

CANADA / JUDGMENT

## Ashcroft v. Dhaliwal

2008 BCCA 352

### COURT

British Columbia Court of Appeal

### DECIDED

16 September 2008

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2008 BCCA 352 Ashcroft v. Dhaliwal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ashcroft v. Dhaliwal,

2008 BCCA 352

Date: 20080916

Docket: CA35058

Between:

Elisabeth Ashcroft

Appellant

(Plaintiff)

And:

Gursharan Dhaliwal and Jagpal Trucking Ltd.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Huddart

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Tysoe

T. R. Berger, Q.C.

J. S. Mackoff

Counsel for the Appellant

P. G. Foy, Q.C.

A. M. Gunn, Jr.

Counsel for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia

28 April 2008

Place and Date of Judgment:

Vancouver, British Columbia

16 September 2008

Written Reasons by:

The Honourable Madam Justice Huddart

Concurred in by:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Huddart:

- [1] At its root, this appeal from an assessment of damages is about whether the settlement amounts received from a subsequent tortfeasor should be deducted from a damage award made against the original tortfeasor where a trial judge finds both tortfeasors caused the appellant an indivisible loss by their admitted negligence. The trial judge's reasons for judgment are indexed at: 2007 BCSC 533, [2007] 10 W.W.R. 326, 71 B.C.L.R. (4th) 234.
- [2] For the following reasons I find that the trial judge was correct to deduct the settlement amounts from the damage award against the respondents. The fundamental principle of damage awards is that the plaintiff should be "compensated for the full amount of his loss, but not more". The proper focus of a damage award is on the plaintiff's loss. The Court should not encourage settlement with the promise that plaintiffs may have the opportunity for double recovery. There is no valid policy reason for treating concurrent and consecutive torts differently when both are necessary causes of an indivisible injury and its consequential losses.

## Facts

- [3] The appellant, Ms. Ashcroft, was injured in two motor vehicle accidents nearly a year apart. The first accident occurred on 27 October 2003 when a dump truck driven by the respondent, Mr. Dhaliwal, attempted to merge into the lane in which Ms. Ashcroft was driving her small sports car. Mr. Dhaliwal did not see Ms. Ashcroft's car, which was partially ahead of him, and drove his right front bumper into the driver's side of Ms. Ashcroft's car. After both vehicles came to a stop, Mr. Dhaliwal still did not see Ms. Ashcroft's car and attempted, again, to move into her lane causing her car to tip up onto its right hand side. Ms. Ashcroft became suspended in the air by her safety belt and harness. When Mr. Dhaliwal finally observed what had happened, he backed up his truck causing Ms. Ashcroft's car to fall back to an upright position on the roadway. At the time of the accident, Mr. Dhaliwal was in the employ of the respondent Jagpal Trucking Ltd. which owned the dump truck. Both respondents admitted liability.
- [4] The second accident occurred on 20 October 2004. A vehicle, turning left, cut across the path of the car in which Ms. Ashcroft was travelling and collided with the right hand front passenger side of the car occupied by Ms. Ashcroft. The trial judge described the second accident as "relatively minor" compared to the first accident. The driver and owner of the left-turning vehicle admitted liability for this second accident. Ms. Ashcroft settled her claim arising from the second accident and sought only an assessment of damages for the first accident. While its terms were not before this Court, it seems agreed by all parties that the settlement precludes claims against the respondents by both the appellant and the second tortfeasor.
- [5] Before the accidents, Ms. Ashcroft was in excellent health. After the first accident, she suffered soft tissue injuries to her neck, shoulders, back, hips, upper arms and legs. The trial judge found, at paragraph 23, that Ms. Ashcroft developed post-traumatic stress disorder, major depressive episode and chronic pain disorder as a result of the first accident. She had returned to work but was still receiving treatment and trying to recover from the first accident when the second accident occurred, aggravating and exacerbating her injuries from the first accident. After the second accident, Ms. Ashcroft permanently lost her ability to return to work.

## The reasons of the trial judge

- [6] Drawing on the concepts as discussed in *Athey v. Leonati*, [1996] 3 S.C.R. 458, [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, the trial judge defined an "indivisible" injury as that "caused or materially contributed to by a tort" and a "divisible" injury as one that has "no causal connection" to the tort. He found that Ms. Ashcroft's injuries from the second accident were "indivisible" from her first-accident injuries and their consequences because, at the time of the second accident, she had not yet recovered from the first accident and the second accident realized a vulnerability created by the first accident, namely, the risk that her first-accident injuries would be aggravated and exacerbated. Thus, the respondents were

fully liable for the entirety of the injuries and their consequences the first tortfeasor had caused Ms. Ashcroft.

- [7] Unsurprisingly, having found the respondents 100% liable for the appellant's damages and in the absence of contributory negligence or any claim against the settling tortfeasor, the trial judge did not find it necessary to apportion the fault for Ms. Ashcroft's loss between the two tortfeasors. He awarded \$120,000 in non-pecuniary damages; \$101,309 for past loss of earnings to the date of trial (March 5, 2007); \$105,000 for loss of future earning capacity; \$28,573.42 for special damages to date of trial; \$35,000 for cost of future care; \$10,000 in trust for her husband and two children; plus a gross-up for taxes and pre-judgment interest. The total award was approximately \$400,000.
- [8] Then, he directed that the net proceeds from the settlement of the second action be deducted to ensure the appellant was not over-compensated for her loss. He explained why as follows:
- [48] My ruling on the law raises the question of possible double recovery because Mrs. Ashcroft has already received a settlement for the second accident. Here, in my opinion, the common law rule against double recovery comes into play.
- [49] The principle against double recovery is stated in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25 per McLachlin J. (as she then was) at 962:

It is a fundamental principle of tort law that an injured person should be compensated for the full amount of his loss, but no more. The plaintiff is to be given damages for the full measure of his loss as best that can be calculated. But he is not entitled to turn an injury into a windfall.

- [50] To prevent double recovery in a case such as this, there must be a deduction from the full measure of damages of any extra benefit received by a plaintiff, and judgment given for the net amount only. See *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 230 D.L.R. (4th) 567.
- [51] Thus, Mrs. Ashcroft must account for any damages (as distinct from costs) she has received in settlement of her claim for the second accident. That amount will be deducted from the full amount of damages assessed in the present action and the judgment will be for the net amount after the deduction.
- [52] If counsel cannot agree on the amount of the deduction, they may apply to have the amount set.
- [9] Anticipating that his order might be appealed because he had taken the wrong approach to the assessment of damages, the trial judge also provided an alternative assessment by what he saw as a contrasting approach for determining responsibility for damages. According to this approach, the first tortfeasor would be liable only for Ms. Ashcroft's condition up until the day before the second accident: *Long v. Thiessen* (1968), 65 W.W.R. 577 (B.C.C.A.). In that case, this Court established what is now widely accepted and known as the "devaluation approach" to the apportionment of damages between tortfeasors who cause the same

damage. Robertson J.A., for the majority, explained this approach at 591:

I think that the way in which justice can best be done here is: (a) To assess as best one can what the plaintiff would have recovered against the Thiessens had his action against them been tried on April 22, 1966 (the day before the second accident), and to award damages accordingly; (b) To assess global damages as of the date of the trial in respect of both accidents; and (c) To deduct the amount under (a) from the amount under (b) and award damages against Laliberte in the amount of the difference. I think that nothing I have said in this paragraph is inconsistent with *Baker v. Willoughby* [1968] 2 WLR 1138, [1968] 2 All ER 236, or any of the cases referred to there.

- [10] Lest this alternate assessment be thought to be inconsistent with his finding of an indivisible injury, I note, as did the trial judge, that the "but for" test for causation establishes responsibility for the injury and its consequences; the law does not apportion damage between multiple causes: *Athey* at paragraphs 12, 17-20. Apportionment between joint and several tortfeasors is a defendant's statutory right: *Negligence Act*, R.S.B.C. 1996, c. 333, s. 4; *Athey* at paragraph 22.
- [11] However, in making his alternative assessment, the trial judge applied what has come to be known as the "percentage method" of apportionment initially set out in *Pryor v. Bains* (1986), 69 B.C.L.R. 395 (C.A.), as he explained:
- [70] Here the court's task is to apportion the overall damages between the two accidents. More precisely, an assessment of the damages for the first accident is to be based upon Mrs. Ashcroft's situation the day before the second accident took place. The assessment must, of course, include Mrs. Ashcroft's physical and mental state as of the day before the second accident and her future prospects related thereto. What is not included is the exacerbation of her condition attributable to the second accident.
- [71] Defence counsel points out that various heads of damage will be affected differently by using the *Long v. Thiessen* method. For example, the proportions for past loss of earnings, loss of future earning capacity, special damages, cost of future care and non-pecuniary damages will vary, depending on precise analyses of the facts relating to each head of damages.
- [72] While defence counsel makes a valid point, I find that the present case does not lend itself to individual analyses being carried out with any degree of accuracy. I think it best to do what the court did in *Gibson v. Rickett*, [1996] B.C.J. No. 3110, that is, make a global assessment and estimate the proportion of damages attributable to each accident. I set those proportions at 70% due to the first accident and 30% due to the second. Using the *Long v. Thiessen* approach, I assess the damages in this action at 70% of the total damages I have determined by the *Athey v. Leonati* approach.

- [12] Effectively, the trial judge assessed the damages flowing from the indivisible injury, then apportioned those damages between the two admitted tortfeasors, attributing 70% of the total loss to the first tort. Relying on this apportionment, the appellant subsequently sought clarification of the ruling and applied for an order for payment of \$280,000, thereby limiting the deduction to 30% of the award. The trial judge rejected that application and affirmed his order that all the settlement proceeds be brought into account.
- [13] The dispute arises from an anomaly. The settlement proceeds were revealed to be \$315,000, about 75% of the appellant's loss as assessed by the trial judge and significantly more than the 30% that the trial judge attributed to the fault of the settling defendants under his alternative analysis.

### The parties' positions

- [14] The appellant would have this Court find that the trial judge accomplished the only task raised by her pleadings when he determined that the appropriate compensation for the damages she suffered from the first accident was \$280,000. She would have us set aside the trial judge's order and substitute an order to pay that amount. Like the plaintiffs in *O'Neil v. Van Horne* (2002), 59 O.R. (3d) 384, 158 O.A.C. 188, 212 D.L.R. (4th) 558, and *Misko v. Doe*, 2007 ONCA 660, 87 O.R. (3d) 517, 286 D.L.R. (4th) 304, 229 O.A.C. 124, the appellant had sought only an assessment of the damages resulting from the respondents' negligence. In support of her position that the settlement of a subsequent tort action is irrelevant, counsel cites *Bracey v. Jahnke* (1997), 34 B.C.L.R. (3d) 191, 92 B.C.A.C. 254, 147 D.L.R. (4th) 632. In any event, the appellant further argues, to take into account the settlement proceeds would be counter to the public interest in encouraging settlements.
- [15] The respondents point out that the trial judge apportioned damages under Long only as an alternative to his original finding under Athey that the respondents were liable for the full award less the settlement amount. While they argue that the trial judge erred in finding that Athey and Long are conflicting approaches to the assessment of damages, they conclude that the assessment should stand and the appeal should be dismissed because the quantum of the award is not "sufficiently erroneous to justify the expense of a new trial or new assessment." However, if this Court finds that the trial judge erred in deducting the settlement proceeds from the global award, the respondents ask that the matter be remitted to the Supreme Court for a separate assessment under each head of recovery as of the day before the second accident occurred. While the respondents ask, alternatively, that this Court substitute its own award, that course is impossible in the absence of a record of the trial proceedings.

### Discussion

- [16] As I read the trial judge's reasons, he found as a fact that the first tortfeasor caused the appellant's depression, post-traumatic stress and chronic pain disorders and thus her inability to continue working, as well as the other losses for which she was claiming

compensation, and that the negligence of the second tortfeasor was also a necessary cause of those injuries and her loss. No party suggests error in the trial judge's global assessment (at \$400,000) of what he determined to be the appellant's loss flowing from the indivisible injuries caused by the two torts. The respondents challenge his finding of an indivisible injury and his apportionment only for the purpose of determining the appropriate order if the appeal is allowed.

- [17] I agree with the respondents' counsel that the analytical difficulty in this case flows from the need to distinguish the rule of causation from that of legal responsibility for damages under the Negligence Act. If, as here, two torts were necessary causes of the injuries, liability for the loss resulting from those injuries may be apportioned based on "fault", but each tortfeasor is responsible for the entire damage to which their tort materially contributed beyond the de minimis range: *Athey* at paragraphs 12 and 41. As I noted earlier in these reasons, the causation rule does not apportion responsibility for damages.
- [18] I also agree with the respondents that *Athey* does not preclude the joint tortfeasor's right to apportionment. The method of apportionment may be by percentage, as in *Pryor*, or by the devaluation approach in *Long*. There is no difference in principle between these two approaches; it comes down to which is the most practical method on the evidence before the court: The Honourable Mr. Justice Kenneth C. Mackenzie, "Apportionment of Damages Between Successive Tortfeasors After *Athey*" (a paper presented at the Continuing Legal Education course *Torts Update*, 23 April 2004) at 5.1.3. I also agree with my colleague at 5.1.2., that the devaluation approach articulated in *Long* requires the court to fully consider the plaintiff's vulnerability to aggravated injuries, whether possible or realized, when apportioning damages to the first tortfeasor.
- [19] In the absence of contributory negligence, apportionment would be a matter of indifference to the plaintiff, barring special circumstances; the tortfeasors would be jointly and severally liable to the plaintiff: see section 4(2)(a) of the Negligence Act, *E.D.G. v. Hammer*, 2003 SCC 52 at 32, [2003] 2 S.C.R. 459, 230 D.L.R. (4th) 554, *Athey*. If both tortfeasors were before the court, apportionment would fall to be determined on evidence they presented and submissions they made. The trial judge would be required to apportion responsibility for the appellant's losses between the tortfeasors in the first and second accidents as required by section 4(1) of the Negligence Act.
- [20] However, in this case, the plaintiff settled her claim with the second tortfeasor and was claiming only the damages attributable to the respondent tortfeasor's fault. In effect, like the plaintiff in *Misko*, she was seeking an apportionment of damages between the admitted tortfeasors and judgment for only the portion of those damages attributable to the fault of the respondent tortfeasor because she had released the second tortfeasor from all responsibility to her. Because the respondent tortfeasor would be responsible only for his share of the appellant's damages, he would have no claim against the second tortfeasor.

- [21] I take the view this apportionment was not necessary. The settlement had effectively apportioned the damages, although the proportionate shares were determined only when the trial judge made the global assessment required in the case of an indivisible injury. Because the settlement amount was not disclosed to the trial judge, and was likely protected by settlement privilege, the trial judge was correct to order that the settlement proceeds be deducted from the global award of \$400,000. Quite properly, he left the door open to submissions and possibly evidence about the appropriate deduction.
- [22] After submissions restricted to the alternate assessment, the trial judge deducted the settlement amount, citing the essential purpose and fundamental principle of tort law that "an injured person should be compensated for the full amount of his loss, but not more": *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962, 69 D.L.R. (4th) 25. In *Ratych* the Court explained that the purpose of a damage award is not to "punish the defendant or enrich the plaintiff" but rather to restore the plaintiff "as nearly as possible to his pre-accident state". The Court identified the modern trend in the law of damages as one moving away "from a punitive approach which emphasizes the wrong the tortfeasor has committed". The Court continued at 963-64:

The link between the moral culpability of the tortfeasor and his obligation to pay damages to the person he injures is frequently tenuous in our technological and mechanical era. A moment's inattention is all that is required to trigger astronomical damages. The risks inherent in such activities as the use of our highways by motorists are increasingly recognized as a general social burden. In this context, the maxim that compensation must be fair to both the plaintiff and the defendant seems eminently reasonable: *Phillips v. South Western Railway Co.* (1879), 4 Q.B.D. 406 (C.A.). That fairness is best achieved by avoiding both undercompensation and overcompensation.

The trend away from a moralistic view of tort suggests that the process of assessing damages should focus not on how the tortfeasor may be appropriately punished, but rather on what the injured person requires to restore him to his pre-accident state. To focus on the alleged "benefit" to the tortfeasor resulting from bringing collateral payments into account is to misconstrue the essential goal of the tort system. The law of tort is intended to restore the injured person to the position he enjoyed prior to the injury, rather than to punish the tortfeasor whose only wrong may have been a moment of inadvertence.

- [23] In *Ratych* a police officer's wage paid by his employer while he was unable to work due to the negligence of the defendant was deducted from the total damage award; the officer did not have lost wages for which he was entitled to be compensated.
- [24] In *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 at 396, 113 D.L.R. (4th) 1, the Court confirmed that the basic principle of recovery in an action for tort is full compensation short of double recovery:

... to compensate the injured party as completely as possible for the loss suffered as a result of the negligent action or inaction of the defendant. However, the plaintiff is not entitled to a double recovery for any loss arising from the injury.

- [25] Although the members of the Court in *Cunningham* agreed on the fundamental rule against double recovery, the Court divided on the issue of the nature of the insurance exception to this rule. The majority of the Court articulated the insurance exception as exempting wages paid under an insurance policy whether that policy was private or obtained through a collective agreement; the dissenting members of the Court would have restricted the insurance exception to non-indemnifying policies, i.e. policies that did not attempt to make good a particular loss such as life insurance policies.
- [26] The fundamental question on this appeal is similar to the one in *Ratych* and *Cunningham* except that, in this case, the appellant effectively seeks an exception to the rule against double recovery for settlement proceeds. The appellant argues that the court must ignore settlement proceeds in these circumstances to encourage the settlement of claims. The argument appears to be as follows: when the appellant settled with the second tortfeasor, the settling parties would have estimated the amount remaining to be recovered from the first tortfeasor. By settling with the second tortfeasor, the appellant took the risk of undercompensation, that the trial judge would make a less favourable award against the first tortfeasor than the settling parties had anticipated. The appellant risked settling for too little against the second tortfeasor.
- [27] However, the converse of this risk is that a trial judge could make a more favourable award against the first tortfeasor than the settling parties had anticipated and thus the appellant would be overcompensated for her loss. Effectively, the appellant argues, this opportunity to profit from overcompensation is necessary to offset the risk of undercompensation if settlement is to be encouraged in multiple tortfeasor situations.
- [28] Clearly there is a public interest in encouraging settlement: *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276, 17 B.C.A.C. 134, 96 D.L.R. (4th) 227. However, it would be wrong to promote settlement by encouraging parties to seek out double recovery in breach of the fundamental principle of damages: see *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 40 B.C.L.R. (4th) 245.
- [29] In *Dos Santos*, the plaintiff's long-term disability insurer was entitled under the policy to receive 75% of the plaintiff's net recovery from the tortfeasor to the extent that the recovery could be attributed to loss of income. The plaintiff had settled with the tortfeasor, and the insurer sought all documents underlying the plaintiff's settlement so that it could determine what sum was paid in respect of lost income, past and future. Following *Gnitrow Ltd. v. Cape plc*, [2000] 1 W.L.R. 2327, [2000] 3 All E.R. 763, the Court found that although the settlement documents were privileged, an exception to that privilege must be made to prevent the plaintiff's double recovery. The public interest in encouraging settlement was outweighed by the concern to prevent excessive compensation.

- [30] Although the concern in the case at bar is whether to deduct settlement proceeds from global damage awards rather than whether to make an exception to settlement privilege, the principle is the same: the concern to prevent double recovery outweighs the public interest in encouraging settlements.
- [31] This is the rule that applies to separate but concurrent tortfeasors who cause the same injury: *Dixon v. British Columbia* (1980), 24 B.C.L.R. 382, 128 D.L.R. (3d) 389 (C.A.). In that case, the plaintiff, a passenger on a bus from Victoria to Vancouver, claimed compensation from both the bus operator and the ferry authority for loss he suffered as a result of a fall on the ferry. The trial judge found the gross negligence of both caused the plaintiff's injuries, apportioned responsibility 75% to the ferry authority and 25% to the bus operator, and ordered the amount the ferry authority had paid in settlement (\$22,500) be deducted from the award of general damages (\$30,300). The plaintiff appealed the deduction, arguing that the bus operator "should not be permitted to take advantage of the payment by the Ferry Authority" to the plaintiff. Mr. Justice Taggart, writing for the Court at 400, agreed with the trial judge that "the plaintiff ought not to receive more in the way of damages than the amount to which he has been found entitled".
- [32] In *Dixon*, both the trial judge and this Court relied on the reasons of Aikins J. in *Lawson v. Burns*, [1976] 6 W.W.R. 362 (B.C.S.C.). Aikins J. in turn relied on this passage from the reasons of Lord Denning M.R. in *Bryanston Finance Ltd. v. de Vries*, [1975] Q.B. 703, [1975] 2 All E.R. 609 (C.A.) at 619:

In the present case, the question that arises is this: suppose that the plaintiff settles with one of the wrongdoers before judgment by accepting a sum in settlement; or suppose that by consent an order is made by which the plaintiff accepts an agreed sum from the one tortfeasor and discontinues against him, but goes on against the other. I believe this to be a new point. It should be solved the same way as the payment into court was solved. If the plaintiff gets judgment against the remaining tortfeasor for a sum which is more than the sum already recovered (by the settlement or the consent order), he is entitled to enforce it for the excess over which he has already recovered. But, if he gets judgment for less than he has already recovered, then he recovers nothing against the remaining tortfeasor and should pay the costs.

- [33] In *Dixon*, the torts can be categorized as "concurrent" because their negligence combined to cause one injury and its consequential loss at the same time. In the case at bar, the torts can be categorized as "consecutive" because, while the appellant's injury was indivisible and the negligence of both the settling defendant and the respondent tortfeasor were necessary causes of that injury and the loss resulting from it, the negligence occurred at different times.
- [34] The first question is whether a different rule should apply to consecutive torts. If the treatment of the receipt of settlement proceeds should be the same, the final question is whether the policy underlying the recently developed settlement privilege should trump the policy underlying the long-standing rule against double recovery or give way to it.

- [35] I am not persuaded there is a valid policy reason for treating concurrent and consecutive torts differently when both are necessary causes of an indivisible injury and the losses consequential to it. Indeed, I am not persuaded the distinction is material to the issue before this Court: whether settlement proceeds should be deducted from a damage award made against one of two tortfeasors liable to pay compensation for the loss incurred by reason of their combined negligence. In *Hutchings v. Dow*, 2007 BCCA 148 at para. 23, 66 B.C.L.R. (4th) 78, 238 B.C.A.C. 139, [2007] 5 W.W.R. 264, leave to appeal to S.C.C. refused (27 September 2007), 32034, this Court categorized separate torts causing the same damage as "concurrent torts" as suggested in *Glanville L. Williams, Joint Torts and Contributory Negligence* (London: Stevens & Sons, 1951) at 1. Consequently, I would apply the reasoning of this Court in *Dixon* to this case unless the reasoning in *Bracey* or *Misko* governs, as the appellant argues it should.
- [36] The appellant considers the deduction of the settlement proceeds to be an error in law because the two causes of action are separate and unrelated, as two comparable successive torts were held to be in *Bracey*. Although it does not help their position, the respondents' fundamental point is that successive injuries must always be divisible if there are to be successive torts; the trial judge fell into error when he failed to distinguish the concept of an indivisible injury from the concept of indivisible loss or damage, thereby failing to distinguish between determining causation and assessing damages. Both submissions require this Court to find the trial judge erred in finding the separate torts caused an indivisible injury. They are untenable, as was a similar submission in *Hutchings* because they fly in the face of an unchallenged finding of fact.
- [37] In *Bracey*, the defendant sought to bring into account an award for damages suffered in an earlier incident that contemplated future losses embracing the period of the second accident. The trial judge refused, stating that his task was "to properly weigh and assess damages for pain and suffering attributable solely to the [second] 1992 accident." This Court agreed with his approach, holding that the awards and the reasons for judgment in the earlier action were irrelevant and not properly before him.
- [38] That conclusion is not surprising. If the plaintiff continued to suffer from the "permanently disabling injuries" on the day before the second accident, evidence about that condition would be relevant to the assessment of appropriate compensation in the second action, but the two claims would be separate and unrelated. That is not this case. In *Bracey*, there was no factual finding of an indivisible loss caused by two tortfeasors in successive accidents, thereby rendering both tortfeasors liable to the victim for the entire loss resulting from that injury and bringing apportionment into play under s. 4 of the Negligence Act.
- [39] More apposite is the reasoning of Rosenberg J.A. on behalf of the Ontario Court of Appeal in *Misko*. The appellant in that case was involved in two motor vehicle accidents. He settled with the first tortfeasor and gave him a standard release. Because the identity of the second tortfeasor was unknown, he sued Liberty Mutual, from whom he had obtained unidentified motorist coverage. After the insurer learned of the earlier accident and settlement during

discoveries, it issued a third party claim for contribution against the first tortfeasor. When that claim was struck on the settling tortfeasor's motion on the basis that the defendant and he were not concurrent tortfeasors (existing or happening at the same time), the insurer appealed. The appeal was dismissed on a different basis: there was no risk that the insurer might be required to compensate the plaintiff for damages from the first accident.

Apportionment was required by the Negligence Act, R.S.O. 1990, c. N.1. Damages flowing from the injury would be assessed and then apportioned by either the devaluation or percentage method; the insurer would be responsible only for the portion claimed for the second tort. Effectively, the court treated the settlement as irrelevant, without mentioning the potential for overcompensation if the injury were found to be indivisible.

- [40] Justice Rosenberg concluded by distinguishing *Alderson v. Callaghan* (1998), 40 O.R. (3d) 136, 111 O.A.C. 141, 42 C.C.L.T. 230, 21 C.P.C. (4th) 224, as involving a different issue. There, on the principles from *Athey* the possibility remained open that the defendant tortfeasor could claim contribution from the non-defendant tortfeasor.
- [41] In my view, even if trial judges were required to apportion responsibility for the appellant's losses between the two tortfeasors, despite the absence from the action of the settling defendant and whether the torts are categorized as concurrent or consecutive, the underlying issue would be the same: whether the two causes of action were separate.
- [42] The two causes of action are not separate: they are linked by the indivisible injury the trial judge found to have been caused by the separate torts. That link brings into play not only joint and several liability, but also the rule against double recovery.
- [43] It follows that I do not see the trial judge's failure to distinguish between concurrent and consecutive torts or to apportion damages as material error, nor do I see his apportionment on the alternative assessment to be relevant. On the only question this appeal raises, I would apply this Court's reasoning in *Dixon* and hold that the trial judge did not err when he required the deduction of the settlement proceeds from the appellant's claim against the second-accident defendants from the global award he made against the respondents.
- [44] Consequently, I would dismiss the appeal.

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Mr. Justice Tysoe"

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