scores in both of these sub-tests were well below the cut-off range.
- [93] Ms Duke agreed that the measure of cognitive linguistic abilities is not a test of the individual's cognitive abilities.
- [94] The defendant called Dr. Debra Russell, a nationally certified signed language interpreter who holds a doctorate in Educational Psychology. Dr. Russell has extensive background working with the deaf. She currently is a director at the Western Canadian Centre for Deaf Studies at the University of Alberta and president of the World Association of Sign Language Interpreters. She opined that the Ms. Duke's test results were flawed, having regard to the fact that they provided no insight into the plaintiff's ability to function in his own language, specifically ASL.
- [95] The bulk of the testing, in Dr. Russell's view, related only to his capacity to read the English language. She opined that translating English literacy and comprehension tests into ASL is not a valid methodology for testing the individual's proficiency in ASL. There are numerous standardized tests that would have determined whether or not Mr. Adams was linguistically functional in his first language, ASL.

Position of the Parties

- [96] The only question I am asked to resolve is the validity of the Release. If the answer is that the Release is binding, counsel for the plaintiff acknowledges its terms Release the defendant from further liability for the acts complained of in the action. If the Release is valid the claim will be dismissed. The plaintiff says that the Release is ineffective against him because he failed to understand its meaning when he signed it.
- [97] The defendant suggests the evidence leads to the conclusion that the plaintiff did in fact understand the meaning of the Release. In the alternative, even if the plaintiff's evidence of lack of understanding is accepted, the doctrine of non est factum has no application to these facts.

Analysis and Conclusions

- [98] The burden to prove the application of non est factum rests on the plaintiff. The doctrine of non est factum goes to negate a party's obligations under an agreement when that party can establish that the agreement was fundamentally or radically different from what he or she believed, or intended it to be, and where the execution was not the result of that party's negligence in failing to take reasonable precautions. *Frolick v. Frolick* 2007 BCSC 84 at para.46.

- [99] Not only must the plaintiff establish that the agreement, in this case, the Release, is fundamentally different from that which he believed he was signing, but also that he was free of contributory negligence when signing the document.
- [100] In *Van der Ros v. Van der Ros*, 2003 BCCA 270, Smith J.A., on behalf of the Court of Appeal, explained the doctrine as follows:
- [13] For many years there was some question as to the effect in law of the carelessness of a signer of a document on his or her plea of non est factum. The law was settled in England in *Saunders v. Anglia Building Society* (Sub. Nom. *Gallie v. Lee*), [1971] A.C. 1004 (H.L.), where the House of Lords concluded that the plea should be available only where the document was fundamentally or radically different from what the signer believed or intended it to be, and where the execution of the document was not the result of the signer's negligence in failing to take reasonable precautions.
- [14] This principle was adopted in Canada in *Marvco*, supra. In that case, a married couple signed a collateral security instrument upon which the plaintiff relied. They did not read the instrument before signing it but relied on the fraudulent misrepresentations of their trusted son-in-law as to its nature. The Court applied *Saunders* and held that the couple were not entitled to rely on non est factum in defence of the plaintiff's claim because of their carelessness in failing to determine the nature of the document they were signing. The Court noted that the question was which of two innocent parties should bear the loss and said (at p. 786 i):

This principle of law is based not only upon the principle of placing the loss on the person guilty of carelessness, but also upon a recognition of the need for certainty and security and commerce.

- [15] The *Saunders* and *Marvco* decisions were followed by this Court in *Adera*, supra, a case where a guarantor pleaded non est factum as a defence to the plaintiff's action for judgment on his guarantee of the debt of his business partner. The Court, per Hutcheon J.A., said (at p. 54), in the passage quoted by the trial judge, that "...it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning."
- [101] Here, the plaintiff suggests that he was only told by Dr. Hole that signing the Release precluded him from joining the class action and that he relied on her in signing the agreement without clearly understanding it.
- [102] For the following reasons, I do not agree with that position.
- [103] The evidence before me makes clear that the plaintiff was able to communicate, with the aid of an ASL interpreter, with both Dr. Hole and Megan Ellis. The plaintiff acknowledged that he is able to function in his day-to-day life with the aid of an interpreter to communicate such significant matters as relating medical symptoms to his doctor, taking the motor vehicle driver's examination and communication generally to manage his day-to-day living. He described his ASL skills as "pretty good" and, throughout the course of his examination both in direct and cross-examination, demonstrated that where he has any

doubt as to the meaning of a question interpreted from English into ASL, he did not hesitate to clarify the question so that he could provide a meaningful answer.

- [104] I observed the plaintiff throughout the course of his examination and cross examination and I am satisfied that when adequate translation provided to him he is, sometimes with clarification, able to grasp concepts of some complexity.
- [105] The best evidence of what occurred after the plaintiff determined he would accept the final offer from the JICP is contained in the note of Dr. Hole over the course of May 23 and May 24, 2000.
- [106] I accept that Dr. Hole relayed to Mr. Adams on May 23, 2000, that if he accepted the money offered by the JICP and signed the Release form then he would not be eligible to participate in the class action.
- [107] On May 24, 2000, she further noted that she had reviewed the implications of signing the Release and Opt-out Forms.
- [108] This notation, in my view, needs to be seen in light of Dr. Hole's evidence, which I accept, as to her standard practice to advise claimants that acceptance of JICP money precluded recipients from suing the government in the future either in an individual action, such as this, or by joining the class action.
- [109] The plaintiff testified that he understood only that he was precluded from joining the class action but, nonetheless, within six months of signing the Opt-out Form he joined the class action despite this understanding.
- [110] Only when advised in 2004 that he was not eligible to participate in the class action because he had executed an Opt-out Form in 2000 did he seek legal advice and proceed to pursue an individual action against the province.
- [111] There is no argument that the Release clearly precludes a further action against the provincial government for the acts of sexual abuse alleged to have occurred at Jericho during the plaintiff's days as a student there.
- [112] While I accept Ms. Duke's opinion that the plaintiff is functionally illiterate and, would not be able to clearly comprehend the contents of the Release if left to read it on his own, I am satisfied that the terms of the Release were explained to him by Dr. Hole.
- [113] As to his proficiency in ASL, the plaintiff testified that for the "most part" he understood ASL without problems. "I am pretty good at ASL. I'm not like, superb, or you know, super proficient, but, yes, good"
- [114] As to what he was told of the settlement process by Dr. Hole, he was asked the following:
- Q: Did Dr. Hole explain to you if you took JICP money you could not get any money--any money awarded by a court?

The plaintiff replied:

A: Yes, but as I said, it wasn't really all that clear.

[115] This response, in my view, negates the denials by the plaintiff as to the extent of Dr. Hole's advice over the essence of the Release. He stated in direct examination that he was told only that the acceptance of JICP money precluded him from participation in the class action.

[116] Generally, I find the plaintiff's evidence as to his meetings with both Ms Ellis and Dr. Hole to be lacking in detail as to what was said and why he says he failed to appreciate the Release precluded him from further action against the province for sexual abuse alleged to have occurred at Jericho.

[117] I accept the evidence of Megan Ellis that it was standard operating procedure for her to advise claimant's options for legal redress arising out of the plaintiff's time at Jericho. I further find that Dr. Hole would have advised him of same both during the intake procedure and over the two days in May referenced in her note.

[118] I do not accept Dr. Duke's evidence that the plaintiff is incapable of understanding the concept contained within the Release he signed when, as was the case here, the document was explained to him in ASL.

[119] Further in cross-examination the plaintiff was asked:

Q: Did she explain that the JICP was a legal settlement? Did she -- did Dr. Hole explain that the JICP was a legal settlement, so you should settle?

The plaintiff replied:

A: I think she did, but I don't think I understood that clearly. It was sort of then this is--then it's done, here is the cheque, everything is done and I walked away realizing when I got home I didn't really understand it.

[120] Even were I to accept, which I do not, that the plaintiff didn't comprehend that receipt of JICP money precluded him from both pursuing an individual law suit such as the one before me and from entry into the class action which he acknowledged he did understand but entered anyway, I am of the view that the passage at para. 14 of Van der Ros has application here.

[121] The plaintiff acknowledged a good working relationship with Dr. Hole. She advised him to get legal advice as to the effect of the settlement, but he declined despite such advice being provided to him without charge.

[122] I conclude that over the course of their two meetings on May 23 and May 24, 2000, she discussed with the plaintiff the terms of each document, the Release and the Opt-out Form.

- [123] The plaintiff met with Megan Ellis a second time in early June 2000, before he received the cheque for \$60,000. He acknowledged that Megan Ellis would, if asked, have explained the terms of the Release to him. He did not ask. Had he second thoughts on the \$60,000 settlement and returned the funds upon meeting with his lawyer, I have no doubt that the defendant would not have tried to enforce the settlement on the strength of the signed Release. Such would have been inconsistent with the goals of the program as explained by both Ms. Morley and Dr. Hole.
- [124] Instead, the plaintiff accepted the \$60,000 and, despite clearly understanding the advice that he could not join the class action, enrolled in the class action some seven months later.
- [125] When advised he was unable to receive compensation because of the Opt-out Form, he caused this action to be commenced. He initiated no challenge to the determination that the Opt-out Form precluded his participation in the class action settlement.
- [126] Upon commencing this action in 2005, he didn't offer up the settlement funds to the government.
- [127] I concur with the defendant that even were I to accept that the plaintiff did not understand the full import of the Release he signed on May 24, 2000; he cannot now avoid its consequences based upon his own negligence in failing to make proper inquiry as to the consequences of the document which he willingly signed.
- [128] If clarity could not be obtained from Dr. Hole as to the documents' import, the plaintiff knew that he could obtain, at no expense to himself, legal advice from Megan Ellis as to the import of all documents he was being asked to sign and their impact upon any further compensation he might receive in respect of the events he says occurred at Jericho.
- [129] The facts here are unlike those in the cases relied upon by the plaintiff.
- [130] In *Sullivan v. Crnogorac* (1983) 60 N.S.R. (2d) 201 (NSSC), Hallet J. was satisfied that the defendant who was relying on a plea of non est factum, was not negligent in relying on his solicitor for advice as to the contents of the agreement. The defendants had to rely on counsel because of their partial illiteracy and there appeared to be a misunderstanding between the lawyer and the defendants as to the contested term.
- [131] Here, the plaintiff says the explanation given by Dr. Hole was unclear but he chose not to seek clarification from her or seek legal advice from Megan Ellis as to the settlement's implications. While the plaintiff was illiterate, Dr. Hole specifically explained the implications of the settlement and the Release. If the plaintiff did not understand the terms, he could have taken further steps to clarify the agreement. From his other communications with Dr. Hole and in court, it is evident that the plaintiff has the skills to ask for further clarification if needed.

[132] In *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, Wilson J. assessed the terms of a purported release signed by an intoxicated person. In deciding the waiver was ineffective as against the plaintiff, the court stated the following:

As already mentioned, the trial judge found that the waiver provision in the entry form was not drawn to the plaintiff's attention, that he had not read it, and, indeed, did not know of its existence. He thought he was simply signing an entry form. In these circumstances Sundance cannot rely upon the waiver clause in the entry form.

[133] Those are hardly the facts here. Here, there were many attempts to clarify the implications of the Release, both at the time the plaintiff applied to the program, and at the time he accepted the \$60,000. Further, on May 23, 2000, Dr. Hole suggested the plaintiff not accept the offer immediately but obtain further legal advice. To this suggestion, the plaintiff replied he had seen Megan Ellis and didn't need a further consultation. The following day he returned and signed the release.

[134] Lastly, plaintiff's counsel referred me to *Arndt v. Ruskin Slo Pitch Association*, 2011 BCSC 1530. In *Arndt*, a waiver was held unenforceable because the waiver sought to be relied upon by the defendant was 'hidden within a roster' provided to team coaches for preparation by players.

[135] In declining to enforce the waiver, Humphries J. noted:

[134] Given the nature of the document and the circumstances under which it was presented to the plaintiff, there were no reasonable steps taken by the defendants to ensure she understood what she was signing. The defendants simply left it to the coaches/managers to explain what the document was and to ensure it was signed by all players. There was no system in place to ensure that the players had had the nature of the document explained to them. The coaches and managers have provided no evidence to show that the plaintiff and the other players were advised of the release, nor that anyone was directed to the back of the document. There was no signature on the actual release on the back of the document. The document was not witnessed. The plaintiff did not get a copy. Although the plaintiff deals with legal documents in her work, she does not give legal advice nor does she deal with waivers.

[136] That is not what happened here. Dr. Hole explained to all claimants, at the original intake into the Program, that acceptance of a JICP award precluded further action against the province. After the Panel first met with respect to the plaintiff's award, Dr. Hole advised the plaintiff to get legal advice. He declined. She then, as I have found, reviewed all the relevant documents signed by the plaintiff with him in his first language, ASL.

[137] In the result, I find that the doctrine of non est factum has no application to the case at bar. The Release executed by the plaintiff is binding upon him and, as such, the action against the defendant is dismissed.

[138] Costs, if sought, follow the event.

"Harvey J."

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