

**COMPROMISING POSITIONS — THE UNAUTHORIZED
SETTLEMENT OF LAWSUITS
BY LAWYERS
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Introduction

Suppose a lawsuit is begun, and that during the course of the suit a compromise is agreed to by the lawyers on either side. Now suppose that one of the parties objects to this settlement and refuses to be bound by it because his lawyer was under instructions either not to settle at all, or to settle only upon a set of express terms which have been ignored. The lawyer and party on the opposing side had no notice of any such prohibition or limitation. Both lawyers, of course, acted *bona fide* in the best interests of their clients. Should the settlement be binding? The question will be answered yes or no depending upon which of two, irreconcilable, lines of cases a court may decide to follow.

A lawyer who has been retained to conduct a matter of litigation has authority to compromise that action; indeed, this appears to be beyond controversy:

The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause. Every one must reasonably expect that a cause may not be carried to its natural conclusion, and that it is proper and usual, and often necessary, to compromise. The authorities seem to me to establish clearly that the attorney has power to compromise the action in a fair and reasonable manner.¹

The legal basis for this ability is to be found in the law of agency, although the exact type of authority is controversial. It might be implied authority, that is, a power necessary to the efficacious carrying out of the delegated task of litigation, or it might be apparent authority — there only to protect unwitting third parties who have relied on the appearance of authority in agreeing to compromise. If it is implied authority, then the answer to the question raised above must be that the settlement is not binding since there can be no argument of implied authority on the facts. If it is apparent authority, then the answer must be that the settlement is binding since the matter is viewed purely through the eyes of the third party. The reality is immaterial; the appearance of authority is all.

There are many, many reported cases concerning settlements arranged by lawyers for their clients who then repudiated. The earliest appears to be *Latuch v. Pasherante*² in 1696, the headnote of which states “Attorney’s consent binds the client though contrary to his express orders.” The court briskly remarked “. . . as for the client, he was bound by the consent of his attorney, and they could take no notice of him.” About 290 years later, in

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1. *Prestwich v. Poley* (1865), 18 C.B. (N.S.) 806 at 816; 144 E.R. 662 at 666 (*per* Sir Montague Smith, J.). The cases *In re Newen* (*infra*, n. 13) and *Roman Catholic Archiepiscopal Corporation of Winnipeg v. Rosteski* (*infra*, n. 10) make it clear that a solicitor on the record as the agent of the party’s solicitor has the same power to compromise as has the party’s solicitor.

2. (1696), 1 Salk. 86, 91 E.R. 81 (B.R.). The whole report takes only about a dozen lines of print.

Canada, the Court in *Revelstoke Companies Ltd. v. Moose Jaw*³ took the same view and dismissed the protestations of the client, the defendant in the case, by saying “. . . the defendant’s remedy appears to be against [its] then solicitor rather than the plaintiff.”⁴ In between these two cases there are dozens of other cases, both English and Canadian, where the courts take the opposite approach and accede to the wishes of the disgruntled clients and set aside the compromises worked out by their lawyers. From an analysis of all these cases one can discern situations in which the settlements, for a variety of other reasons, either clearly must or clearly cannot stand, and these findings come as no surprise to anyone. There remains, however, a core of decisions in which the decisive factor, at times unarticulated, is the fundamental agency law question about the basis of the lawyer’s power to compromise.

It would be efficient, I think, to deal first with the non-controversial cases to clear the ground for discussion of the central problem of this article.

Pre-litigation Settlements

First, for a lawyer’s ability to compromise to arise at all, an action must have been launched; the lawyer-agent has this power only in litigious matters. Examples of this proposition are, *inter alia*, *Duffy v. Hanson*⁵ where a settlement for personal injuries, arranged by the plaintiff’s lawyer, was held by Willes J. to be non-binding, the writ not yet having issued, and in Canada, *Coastal Estates Ltd. v. Dales*⁶ where the same outcome resulted from the fact that the settlement was arranged prior to action. Chitty J. in *Macaulay v. Polley*⁷ explains why there is this difference in the lawyer’s ability post-suit and pre-suit. “In the former the authority [to compromise] is evident, but in the latter it is a matter of evidence”⁸ meaning that, as to the latter situation, the person wishing to uphold the settlement (hereafter referred to as the third party) must prove the existence of *actual* authority on the part of the lawyer, either antecedent to the settlement, or as a matter of ratification by the client. In the lawsuit situation, it can be argued that the lawyer is being held out by the client as his agent to conduct the case and thus has been clothed with “evident”, or apparent authority or, at least, has implied authority to carry out this task to the best of his professional ability, necessarily including the decision to compromise.⁹

Express Authorization

Secondly, it should be clear that agreements made by lawyers who had antecedent authority from their clients, or whose clients later ratified, must be binding even though the client then changes his mind. This proposition is simply a matter of ordinary agency law. Where there is no question of

3. [1984] 1 W.W.R. 52 (Sask. Q.B.).

4. *Ibid.*, at 60 (per Estey J.).

5. (1867), 16 L.T.N.S. 332 (C.P.).

6. [1952] 3 D.L.R. 422 (B.C.S.C.).

7. [1897] 2 Q.B. 122 (C.A.).

8. *Ibid.*, at 123.

9. It was not necessary to this decision for the court to enquire into the particular basis of authority in litigious matters.

the authority extended to the lawyer, it is as if the client had negotiated the settlement personally. Unilateral withdrawals are not countenanced. There are many decisions on this point and I offer two by way of example.

In *Roman Catholic Archbishop Corporation of Winnipeg v. Rosteski*¹⁰ an action was begun wherein the plaintiff claimed to have been given a parcel of land by the defendant. At a meeting of the defendant and his lawyer, the lawyer was told to accept a settlement offered by the plaintiff. The next day, the lawyer communicated acceptance to the plaintiff's lawyer but, shortly thereafter, received word that the defendant had his mind. After a review of the authorities, the court concluded that the defendant was bound to the agreement since it had been concluded on his express authorization.¹¹

An English decision, *Little v. Spreadbury*,¹² the case of the "Pomeranian bitch known as Firefly", involved the compromise of a suit over ownership of a dog. The defendant repudiated the agreement on the grounds that she had not really understood the terms of the agreement when her solicitor read them to her and that, furthermore, she had not intended to agree to any compromise except on certain different terms. The court, however, found that she had appeared to assent to the arrangement. Bray J. said,

... if a client by her conduct induces her solicitor to believe that he has authority to make a certain compromise, and he, reasonably relying on that conduct and believing that he has that authority, does make that compromise, the client is bound whether she intended to give that authority or not and whether she in fact understood or did not understand the terms of the compromise.¹³

There is a pod of English cases which ought to be examined at this point as being similar to cases in which it has been found that the client expressly assented. Here, the compromise has been reached in court, *with the client present*. At the time of the deal being struck by counsel, this client remains mute. He then, later, outside of court, sometimes immediately, repudiates the arrangement. In all of these cases, the courts have upheld what counsel agreed to in court, on the basis of the client's apparent consent and, therefore, authorization of it. The most notable of these cases is *Holt v. Jesse*¹⁴ a suit concerning the removal of the defendant from the office of honorary secretary of the Society for the Abolition of Vivisection. A consent order was given, on agreement by counsel in court, in the presence of the defendant. Immediately upon leaving Court, the defendant voiced his objection to the order and then applied for a discharge so that the whole matter could be reheard on its merits. The application was refused by Vice-Chan-

10. (1957), 23 W.W.R. 113 (Man. Q.B.); aff'd (1958), 26 W.W.R. 82 (Man. C.A.).

11. See also: *Vardon v. Vardon* (1883), 6 O.R. 719 (Ch. D.); *Grant v. McKee* (1896), 11 Man. R. 145 (Q.B.); *Re Solicitor; Re Williams v. Swan*, [1942] O.R. 604 (C.A.); *Kennedy v. Gunnar-Nesbitt Aviation Ltd.* (1973), 38 D.L.R. (3d) 288 (Alta. S.C.-T.D.); *Rogers v. Rogers* (1981), 26 B.C.L.R. 111 (S.C. — Chambers); *Co-Operative Fire and Casualty Company v. Shipley* (1982), 53 N.S.R. (2d) 235 (S.C.-T.D.); *Poon v. Dickson* (1982), 134 D.L.R. (3d) 559 (Alta. C.A.).

12. [1910] 2 K.B. 658.

13. *Ibid.*, at 664. See also: *Smith v. Troup* (1849), 18 L.J.C.P. (N.S.) 209; *Hargrave v. Hargrave* (1850), 12 Beav. 408, 50 E.R. 1117 (Rolls); *Davis v. Davis* (1880), 13 Ch. D. 861; *Harvey v. Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. 249 (C.A.); *In re Newen*, [1903] 1 Ch. 812.

14. (1876), 3 Ch. D. 177.

cellor Malins who said “. . . if I were to accede to this application it would be a general license to parties to come to this Court and deliberately to give their consent, and afterwards at their will and pleasure come and undo what they did inside the Court, because on a future day they find they do not like it.”¹⁵ Even where clients have said they did not understand what was going on, or where they have said counsel acted in contravention of express instructions, the Courts have set their faces against unravelling the compromises made in the presence of these clients.¹⁶

Defective Contracts

The third preliminary matter to be disposed of is that, since the compromises take the form of contracts, the rules of contract law must be observed. If they are offended then the settlements clearly cannot be supported. The question of a lawyer's ability to compromise really does not come into it, since even if these arrangements had been negotiated by the clients themselves, they would still be ineffective.

The interesting case of *Cumming v. Ince*¹⁷ illustrates two points of contract law as it relates to compromises. The plaintiff had been forcibly confined to a lunatic asylum by her two sons-in-law pursuant to a family dispute over property. Prior to a hearing into her sanity, a compromise was arranged by her counsel whereby she was released from the asylum upon turning over certain property to the control of others. She then disputed the compromise and, for two good reasons, it could not survive. First, if she were indeed insane, she would have had no legal capacity either to enter the settlement herself or to instruct counsel to do so on her behalf.¹⁸ Secondly, even if she were sane, the arrangement was the result of duress because she acted only to obtain release from the asylum. She would not be bound to the agreement whether she made it personally or through expressly authorized counsel.

The earliest reported Canadian case in this general area is *The Bank of Nova Scotia v. Morrow*¹⁹ where the plaintiff's attorney agreed, in compromise of the suit, that his client would be satisfied if the defendant paid part of the debt owing. The court considered whether or not the attorney would have had authority to settle in this case but went on to say, even if there had been power to compromise, this particular settlement was non-binding on the plaintiff because it was without consideration, being an agreement to accept a lesser sum in satisfaction of a greater sum owing.

The other cases in which settlements were set aside for contract law reasons have all concerned mistake. In *Hickman v. Berens*,²⁰ because the

15. *Ibid.*, at 184.

16. See also: *Elworthy v. Bird* (1829), Tamlyn 38, 48 E.R. 16 (Rolls); *Chambers v. Mason* (1858), 5 C.B. (N.S.) 59, 141 E.R. 23; *Lynch v. Cowell* (1865), 12 L.T. (N.S.) 548 (Q.B.); *Rumsey v. King* (1876), 33 L.T. (N.S.) 728 (Q.B.).

17. (1847), 11 Q.B. 112, 116 E.R. 418.

18. The same point covers compromises made on behalf of infant clients: *Biddell v. Dowse* (1827), 6 B. & C. 255, 108 E.R. 447 (K.B.).

19. (1877), 17 N.B.R. 343 (S.C.).

20. [1895] 2 Ch. D. 638 (C.A.). See also: *Wilding v. Sanderson*, [1897] 2 Ch. D. 534 (C.A.).

parties had had fundamentally differing views as to the meaning of an essential term of their settlement, it was dismantled. In *Lewis's v. Lewis*²¹ the minutes of settlement were set aside because they did not accurately reflect the compromise made.

Common mistake of fundamental facts on which the compromise is based may upset the settlement; *Hawitt v. Campbell*²² resulted in a void compromise because the full extent of the plaintiff's personal injuries was not known at the time of contracting. Mistake of fact is always a treacherous concept in contract law, however, as the two cases *Dodge City Leasing Ltd. v. Keddy Rent-a-Car Ltd.*²³ and *A.-G. v. Tomline*²⁴ demonstrate. In the former, a settlement based on an incorrect arithmetical calculation was set aside, whereas in the latter the same kind of settlement was upheld.

Even a mistake of law may serve to erase a settlement as in *Lemesurier v. Macaulay*,²⁵ although the usual stance of the courts is that mistakes of law in contract are immaterial as in *In Re John Kline*.²⁶

In all of these cases, the courts spoke about the general question of a lawyer's ability to compromise a suit on behalf of a client, often considering very full lists of authorities, and for this reason I have noted them. It is important to keep in mind, however, that the cases themselves actually turn on questions of contract law and do not, therefore, constitute authoritative statements on the central issue of a lawyer's power to bind clients to settlements.

Lack of Authority Known to Third Party

As a fourth proposition, it must be clear that where the lawyer has been expressly instructed by the client either not to settle at all or else to settle only on stated conditions, and this prohibition or limitation is known to the third party, then no settlement will be binding. Any third party dealing with a person who, *to his knowledge*, has no representative capacity, does so entirely at his own risk. This, like the second proposition above, is merely a matter of ordinary agency law.

In *McDonald v. Field*²⁷ the plaintiff's solicitor, at the time the defendant's lawyer proposed a settlement, stated that he doubted his authority to represent his client who had intimated that he might conduct the case himself. The plaintiff's lawyer promised to try to get the plaintiff's ratification of the settlement and, if successful, to give the defendant a formal receipt or release. The client did not ratify; the defendant's lawyer was so informed; the plaintiff was entitled to proceed to trial. No binding settle-

21. (1890), 45 Ch. D. 281.

22. [1983] 5 W.W.R. 760 (B.C.C.A.).

23. (1976), 22 N.S.R. 14 (N.S.S.C.-T.D.).

24. (1877), 7 Ch. D. 388. See also: *Re Wedge; Wedge v. Panter* (1908), 98 L.T. (N.S.) 436.

25. (1892), 22 O.R. 316 (C.P.D.).

26. (1923), 56 N.S.R. 389 (C.A.). See also: *A.G.B.C. v. Deeks Sand & Gravel Co.*, [1956] S.C.R. 336; *Fairgrief v. Ellis*, [1935] 2 D.L.R. 806 (B.C.S.C.); and *Elsas v. Williams* (1884), 52 L.T. (N.S.) 39 (Ch.).

27. (1882), 12 P.R. 213 (Ont. C.P.D.).

ment was found in *Rollings v. Gallant*²⁸ where the court found that the client had impressed upon his lawyer that he, the client, was to have the final say over any settlement proposed. From correspondence it was clear that the defendant's solicitor was aware of this lack of authority on the part of the plaintiff's lawyer.

Collateral Matters

Fifthly, it is often said that any authority a lawyer may have to compromise does not extend to matters which are collateral to the suit. In *In Re a Debtor*²⁹ the settlement in dispute was reached after judgment had been achieved in the case. This fact gave the court some pause since it was vigorously argued that the solicitor's authority to do anything at all for the client ought to evaporate in the absence of a fresh retainer. The court found it unnecessary to decide that point because in any case the plaintiff's solicitor had acted beyond the scope of *any* recognized authority. What he had done was to enter into an agreement not merely between the plaintiff and the defendant, but also with the defendant's other creditors, strangers, of course, to the action in which the judgment had been obtained.³⁰

The point concerning a lawyer's capabilities *after* judgment, was dealt with in *Norquay v. Broggio*.³¹ There the plaintiff's solicitor made a compromise with the defendant, after the sheriff had seized some of the defendant's mining interests, that the defendant should be released from the residue of the judgment. The plaintiff then wished to have the sheriff's return set aside and a new writ of execution issued. Craig J. after brief consideration of some cases, concluded that they gave no help on this question of post-judgment authority. On the basis of court practice, and because of the special relationship existing between solicitor and client when a suit is involved, a relationship which he characterized as including a wider and more extended authority than in the case of an ordinary principal-agent connection, he decided that the lawyer's authority ran beyond the judgment to exercise his professional skill and discretion in effecting recovery of the fruits of the judgment. The compromise stood.

Lack of *Bona Fides*

As a sixth and final preliminary matter, there is the requirement that the lawyer, in compromising, must act in a *bona fide* way in the best interests of the client, which is a duty owed by any agent to his principal. Lack of *bona fides* is probably the best explanation for the bizarre case of *Russell v. Brown*.³² There, the plaintiff had begun an action against the defendant

28. (1983), 43 Nfld. & P.E.I.R. 320 (P.E.I.C.A.).

29. [1914] 2 K.B. 758.

30. In *In Re West Devon Great Consols Mine* (1888), 38 Ch. D. 51 (C.A.), the court thought it was well within a counsel's capacity to agree, as part of a consent order, that his clients would not appeal in a winding-up. In *Ellender v. Wood* (1888), 4 T.L.R. 680 (C.A.), the plaintiff complained about a compromise made by her counsel at a trial for seduction. The court thought that some of the items he agreed to were beyond the subject matter of the suit but was ultimately unmoved by the plaintiff's plight because of her long delay in coming forward to complain.

31. (1905), 2 W. L.R. 108 (Y.T.).

32. [1948] O.R. 835 (C.A.), although there is also the hint of insanity.

claiming possession of certain premises owned by the defendant. The plaintiff had used the building for her business and also as a residence for a number of years. There was no tenancy agreement, by plaintiff's own admission, and this fact was obvious from the statement of claim. Robertson C.J.O. said, "The very highest at which the [plaintiff's] case can be put, upon the allegations in the statement of claim, is that she was to have something in the nature of an option for a lease"³³, upon the defendant's moving the building to a different site and making some repairs. It was perfectly clear that the plaintiff at no time bound herself to take possession or, indeed, to pay any rent. The defendant consulted a Mr. Bragg to conduct the case on her behalf. He delivered no statement of defence. Minutes of settlement were entered into between himself and the solicitor for the plaintiff which were entered as a consent order. The plaintiff was therein declared to be entitled to possession of the premises.

In astonishment, Robertson C.J.O., in setting aside the compromise, remarks,

There is no reasonable explanation on the record of the conduct of Mr. Bragg . . . It would be obvious to any solicitor in his senses that the [plaintiff] on her own statement of claim was not entitled to judgment in the terms to which Mr. Bragg agreed. The judgment awards the [plaintiff] possession of the [defendant's] premises without limitation as to time and unconditionally. There is no provision for the payment of rent, or for the termination of the right to possession. If the [plaintiff] were the owner, the declaration for a right to possession could not be more absolute.³⁴

Nor was that all. The court found that the defendant had instructed Mr. Bragg to settle the matter once and for all. The compromise, however, required the defendant to pay \$400 representing the plaintiff's losses to the date of issue of the writ, adding that the award was without prejudice to the plaintiff's right to recover any further damages suffered after that date. Not surprisingly, the plaintiff launched a second suit for a further \$3,000 damages, based on the rights declared in the consent judgment.

The Court of Appeal decision contains a fairly good collection and analysis of the cases concerning a lawyer's ability to compromise, but in the end says that even if Mr. Bragg had a general authority to settle, such authority would have to be carried out in a fair and reasonable manner. In a statement damning Mr. Bragg's conduct, Robertson C.J.O. said that Mr. Bragg had acted "with a strange disregard for his obligations as a solicitor . . . The [evidence] does not indicate that Mr. Bragg at any time directed his mind to a consideration of his client's legal position."³⁵ Hogg J.A. said, "The arrangement or settlement was not, in my opinion, fair, nor was it reasonable, nor do I consider that Bragg acted *bona fide* . . .".³⁶

No Express Authorization or Prohibition

A study of the cases shows that where it cannot be proved that the client either actually limited the lawyer's authority to settle or prohibited a compromise altogether, the arrangements are upheld.

Although Malins V.-C. said in *Scully v. Lord Dundonald*,³⁷ "I have said what the rule is, and as a rule I suppose it had better so remain, that

33. *Ibid.*, at 841.

34. *Ibid.*

35. *Ibid.*, at 842.

36. *Ibid.*, at 856.

37. (1878), 8 Ch. D. 658.

without express authority the solicitor cannot bind his client"³⁸, the statement was unnecessary to the decision since it was found as a fact that the client had expressly agreed to the compromise, which would have made it binding without question. As a general statement of the law, the utterance is worthless. The only other decision that might lend some credence to Vice-Chancellor Malin's opinion is *Rogers v. Horn*³⁹ the report of which merely states, "Jessel, M.R., held that where an order had been made by consent, such consent could be withdrawn at any time before the order was passed and entered . . ."⁴⁰ suggesting that in the absence of express authority, counsel could not bind a client to a compromise. On the other hand, the statement also suggests that even if there were express authority or even if the client had personally consented, the compromise would still be vulnerable, a statement which is so extravagant in the face of the weight of authority, that it must be regarded as wrong. The case was overruled in *Harvey v. Croydon Union Rural Sanitary Authority*.⁴¹ All of the other reported cases I have found uphold compromises made by lawyers in the absence of express limitation or prohibition.

Representative of the English cases is *Prestwich v. Poley*⁴² where the court was unanimous in finding that an attorney has a general power to compromise an action on behalf of a client and does not need express authority.⁴³ Montague Smith J. said,

I think it would be most unfortunate for clients as well as for attorneys, if the latter had not power to make compromises. There may be in the progress of a cause a moment when an opportunity to settle a matter advantageously for the client presents itself, which may not occur again, and so the advantage would be lost if the attorney delayed in order to consult his client's wishes upon the subject.⁴⁴

Two years earlier, in *Chown v. Parrott*,⁴⁵ the plaintiff, suing his lawyer for arranging a settlement with which the plaintiff disagreed, had argued that for a solicitor to compromise an action without having been expressly authorized was beyond the scope of an attorney's ability and must, therefore, be a negligent act. The plaintiff was really saying that compromise was a matter collateral to the suit. The court rejected this argument. It found the law to be well established that, in the absence of clear instruction not to settle, the attorney has general power to compromise provided he acts with due skill and care and in the best interests of his client.

There are three English decisions which require special mention here. They are *Strauss v. Francis*,⁴⁶ *Matthews v. Munster*⁴⁷ and *Welsh v. Roe*.⁴⁸

38. *Ibid.*, at 665.

39. (1878), 26 W.R. 432 (Ch.).

40. *Ibid.*

41. *Supra* n. 13.

42. *Supra* n. 1.

43. The court was more concerned with the question whether taking goods instead of money as a compromise was a matter collateral to the suit and therefore beyond the scope of the lawyer's powers, but concluded that it was not. See also: *In re Hobler* (1844), 8 Beav. 101, 50 E.R. 40 (Rolls); *Re Wood, Ex parte Wenham* (1872), 21 W.R. 104 (Bankruptcy) and a remark from the bench made by Pollock C.B. during argument in *Thomas v. Harris* (1858), 27 L.J.N.S. Ex. 353 at 355.

44. *Supra* n. 1, at 817 and 666.

45. (1863), 14 C.B. (N.S.) 74, 143 E.R. 372.

46. (1866), 1 L.R.Q.B. 379.

47. (1887), 20 Q.B.D. 141 (C.A.).

48. (1918), 87 L.J. 520 (K.B.).

Although, on their facts, they belong to the *Prestwich v. Poley* camp in that, in each, the court found that whereas there had been no express authority from the client to compromise, neither had there been express prohibition, they go beyond that case in very strong *obiter* remarks. After considering the state of the authorities, as they then were, each court states that a lawyer has a power to compromise a lawsuit for a client and the *only* effective limitation on that power (absent fraud etc.) is an express prohibition known to the third party. In other words, these courts believe that as long as the third party relies on an appearance of authority, the client is bound to whatever compromise his lawyer arranges. These three cases support the apparent authority theory as the basis of a lawyer's ability to compromise.

We have had exactly the same experience in Canada. Where the court finds that the client did not expressly limit the lawyer's authority to settle, the settlements are always upheld. In *Re Rose*⁴⁹ the Ontario Court of Appeal agreed in the majority that a compromise reached over a disputed will by counsel for both parties was binding. During the trial, the judge had invited counsel to his room where he proposed a way in which the matter could be compromised. The judge then pronounced judgment in court in the terms agreed. Almost immediately the co-caveators in the case informed the judge that they did not consent to the settlement. Nevertheless, the court refused to unravel the compromise. The majority referred to the general authority of a lawyer to compromise an action on behalf of a client and saw no reason to depart from that situation in this instance. The dissenter, Riddell J.A. thought that the arrangement should not bind the co-caveators since "grave injustice" had been done to them and they were entitled to a new trial. Riddell J.A., however, quoted no relevant authority for his view.⁵⁰ In *Pineo v. Pineo*⁵¹ the court characterized as "nonsense" the argument that compromise was a matter collateral to a lawsuit.

In Canada, as in England, we again find cases where the client has not made a limitation upon the lawyer's authority to settle, but where the court goes on to indicate that in its view it would not have made any difference if he had. The court in *Propp v. Fleming*⁵² found that the plaintiff had not made out her allegation that she had expressly forbidden her lawyer to settle on certain terms proposed by the defendant. Two of the three judges also pointed out that even if there had been a limit, it had never come to the notice of the third party, thus adopting the apparent authority theory.

49. [1943] 4 D.L.R. 122 (Ont. C.A.).

50. Two other cases reaching the same conclusion as the majority in *Re Rose* are *Mills v. Far-land Sales Limited*, [1974] 5 W.W.R. 646 (Sask. Q.B.) and *Besenski v. Besenski* (1982), 21 Sask. R. 54 (Q.B.). In fairness, I must mention *Holmes v. Knight and Aubin*, [1944] 4 D.L.R. 628 (Ont. C.A.) which *may* support the notion that express authority is necessary. The majority found the compromise invalid as based on a "mistake," yet the error was neither as to a fact (or even a law) underlying the settlement, nor as to the extent of the lawyer's authority (to be discussed later), the only two kinds of mistake recognized as affecting settlements. The "mistake" was that whereas the lawyer meant to get authority from both this clients before accepting an offer of settlement, he remembered to ask only one of them. Neither had expressly prohibited or authorized settlement. The case is likely aberrational.

51. (1981), 45 N.S.R. (2d) 576 (S.C.-T.D.).

52. (1968), 67 D.L.R. (2d) 630 (B.C.C.A.).

The third judge found no limitation and upheld the settlement on that basis alone.⁵³

To this point, by way of summary, it is quite clear that settlements arranged by lawyers for their clients are a generally accepted part of the attorney's professional abilities once a lawsuit is actually launched. Certainly, if the client has specifically authorized the compromise, then it must stand, in the absence of any contractually vitiating element. Also, it must be kept in mind that if the third party knows of any lack of authority on the lawyer's part, the settlement will be meaningless without the client's actual consent. The cases indicate, as well, that if the settlement concerns collateral matters it will not be binding, nor, of course, will it stand up to a lack of *bona fide* behaviour on the lawyer's part. It is evident that the client need not have given the lawyer express authority to settle; where the client has been silent or neutral on the matter of compromise, the law regards the settlement as binding.

Express Prohibition or Limitation

It is now time to consider the situation where there has been an express limitation or prohibition by the client on the lawyer's power to compromise and yet the lawyer negotiates a settlement. It is in this situation that the law has taken two distinct and contradictory positions.

Perhaps the best way to illustrate the two possible judicial responses to the central question of this article: to what extent does a lawyer have authority to compromise a suit on his client's behalf when the client has expressly forbidden it, is to quote remarks of Chancellor Boyd of Ontario. In the earliest Canadian case directly on point, *Watt v. Clark*,⁵⁴ counsel compromised a case of libel and slander on behalf of the defendant. When he learned of the settlement, the defendant refused to abide by it. In what must be regarded as a model of economy in judicial reasoning, Boyd C. said, "This is a free country, and the defendant has a right to do as he pleases. He must be allowed to have the action tried"⁵⁵ and he set aside the consent judgment. Only one year later in *Hackett v. Bible*⁵⁶ he said, "As between solicitor and client, the former has power to compromise, not only without, but contrary to, the wishes and directions of the latter, so long as the opponent or other person dealt with has not notice of the solicitor's ostensible authority being limited. . .".⁵⁷ In the space of just one year Chancellor Boyd had the opportunity to exhibit the two completely opposed reactions to the problem which are still with us today. It might have been some comfort to know how Boyd C. personally resolved the conflict, but, unfortunately for us, these two pronouncements seem to have exhausted his interest in the topic and we hear no more from him.

53. See also *Bandag Inc. v. Vulcan Equipment Company Limited* [1977] 2 F.C. 397 (T.D.) and *Fabian v. Bud Mervyn Construction Ltd.* (1981), 127 D.L.R. (3d) 119 (Ont. Div. Ct.). The dissenter, Galligan J., thought that a trial should have been ordered to find out whether or not the client had actually limited the lawyer's authority to settle, thus indicating that in his opinion a limitation *per se* would be sufficient to undo the compromise.

54. (1887), 12 P.R. 359 (Ont. Div. Ct.).

55. *Ibid.*, at 361.

56. (1888), 12 P.R. 482 (Ont.).

57. *Ibid.*, at 484.

The English Cases

The earliest cases uphold the arrangements against the client. Remember *Latuch v. Pasherante*⁵⁸ in 1696, and in 1811 in *Filmer v. Delber*⁵⁹ we find Mansfield C.J. dismissing the client's protestations over her lawyer's agreement with the third party to refer her lawsuit to arbitration. She said she had expressly forbidden her lawyer to consent to a reference and sought the nullification of the reference order. Mansfield C.J. taking a pragmatic approach said:

... here is an express agreement to refer properly entered into by counsel and attorney; it is now said that they had no authority to enter into that agreement; if so, the Defendant's remedy is by action against her attorney. There would be no end to these applications if the Court were to interfere; such interference would lead to collusion; when a party did not like the prospect of the reference, he would say that he had never given his attorney authority to refer.⁶⁰ [emphasis added]

Later cases support the *Filmer v. Delber* school of thought and add another reason to that of the court's need to proceed with its business on the basis that counsel had authority to compromise. *Wright v. Soresby*⁶¹ involved a defendant seeking a new trial because his counsel had settled against express directions. Client and attorney were both present in Court when counsel told them of the third party's proposal to compromise. Counsel was told that the defendant would not consent but immediately thereafter counsel accepted the offer. The defendant's request for a new trial was regarded as untenable by Barons Parke and Alderson and by Lord Lyndhurst C.B. who gave as the reason that the consultation among counsel, attorney and client took place in private and was never communicated to the third party. To upset the compromise would be to prejudice the third party. This, then, is recognition of the concept of apparent authority; that is, the matter should be viewed from the position of the third party and the settlement upheld to protect his reliance on the ostensible authority of counsel to compromise.⁶²

Apparently without the benefit of knowledge of these cases, the Irish Court of Common Pleas reached the same conclusion in *Brady v. Curran*,⁶³ a case of slander and assault. The court observed that it was well established that an attorney had authority to compromise, that the client held the attorney out as his agent and that the third party contracted with the attorney on the faith of his having that normal authority. The third party was not to be denied the benefit of the settlement. In the absence of any evidence that the third party knew or ought to have known of any limitation or prohibition, the court simply was not interested in pursuing the question of whether or not such a fetter existed. The client's remedy was said to be against his attorney and meanwhile the compromise was enforced.

58. *Supra* n. 2.

59. (1811), 3 Taunt. 486, 128 E.R. 192 (C.P.).

60. *Ibid.*, at 486 and 193. See also *Mole v. Smith* (1820), 1 Jac. & W. 665, 37 E.R. 522 (Rolls) (*per* Lord Eldon at 673 and 524).

61. (1834), 3 L.J.N.S. Ex. 207.

62. See also *Faviell v. The Eastern Counties Railway* (1848), 2 Ex. 344, 154 E.R. 525.

63. (1868), 1.R. 2 C.L. 314 (C.P.) followed in *Berry v. Mullen* (1871), 1.R. 5 Eq. 368 (P.).

However, in *Furnival v. Bogle*,⁶⁴ decided in 1827, there is the first real indication of a contrary point of view.⁶⁵ Counsel consented to a proposal made at the start of the hearing. *Unknown to him*, the client had, twice before, rejected such a proposal and had instructed his solicitor to avoid settling on that basis. Neither client nor solicitor was present. The court decreed that the client was not bound by the action of his counsel. The court thought that the client's prohibition was a material fact and without knowing about it, counsel could not exercise proper judgment. Interestingly, the court went on to remark that had the solicitor been present, knowing all the facts, *his* consent would have been binding on the client. This represents the then orthodox view, but the actual point of decision, that is, *the counsel* did not appreciate the lack of consent, opens the way to the position that the lawyer's misapprehension of instructions is, alone, grounds for dismantling a compromise. No authorities were cited by the court in reaching its decision.

It is *Swinfen v. Swinfen*⁶⁶ that pioneered the proposition that a compromise made by a lawyer against express prohibition or limitation by the client does not bind the client, even though the third party had no knowledge of a fetter on the lawyer's power. The case concerned a disputed will. The plaintiff was the deceased's heir-at-law and the defendant, Patience Swinfen, was the widow of the deceased's son. The plaintiff doubted the testamentary capacity of the deceased and cast aspersions on the behaviour of Patience Swinfen concerning the making of the will which left everything to her and which named her sole executrix. During the conduct of the trial evidence was given which, in the opinion of counsel for Mrs. Swinfen, put her case in a poor light. He suggested an attempt at compromise but she refused. The next morning, in her absence, counsel agreed to a compromise. It was drawn up into an order of the court and made a rule. When Mrs. Swinfen arrived and learned what had been done she expressed her disapproval although she made no protest in court.

The plaintiff attempted to enforce the agreement but Patience Swinfen demurred. An action was taken in the Common Pleas Division to commit her for her refusal to accede to the order. The court strongly suggested that she would be bound but did not find sufficient proof of a refusal on her part. In his second attempt in that court, plaintiff again came away empty-handed. Of the three judges, Crowder J. found against the heir because he had the opinion that in order to compromise, counsel would need specific instructions. Obviously if he had been instructed not to settle, the arrangement would not bind. He said, "If . . . a counsel, under a misapprehension of his client's instructions, and, believing himself to have authority, acts in fact without it, he cannot in my opinion bind his client".⁶⁷ His two fellows, Cresswell and Williams JJ., did not agree but felt that for Mrs. Swinfen to

64. (1827), 4 Russ. 142, 38 E.R. 758.

65. The slightly earlier case, *Bodington v. Harris* (1823), 1 Bing. 187, 130 E.R. 76 (C.P.) does not really count because, although the court set aside a compromise made against the client's express instructions, it stressed that because of the very special circumstances of the case, it was not to be regarded as a precedent.

66. (1858), 2 De G. & J. 381, 44 E.R. 1037 (Ch.).

67. *Swinfen v. Swinfen* (1857), 1 C.B. (N.S.) 364 at 401, 140 E.R. 150 at 165 (C.P.).

be committed there must be unanimity of judges and so the plaintiff's action was dismissed.

The heir then turned to the Chancery Court seeking specific performance and, again, lost. Knight Bruce L.J. said that the bartering away of Mrs. Swinfen's case was not an act in the ordinary course of business of an advocate and was against her express instructions. Also he pointed out that the original case was one which had serious implications for her character for truth and upright dealing. To grant specific performance in such a case would, in his view, be contrary to clearly recognized principles of equity. He mused that she might have been bound civilly at law and possibly liable to damages but did not care to express an opinion. Lord Justice Turner did not think it necessary to enter into the general question of the power of counsel to bind clients to compromises. He said, assuming such arrangements were binding, a Court of Equity could still refuse to grant specific performance in a case of pressure and surprise on the client, such as he found here. The plaintiff should be left to his remedy, if any, at law. Neither judge cited any authorities but some were referred to in argument, including *Furnival v. Bogle*.⁶⁸

Building from *Swinfen* and *Furnival*, the law was further developed by two cases which are cited time and again for the proposition that a compromise by counsel against express directions cannot stand. Ironically, neither one involved that fact situation. In both, the settlements were held to be binding on the client who was found to have expressly authorized them. The cases are *Holt v. Jesse*⁶⁹ and *Harvey v. Croydon Union Rural Sanitary Authority*.⁷⁰ In *obiter*, Malins V.-C. in *Holt v. Jesse*, after referring to *Swinfen* and *Furnival* said,

... if consent has been given under a misapprehension, or from a misstatement, or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it never has been the rule of this court [Chancery], and I also trust it never will be the rule of this Court, that the unfortunate client should be bound by such misapprehension.⁷¹

At the trial level, concerning the validity of the compromise in the *Harvey* case, Pearson J. set it aside. He felt himself bound by *Rogers v. Horn*⁷² to the effect that consent could be withdrawn at any time before the order was passed and entered. The Court of Appeal overruled *Rogers v. Horn* by stating that consent may not be arbitrarily withdrawn. The Court said that if the consent had been given through mistake then it could be withdrawn, but in the case itself there was no evidence of mistake.

These cases represent the view that the matter is one of implied authority. The focus is on the relationship between lawyer and client. If the client has given no directions concerning settlement, then the lawyer has implied authority to compromise the suit as a necessary part of his task which is to

68. *Supra* n. 64.

69. *Supra* n. 14.

70. *Supra* n. 13.

71. *Supra* n. 14 at 184.

72. *Supra* n. 39.

handle the case on behalf of his client using his best professional skill and judgment. If, however, the client has expressly forbidden settlement, there can be no more talk of implied authority; any settlement made will be in excess of authority and therefore not binding. The fact that the third party knows nothing of the limitation and settles relying on the appearance of counsel's authority, is irrelevant.

A subsequent case, *Shepherd v. Robinson*,⁷³ clearly recognized and stated the two contrary positions thus developed in the law. The apparent authority line of cases was said by the court to be represented by the triumvirate of *Strauss v. Francis*,⁷⁴ *Matthews v. Munster*⁷⁵ and *Welsh v. Roe*⁷⁶ whereas the implied authority view was exemplified by *Holt v. Jesse*⁷⁷ and *Neale v. Gordon Lennox*.⁷⁸ Amusingly, not one of these cases is authority for the propositions stated. Explaining the second line of cases, Bankes L.J. said that whereas a lawyer may have general authority to compromise, any compromise based on a misapprehension would not be observed. This case makes it clear for the first time that the 'misapprehension' may be either about a matter of fact underlying the settlement or as to the lawyer's authority to compromise. Thus, if a client expressly curbs a lawyer's authority to settle and the lawyer settles anyway, he may be said to have done so under a misapprehension and the settlement is vulnerable. The court in *Shepherd v. Robinson* thought the case at bar fell into the *Holt v. Jesse* category and threw out the compromise.⁷⁹

Most recently in England, there has been *Waugh v. HB Clifford & Sons Ltd.*⁸⁰ where a settlement was arranged by the defendant's solicitor against instructions. The defendant had telephoned explicit instructions to his lawyer's office not to agree to the proposed deal but, for some reason, the instructions were not conveyed to the lawyer until after he had accepted the plaintiff's offer. The case was argued and decided, however, on the basis that the solicitor was expressly forbidden to do what he had done. Brightman L.J. with the concurrence of the other two Court of Appeal judges, upheld the compromise against the defendant. He differentiated between implied and apparent authority; implied authority may be removed from a lawyer by his client's express statement but that will not affect the lawyer's apparent authority unless the third party is aware of the said removal. The only question for the third party is, in Brightman L.J.'s view, whether the settlement contains matter collateral to the lawsuit because if it does it will not stand up. Neither implied authority nor the often wider apparent authority can encompass matters beyond the scope of the particular sort of agent involved. Thus, the two theories are alive and well in England after centuries of litigation on the point.

73. [1919] 1 K.B. 474 (C.A.).

74. *Supra* n. 46.

75. *Supra* n. 47.

76. *Supra* n. 48.

77. *Supra* n. 14.

78. *Infra* n. 106.

79. See also: *Stokes v. Latham* (1888), 4 T. L.R. 305 (C.A.); *Marsden v. Marsden*, [1972] 2 All E.R. 1162 (Fam. D.); and, perhaps, *Scheyer v. Wontner* (1891), 90 L.T.J. 116, but the report is so sparse it is not possible to be certain quite what was decided.

80. [1982] 1 All E.R. 1095 (C.A.).

The Canadian Cases

Turning to the Canadian experience, we again trace this divided approach to forbidden compromises.

In the earlier cases, rejection of such compromises was the likeliest result. Subsequent to Chancellor Boyd's memorable "This is a free country" statement in *Watt v. Clark*,⁸¹ the courts involved gave more elaborate reasons for relieving clients from unwanted compromises. In *Jane Benner v. Edmonds*⁸² the plaintiff sued for slander but her lawyer compromised on terms other than those she had dictated. The judgment is not particularly analytical but at least surpasses *Watt v. Clark* to which it refers. The case was thought to be very similar to *Stokes v. Latham*⁸³ and distinguishable from *Matthews v. Munster*⁸⁴ because in the *Matthews* case the instructions to the lawyer were general, that is to say neutral on the subject of settlement, whereas in *Jane Benner* the instructions were specific. The settlement was scrapped.

An important modern case on the topic is *Yannacopoulos v. Maple Leaf Milling Co. Ltd.*,⁸⁵ a motor vehicle accident case, decided in 1962, where a lawyer agreed to compromise the defendant's case without preserving his client's counterclaim, contrary to instructions. The instructions were vague but the court interpreted them to place a pre-existing fetter on counsel's ability to settle. There was, thus, a misapprehension of the instructions and the compromise was set aside. The court relied on the *Harvey*⁸⁶ case and on *Shepherd v. Robinson*,⁸⁷ clearly opting for the implied authority theory.

The first and still the most powerful Canadian example of judicial acceptance of the apparent authority theory is *Scherer v. Paletta*⁸⁸ decided in the Court of Appeal of Ontario. This case was an action brought as a result of a motor vehicle accident. The defendant counterclaimed for his injuries and his lawyer obtained an offer of \$15,000. The defendant refused the offer and told his solicitor to seek more. The solicitor offered to settle for \$17,500 and plaintiff's counsel agreed. The client then repudiated the settlement and the plaintiff sued upon it. The client said that he had instructed his lawyer to consult him with regard to any figure offered, before accepting or rejecting it. The lawyer said that he had had *carte blanche* from the client to settle for anything above \$15,000. The third party, of course, knew nothing of any alleged limitation. Evans J.A. gave the judgment of the Court of Appeal which upheld the settlement. There was absolutely no reference to any cases, English or Canadian, although Evans

81. *Supra* n. 54.

82. (1899), 19 P.R. 9 (Ont. Div. Ct.).

83. *Supra* n. 79.

84. *Supra* n. 47.

85. (1962), 37 D.L.R. (2d) 562 (B.C.S.C.). See also *Johnston v. Nelson*, [1965] 2 O.R. 556 (H.C.).

86. *Supra* n. 13.

87. *Supra* n. 73.

88. (1966), 57 D.L.R. (2d) 532 (Ont. C.A.). It is true that in *Hackett v. Bible* (*supra* n. 56) Boyd C. stated that a lawyer could settle against his client's wishes, but the case itself appears to involve silence by the client on the question of compromise, rather than an express prohibition.

J.A. did refer briefly to *Bowstead on Agency*.⁸⁹ He noted that there was no evidence of the settlement's being unreasonable, collusive or fraudulent.

Evans J.A. said, "The issue as to whether the retainer was or was not qualified is not before this court for consideration.⁹⁰ On his view of the case, that was a matter of irrelevance, the only relevant issue being the state of knowledge of the third party. He said,

The authority of a solicitor arises from his retainer and as far as his client is concerned it is confined to transacting the business to which the retainer extends and is subject to the restrictions set out in the retainer. The same situation, however, does not exist with respect to others with whom the solicitor may deal. The authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party.⁹¹

He noted that a person who retains a solicitor in a particular matter holds the solicitor out as his agent and

... he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority. As between principal and agent, the authority may be limited ... but as regards third parties the authority which the agent has is that which he is reasonably believed to have. . . .⁹²

He continued,

A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation. . . .⁹³

Although Evans J.A. referred to "implied" authority to settle, it is clear that he must have meant "apparent" authority. Where no limitation is placed on the lawyer's power to compromise, then it is appropriate to speak of implied authority which springs from the retainer. But where the client has expressly removed that ability to settle, then, of course, implication is no longer possible. However, as was pointed out in the *Waugh*⁹⁴ case, apparent authority can exceed implied authority and it is to apparent authority that the court may look in these cases to uphold compromises made against instructions. Evans J.A. does appreciate the difference since he explains that as between lawyer and third party, the lawyer has whatever power the third party may reasonably believe him to have. It is a matter of the normal abilities of the practitioner of any particular trade or profession.

Evans J.A. states that the ability of the lawyer to bind the client to a compromise is subject to any legal disability of the client, and, more interestingly, to the discretionary power of the Court when asked for its assistance, to inquire into circumstances and to grant or withhold approval as it sees fit. He states that want of authority may be brought to the attention of the Court but, in practice, the Court "does not embark upon any inquiry as to

89. 12th ed. at 65-6.

90. *Supra* n. 88 at 534.

91. *Ibid.*

92. *Ibid.*

93. *Ibid.*, at 535.

94. *Supra* n. 80.

the limitation of authority imposed by the client upon the solicitor."⁹⁵ He makes no statement as to the bases on which the Court is to exercise its discretion. One can only surmise that he had in mind cases where the compromise is said to be unreasonable, collusive or fraudulent. Certainly he makes no mention of "misapprehension" of instructions as being a factor.

Since making its appearance on the Canadian scene, the apparent authority position has been quite popular. Cases, which do not themselves involve forbidden compromises, have stated *Scherer v. Paletta* to represent the law.⁹⁶ Of the cases which do concern forbidden compromises, coming after the *Scherer* decision, the majority apply the same approach. In Alberta there is *C. & M. Farms Ltd. v. Rottacker Farms Ltd.*⁹⁷ The Ontario Supreme Court in *Tomasone v. Drennan*⁹⁸ applied *Scherer*. In Nova Scotia there are *Pineo v. Pineo*⁹⁹ and *Landry v. Landry*¹⁰⁰ and in Saskatchewan, *Revelstoke Companies Ltd. v. Moose Jaw*¹⁰¹ chose, as in *Scherer*, to consider the matter as one of apparent authority.

On the other hand, the implied authority notion is still being applied in Canadian courts. In British Columbia, *Bank of Montreal v. Arvee Cedar Mills Ltd.*¹⁰² turned to the *Yannacopoulos*¹⁰³ case for authority that a compromise could be set aside where the lawyer responsible misapprehended his instructions although the third party was unaware of the limitation. The very recent case of *Hawitt v. Campbell*,¹⁰⁴ albeit itself concerning a mistake of fact sufficient to upset the settlement, expressed agreement with the idea that the solicitor's misapprehension of instructions should operate against the validity of the compromise. In Manitoba, Hewak J., without reference to the other point of view, nullified a compromise in *Phillip v. Southam*¹⁰⁵ because the client had forbidden it, unknown to the third party.

Apparent or Implied Authority?

It is clear, then, that there are two different legal responses to the situation where a compromise prohibited by the client has been made. The Canadian experience has paralleled the English. It is also clear that since both views persist, each must have something to recommend it.

The interests of the client are protected by the view that the matter is one of implied authority of the lawyer. So long as the client says nothing about settlement, it can be implied from the general retainer that compromise is within the lawyer's competence. Once the retainer is limited, however,

95. *Supra* n. 88 at 535.

96. See for example, *Propp v. Fleming* (*supra* n. 52) and *Bandag Inc. v. Vulcan Equipment* (*supra* n. 53).

97. (1976), 71 D.L.R. (3d) 263 (Alta. S.C. — A.D.).

98. (1977), 2 C.P.C. 189 (Ont. H.C.).

99. *Supra* n. 51.

100. (1981), 48 N.S.R. (2d) 136 (S.C. — A.D.).

101. *Supra* n. 3.

102. (1978), 93 D.L.R. (3d) 58 (B.C.S.C.).

103. *Supra* n. 85.

104. *Supra* n. 22.

105. (1981), 9 Man. R. (2d) 413 (Q.B.).

and that ability to compromise has been countermanded, no compromise can stand. The client's wishes must be observed and since the lawyer was without authority, the settlement is a nullity as far as the client is concerned. Implication ceases where expression begins.

The other view of these forbidden compromises, that it is a matter of apparent authority, protects the interests of the third party. Unknown to him, the general authority to compromise has been removed from opposing counsel, and he, the third party, relies on an appearance of authority. Thus, the state of his knowledge is crucial, for if he knows or ought to know of the limited retainer then he cannot be heard to speak of the appearance of a general one. If the third party did not know of the prohibition, then his expectations of a binding settlement will be rewarded and the disappointment will fall upon the client who is estopped from denying his lawyer's authority to settle.

A Third Theory?

Some cases suggest that even though there are these two competing points of view on unauthorized settlements, they do not completely cover the field.

Neale v. Gordon Lennox,¹⁰⁶ a decision by the House of Lords, leaves those two positions intact, but discards the compromise on another ground. The plaintiff sued her aunt for libel and slander. At the trial, the plaintiff instructed her lawyer to consent to a reference of the case to an arbitrator on the condition that her aunt state publicly in court that she withdrew all imputations against her niece's moral character. Counsel agreed with the other side to the reference but ignored the condition. The reference was ordered by the court but there was no disclaimer of imputations by the aunt. The opposing side had had no knowledge of the limitation on counsel's authority. The plaintiff sought to have the order put aside.

At trial she was vindicated. Lord Alverstone stated the law to be that counsel would normally have ability to compromise. A secret limitation would be of no effect and the only bases on which the compromise could be upset would be mistake of fact or that the settlement involved matters collateral to the lawsuit. Neither basis was present. He then clutched at a straw by saying that there was a difference where the order being attacked was only interlocutory as in the *Neale* case and where it was final, and set the reference order aside.

The Court of Appeal¹⁰⁷ scorned the notion of a distinction between interlocutory and final orders. They were to be treated the same. Lord Alverstone had, otherwise, stated the law correctly and, therefore, the reference must stand. There was nothing collateral here; an agreement to refer to arbitration was within the normal scope of the advocate's duty and no mistake of fact had occurred. Mere excess of authority on counsel's part

106. [1902] A.C. 465.

107. [1902] 1 K.B. 838 (C.A.).

could not be grounds for undoing the compromise. At both trial and appeal, the authorities were discussed in depth.

In the House of Lords, although the cases were argued, no reference to them was made in any of the judgments delivered. Halsbury L.C. giving the leading judgment said that it was not important to consider these cases since a higher principle was involved. Of the cases he said, "And I can well adopt, and feel that I could safely affirm, every one of the decisions referred to."¹⁰⁸ He then went on, with unanimous support, to reverse the Court of Appeal. In his opinion, the plaintiff was to be allowed her day in court, to defend her character in public. As a matter of pure discretion over the procedure of its court, the House of Lords would not enforce the compromise by letting the order survive. He said,

. . . to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard . . . to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to.¹⁰⁹

It would seem, then, that the House of Lords chose to support neither position and that the *Neale* case is no authority for anything beyond its own particular circumstances. The House of Lords claimed and exercised an over-riding procedural discretion, declining to choose between the two legal positions.

In *Poon v. Dickson*,¹¹⁰ in *obiter*, Moir J.A. interprets the cases and finds a difference between those which require, as part of the compromise, the aid or intervention of the court, and those which do not. The former will not be enforced where the client has not consented, whereas the latter will be upheld just as would any contract made between competent parties. Moir J.A. sees as the explanation of the results in *Neale v. Gordon Lennox*¹¹¹ and *Yannacopoulos v. Maple Leaf Milling Co. Ltd.*¹¹² the fact that, in both, the court's help was needed to carry out the compromises. In *Neale* the arrangement involved an order by the court to refer the matter to arbitration. In *Yannacopoulos* the settlement included an agreement by the parties to enter a consent judgment dismissing the action, and the third party was seeking the entry of that judgment. Since the courts were being asked to lend a hand in the effective creation of the compromises, they could refuse to be moved upon learning of such matters surrounding the compromises as fraud and collusion, (which would come as no surprise) or *misapprehension by a lawyer of his instructions*.

A quick look at the cases in which compromises were forbidden by the clients bears out this third theory. Where the aid of the courts was required as part of the settlement, the courts have struck down the settlements. In the cases where the compromises did not include the need for any court

108. *Supra* n. 106, at 470.

109. *Ibid.*

110. *Supra* n. 11.

111. *Supra* n. 106.

112. *Supra* n. 85.

orders, the compromises have been upheld. The notion that a court may or may not exercise its discretion concerning compromise orders is alluded to in several cases, including *Little v. Spreadbury*¹¹³ and *Scherer v. Paletta*.¹¹⁴ It seems to be the *ratio* of the *Neale*¹¹⁵ decision. *Marsden v. Marsden*¹¹⁶ suggests that the discretion is available in all compromise cases, not just the ones requiring court involvement, but this view is not found in any other case and is, probably, wrong. If the statement were correct, it would not explain the difference in results between court-involved compromises and those not calling for the court's aid.

Even in cases where the matter is thought to be one for the discretion of the court, if asked to make an order, a limitation on this discretion has been recognized. That is, once the order has been made and entered, it cannot be set aside or varied for any reason other than fraud. The mere absence of the client's consent would be insufficient reason to interfere with such an order. The Canadian case of *Thomson v. Gough*¹¹⁷ concerned a consent order dismissing an action on a motor vehicle accident. About one year after the order was made the plaintiff sought to have it expunged on the basis that he had forbidden his then solicitor to settle on the terms proposed by the defendant. The defendant knew nothing of this limitation. The order was set aside by a County Court judge who declared himself to be exercising the discretion alluded to in *Sherer v. Paletta*¹¹⁸ as being available in compromise agreements requiring court orders. The High Court judge, on appeal, pointed out that the County Court judge had misapplied the law. The discretion was to be used by the court *before* the grant of its intervention was perfected and not after. Only fraud could unravel a perfected court order. In the *Marsden* case, Watkins J. said, "So far as I have been able to ascertain, in no case has the court interfered to set aside a consent order save at a time before the order of the court has been perfected."¹¹⁹

If this limitation on discretion is really there, then a number of cases must be re-examined. Most notably there is *Swinfen v. Swinfen*.¹²⁰ The consent order had certainly been entered in that case. The heir-at-law actually brought an action to commit the defendant for her failure to comply with the order and lost because he could not sufficiently prove her refusal. It was only on his second attempt at enforcement, when he sought an order for specific performance, that the compromise was impeached on account of her lack of consent to its being made in the first place. Similarly, in Canada, there is *Johnston v. Nelson*¹²¹ where a judgment had been made in accordance with a compromise agreement. The plaintiff had actually

113. *Supra* n. 12.

114. *Supra* n. 88. In *Scherer v. Paletta* Evans J.A. seemed to consider that the discretion would be available against fraud, collusion or unreasonableness. He did not mention mistake of the lawyer's authority as a basis for exercise of the discretion.

115. *Supra* n. 106.

116. *Supra* n. 79.

117. (1977), 17 O.R. (2d) 420 (H.C.).

118. *Supra* n. 88.

119. *Supra* n. 79, at 1166. See also Lord Coleridge J. in *Little v. Spreadbury* (*supra* n. 12) at 665.

120. *Supra* n. 66 and 67.

121. *Supra* n. 85.

opposed the motion for judgment, claiming dissatisfaction with the settlement, but the judgment was given anyway. Eight months later, the plaintiff got the judgment set aside on the ground that his lawyer had disobeyed instruction not to settle.¹²² There are also the cases of *Watt v. Clark*,¹²³ *Jane Benner v. Edmonds*¹²⁴ and *Holmes v. Knight and Aubin*,¹²⁵ where judgments or orders were made before any complaint was raised and then later set aside on the basis that the settlements were not binding having been made against clients' instructions. Are these cases now to be considered wrongly decided or is it the case that the limitation on discretion is not really there?

In either event, there is still the basic theory to be considered. That theory makes irrelevant, up to a point, the question of implied as opposed to apparent authority. What is primarily relevant is whether or not the settlement requires, as part of its effective creation, some assistance from the court by way of orders or judgments. If so, it is open to the court upon being asked for its help, to take into account, *inter alia*, whether or not the client forbade his lawyer to settle. On that basis alone, absent any fraud, collusion or unreasonableness, the court may decline to grant the intervention sought.

If no assistance is called for, the court will be involved only at the enforcement stage and will then consider whether the compromise meets general requirements of the law such as contractual validity, freedom from fraud and the like. As the Earl of Halsbury L.C. said in *Neale v. Gordon Lennox*,

Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it . . . to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to.¹²⁶

In cases not requiring court assistance, presumably the matter of authority could be raised at the enforcement stage and then the competing views of apparent and implied authority would be canvassed. Halsbury L.C. carefully left those conflicting views in place while carving out the body of settlements needing court intervention and treating them differently.

Since its inception in the *Neale* case in 1902, this third theory has gained popularity and is referred to in both English and Canadian decisions.¹²⁷ Although the theory may have some attractiveness at first glance,

122. Parker J. in *Thomson v. Gough* (*supra* n. 117) doubted the correctness of the decision in *Johnston*.

123. *Supra* n. 54.

124. *Supra* n. 82.

125. *Supra* n. 50.

126. *Supra* n. 106, at 470.

127. It was applied in the very recent case *Campbell v. James* (1984), 41 C.P.C. 51 (Ont. Co. Ct.) by Carter J. This case ought not to be accorded much weight, if any, because it is a departure by an Ontario County Court judge from the decision of the Ontario Court of Appeal in *Scherer v. Paletta* (*supra* n. 88). Carter J. applied the dissenting judgment of Galligan J. in *Fabian v. Bud Merwyn Construction Ltd.* (*supra* n. 53) a case in which the majority considered itself bound by *Scherer v. Paletta*. The departure seems to have been caused by what was, probably, a misreading of the *ratio decidendi* of *Scherer v. Paletta*.

it is, I think, ultimately unsatisfactory. It is based, not on legal reasoning, nor even on some moral principle,¹²⁸ but only on an accident of practice. If it happens that the particular compromise calls for court involvement then it will be treated one way and if no court assistance is required, it will be treated another. As well, if the need for the client's consent is so important to the creation of the compromise, why should it be any the less important at the enforcement stage? Surely court intervention is being sought there too. To ask for an order of specific performance or for damages for breach is to ask for the court's assistance. For preference, I would have the matter decided on the basis of legal reasoning or, failing that, on an honest admission by the courts that they just feel uncomfortable enforcing a settlement the client doesn't want. I am not attracted to a solution that depends upon the way the settlement happens to be drawn.

Conclusion

The most recent Canadian case *Arike v. Royal Trust Corporation of Canada*¹²⁹ briefly canvasses the field and raises all three theories. In that case, the plaintiffs agreed to the settlement of an action against them for refusal to proceed on a contract of sale of their land. The compromise also required them to drop their counterclaim against Royal Trust, but this part had been arranged by their lawyer against their instructions. The minutes of settlement had been made a judgment at a time when the court was aware that the Arikes had limited their lawyer's authority. This was a motion to set that judgment aside.

Smith J. relied on two of the theories to discard the part of the judgment terminating the counterclaim. He said, "It is sufficient to dispose of this application on the narrow basis of 'perfection' or on the alternative basis that the client's approval was in serious question to the knowledge of counsel for the Arikes and to the knowledge (imputed knowledge possibly) of the opposite party."¹³⁰ His first alternative is an application of the notion that a court has a discretion, when asked to make an order or enter a judgment, to refuse, when, to its knowledge, the client forbade the compromise. The second alternative is the apparent authority theory. Smith J. immediately continued by saying that in *his* opinion, mere limitation on the lawyer's ability to settle, should, of itself, allow for the re-opening of the litigation — the implied authority theory.

The *Arike* case epitomizes the conceptual confusion that infests this area of the law.

To decide the matter on legal reasoning would mean choosing between the two irreconcilable versions of the kind of authority possessed by a lawyer representing a client in litigation. As has been shown in this article, the apparent authority approach would uphold compromises forbidden by clients,

128. This is despite Halsbury L.C.'s insistence that "a higher and much more important principle" was involved (*supra* n. 106, at 468).

129. Unreported, Ont. S.C. Feb. 7, 1985, Smith J. (likely to be appealed).

130. *Ibid.*, at 7.

unless the third party knew or ought to have known of the limitation. The implied authority view would strike down compromises forbidden by clients even though the third party had no knowledge of the limitation and acted in reliance on the appearance of authority.

The apparent authority version has the advantage of tending to uphold settlements, a policy much encouraged by our legal system. In *Revelstoke Companies Ltd. v. Moose Jaw*, Estey J. spoke of this policy and thought that to find against the settlement would tend "to encourage multiplicity of actions."¹³¹ In December, 1984, the New York Court of Appeal, in upholding a forbidden settlement on the basis of apparent authority, said ". . . strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process."¹³²

This approach also conforms to prevailing notions of professionalism in the practise of law. As Brightman L.J. says in *Waugh v. H B Clifford & Sons Ltd.*, "It would in my view be officious on the part of the plaintiff's solicitor to demand to be satisfied as to the authority of the defendant's solicitor to make the offer."¹³³ He thinks it ought not to be incumbent on a lawyer to seek confirmation of the opposing lawyer's authority. It would seem highly unprofessional to demand, for example, to see written permission from the opposing client to the effect that his lawyer may settle on any given set of terms, or at all. It would be insulting, as a lawyer, to receive such a request and yet, if settlements are not to be upheld on the basis of the apparent authority of the lawyer to make them, how else could the third party protect against the risk?

A further advantage of adopting the apparent authority approach is that it protects the interests of the third party who, in all innocence, has *bona fide* relied on the appearance of a concluded settlement. If the settlement were to be struck down, such a third party might suffer severe prejudice, through no fault of his own. The abortive compromise may cause such a delay in getting to trial that the third party may find his position badly damaged if not irretrievable. In a brief editorial note on this matter in *Tomasone v. Drennan*, it was said, "In practice there is much to be said for not burdening the innocent third party with the consequences of a dispute or misunderstanding as between his adversary and his adversary's solicitor."¹³⁴

If the apparent authority line were to be followed, the disgruntled clients are not without recourse. They can, and do, sue their lawyers for failure to follow instructions.¹³⁵ It may be that their recovery would be minimal since loss would be difficult to show.¹³⁶ The client would have to prove that the

131. *Supra* n. 3 at 60.

132. *Hallock v. State of New York*, 474 N.E. (2d) 1178 (N.Y.C.A., 1984), at 1180 (*per* Kaye J.).

133. *Supra* n. 80, at 1105. The words "plaintiff's" and "defendant's" in the quotation could, of course, be interchanged.

134. *Supra* n. 98, at 190 *per* W.H.O.M.

135. *Butler v. Knight* (1867), L.R. 2 Ex. 109. But see *Rogan v. Prud'homme*, [1925] 1 W.W.R. 479 (Man. K.B.) where the court found that the client had not limited his lawyer's authority and so the settlement was authorized. The client's action against his lawyer, therefore, failed.

136. *Fray v. Youles* (1859), 1 E.L. & E.L. 839, 120 E.R. 1125 (Q.B.).

settlement achieved by his lawyer was *clearly* inadequate, an unlikely event given that lawyers engaged in the practise of litigation for a living no doubt have developed good skills in negotiating settlements which are as advantageous as the circumstances permit. It may also be the case that the lawyer is judgment-proof and so the client loses all around. This is the price that would, occasionally, have to be paid under the apparent authority doctrine.¹³⁷

The implied authority theory, obviously, does not tend to the fostering of settlements. Indeed, were it to be the chosen solution, no settlement arranged by lawyers would be worth anything until each lawyer had received from the opposing party verification of the authority of the opposing lawyer to compromise. There would then be a clear loss of efficiency and professional attitude. A cherished policy of our legal system, the encouragement of settlements, would be sadly weakened.

On the other hand, if the settlements were to be defeated on account of lack of consent by the client, the disappointed third party would have recourse against the errant lawyer through the action known as breach of warranty of authority, or, perhaps, even for deceit where it could be shown that the lawyer acted with knowledge that he was violating his instructions. It would be relatively easy for the third party to demonstrate as a loss the difference between the negotiated settlement and what was ultimately ordered at the trial. In the *Waugh* case¹³⁸ the plaintiff sued the defendant for breach of the compromise agreement and, in the alternative, the defendant's lawyer for breach of warranty of authority. As it happened, the alternative action was unnecessary. In *Bank of Montreal v. Arvee Cedar Mills Ltd.*¹³⁹ where the compromise was washed out because of the lawyer's misapprehension of his authority, the court noted that the third party was entitled to sue the mistaken lawyer for breach of warranty of authority but that the parties had agreed it was to be by a separate action.

The true advantage of the implied authority view is that it allows the client to have his day in court if that is his wish. If he has clearly forbidden his lawyer to compromise, his way to court will not be barred by the application of a legal theory. It is not surprising that the important cases of *Swinfen v. Swinfen*¹⁴⁰ and *Neale v. Gordon Lennox*¹⁴¹ involved litigants whose personal reputations were to some degree at stake.¹⁴² They were not satisfied by settlements which would not afford them the chance for vindication in open court. The courts in question had no heart to deny them their opportunity. We can hark back to the very first Canadian case in this area to find the rationale for the implied authority approach (even though the court did not appreciate that that is what it was applying). "This is a

137. Naturally, if the settlement were not binding for lack of authority, the client would have no action against his lawyer. When Patience Swinfen eventually sued her lawyer for having made that troublesome compromise in the first place, her action failed. In *Swinfen v. Lord Chelmsford* (1860), 5 H. & N. 890, 157 E.R. 1436 (Ex.), Lord Pollock C.B. said that since the compromise had been a nullity, Mrs. Swinfen had not suffered because of it.

138. *Supra* n. 80.

139. *Supra* n. 102.

140. *Supra* n. 66 and 67.

141. *Supra* n. 106.

142. See also: *Bank of Montreal v. Arvee Cedar Mills Ltd.* (*supra* n. 102) where the defendant wanted his day in court in order to explain to his community why he had shut down the mill.

free country”, said Chancellor Boyd in *Watt v. Clark*, “and the defendant has a right to do as he pleases. He must be allowed to have the action tried.”¹⁴³ That action was for libel and slander.

My choice is the apparent authority theory. Where two innocent parties suffer from the behaviour of another, it seems best to me to throw the loss upon the ‘less innocent’ of the two — in this case, the client whose lawyer has caused the problem. The third party should be able to rely on the appearance of authority of the kind normally possessed by a professional being held out to him as the representative of the other party to the lawsuit. Once we give our colours to our champions, we must be prepared to suffer *all* the consequences of their entry into the lists.

Logic also impels me to this choice. Given that lawyers have authority to compromise lawsuits without express permission from their clients, this ability must be seen as part of the job. Any lawyer handling litigation would, therefore, appear to possess the power, once having been held out by the client as his representative. The client would be estopped from denying his lawyer’s ability to do whatever it is that lawyers do in such circumstances. Because the concept of apparent authority is so deeply set in our law, it would seem perverse that it not operate in this one situation.

I am aware that taking this approach is open to the distaste, not to say revulsion, of those appalled by its result; that is, that a client who had carefully instructed his lawyer against settlement may find himself bound and unable to proceed with the suit. What, they may ask, of the likely indisputable fact that it would be a breach of professional responsibility for a lawyer to compromise in such a case? Surely professional duty requires a lawyer to discuss with the client and to take instructions (preferably written) on each and every offer of settlement.¹⁴⁴

In *Nelson v. Murphy*¹⁴⁵ the Manitoba Court of Appeal threw out a settlement because it had been made directly between the lawyer for the defendant and the plaintiff herself, bypassing her lawyer. The court referred to para. 4(3) of the Canons of Legal Ethics¹⁴⁶ to the effect that a lawyer must never try to negotiate or compromise a matter directly with any party represented by a lawyer. A settlement thus reached could not be pleaded as a bar to the plaintiff’s action. It would be a nullity.

Although the *Nelson* case does not parallel the central situation examined in this article, it does raise the notion that settlements resulting from unprofessional conduct by a lawyer should not be binding. Unfortunate as some may think it, the day has not yet come when courts have taken this view. The requirements of good professional conduct have not even been raised, let alone considered, in any of the cases concerning unauthorized compromises.

143. *Supra* n. 54 at 361.

144. Code of Professional Conduct, Chapter 3 and Chapter 2: commentary 6, sub-para. j.

145. (1957), 9 D.L.R. (2d) 195 (Man. C.A.).

146. Adopted by the Canadian Bar Association, September 2, 1920.

Legal ethics aside, the only logical stance on the matter is the apparent authority approach. To those who do not like this result, I can only say that the other result would involve changing long-established law. The ability to compromise lawsuits would have to be removed from the lawyer's 'bag of tricks.' There would have to be a rule that no compromise would be legal until the clients on both sides had expressly ratified it. Legislation would be needed, at this late date, to effect such a change but, perhaps, this is the direction which ought to be taken. Perhaps, in according lawyers the ability to compromise, the courts were too optimistic. Perhaps the courts did not worry enough about the suits which lawyers settle "by reason of sloth, or inexperience, or lack of stomach for the fight,"¹⁴⁷ or (dare I add?) eagerness to be paid their fees. Given the great number of reported cases dealing with this issue, and the fact that they are still appearing at a surprising rate, clients may well need this protection from their own lawyers.

However, until such legislation is passed, principles of agency law are applicable. They lead, inexorably, to the conclusion that unauthorized compromises are binding.

147. *Karpenko v. Paroian, Courey, Cohen & Houston* (1980), 30 O.R. (2d) 776 (H.C.) at 790 (per Anderson J.).