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COURT OF APPEAL FOR ONTARIO

LABROSSE, SHARPE and CRONK JJ.A.

B E T W E E N:

RENAISSANCE LEISURE GROUP INC., carrying on business as MUSKOKA SANDS INN and VALHALLA INN MANAGEMENT SERVICES LIMITED Plaintiffs, Defendants by Counterclaim (Respondents)	)	Alexander D. Pettingill and Thomas J. Donnelly for the respondents
- and -	)	
JEFFREY FRAZER Defendant, Plaintiff by Counterclaim (Appellant)	)	Eric Sigurdson and Suzanne Courtlander for the appellant
	)	Heard: June 10, 2004

On appeal from a judgment of Justice Maurice Cullity of the Superior Court of Justice dated March 12, 2001.

SHARPE J.A.:

Overview

[1] The legal issues arising on this appeal may be summarized in the following way. A is found liable in tort and, in the same action, successfully claims contribution against B. A then brings a second action claiming contribution from C, who was not named as a party in the first action. Is A bound by the findings of fact in the first action? Is A entitled to assert the claim for contribution against C on the basis that 100 per cent of the fault is to be apportioned between A and C, without regard to the apportionment of fault made against B in the first action?

[2] In 1989, Scott Mellanby, a promising young professional hockey player, was seriously injured in a fight that occurred in the bar of the Muskoka Sands Inn. Mellanby

had come to the aid of his friend, Jeffrey Frazer, who was involved in an argument with Frank Chapple. In the ensuing fracas, Chapple wielded a broken glass as a weapon and cut both Mellanby and Frazer. Mellanby sued Frank Chapple, the owner of the Muskoka Sands Inn, Renaissance Leisure Group Inc. and the manager of the Muskoka Sands Inn, Valhalla Inn Management Services Limited ("Renaissance"). Mellanby did not sue Frazer, nor did Renaissance assert a third party claim against Frazer for contribution. Mellanby recovered $801,605 in damages for his injuries. The trial judge apportioned the relative degrees of responsibility as follows: Mellanby, 35 per cent (contributory negligence); Renaissance, 15 per cent; and Chapple, 50 per cent.

[3] Renaissance appealed. Before the appeal was heard, Renaissance settled with Mellanby, paying him $475,000 in full satisfaction of his claim. Renaissance then brought an action against Frazer for contribution and indemnity, alleging that Frazer had started the fight that led to Mellanby's injuries. At the second trial, the trial judge held that he was not bound by factual findings made at the first trial and that Frazer's degree of responsibility should be determined without reference to the apportionment of responsibility against Chapple in the first trial. He found that Frazer had provoked the fight and that, as between Renaissance and Frazer, the appropriate apportionment of responsibility was Frazer, 80 per cent and Renaissance, 20 per cent.

[4] Frazer appeals to this court, submitting that the trial judge erred in holding him liable to indemnify Renaissance for any portion of Mellanby's damages, or in the alternative, that his share of the responsibility for the damages should be reduced having regard to the result at the first trial and the apportionment of fault against Chapple.

Facts

[5] On August 19, 1989, Scott Mellanby went to Frazer's cottage. Together with Kyle Bryden, Michael Rosenberg, and Andy Manko, they drank some beer, ate dinner, and went to a bar in the Muskoka Sands Inn called Steamer Jake's. Frank Chapple, his son Geoff Chapple, Geoff's girlfriend Kathy Wiegand, and a group of their friends also went to Steamer Jake's that evening. They had consumed some alcoholic drinks during the afternoon and early evening at their cottage. Frank Chapple appeared intoxicated.

[6] At the bar, Rosenberg approached a group of women. He asked one of the women to dance. Geoff Chapple became angry and informed Rosenberg that the woman was his girlfriend. Geoff Chapple then ripped Rosenberg's shirt and scratched his arms. The shirt Rosenberg was wearing belonged to Frazer. Lisa Whitley, the manager of the Muskoka Sands Inn, intervened in the exchange. She warned all of them that it was hotel policy to eject anyone participating in a fight.

[7] Rosenberg walked to the table where his friends sat. Frazer noticed the damage to his shirt. Rosenberg pointed out Geoff Chapple as the man who had ripped the shirt.

Frazer approached Geoff Chapple and asked him for $30, the cost of the shirt. Frank Chapple started yelling and swearing at Frazer. Frazer observed that Frank Chapple appeared red, intoxicated, and threatening. Geoff Chapple told Frazer to ask Rosenberg for the money. James Gibb, a patron who had no connection with either the Mellanby or Chapple groups, and Wiegand both offered to pay for the shirt, but Frazer regarded these offers as insults and insisted that the money come from Geoff Chapple. Frank Chapple's verbal abuse continued. The staff of Steamer Jake's did not observe or intervene in the exchange. Bryden observed this incident, became concerned and returned to the table where Mellanby and Manko were sitting.

[8] It is a disputed fact whether Frazer left the area of the bar occupied by Frank Chapple. At the first trial, Jarvis J. did not specifically address the issue and made no explicit finding on the point, although his reasons suggest that Frazer did not leave and return. At the second trial, Cullity J. found that Frazer left the area and then returned with Bryden, Mellanby and Manko.

[9] In any event, Frank Chapple continued to be verbally abusive and threatening. Frazer was pushed and he then punched Frank Chapple. Chapple deliberately broke his cocktail glass against the nearby railing. Frazer continued to punch him. Geoff Chapple saw that his father was getting the worst of it and he intervened to help him. Mellanby pulled Geoff Chapple back to prevent him from moving to enter the fight between Frank Chapple and Frazer. Frazer and Frank Chapple fell to the floor, alongside Mellanby and Geoff Chapple. Frazer was on top of Frank Chapple, holding him down. Frank Chapple swung an object at Frazer's face. Frazer felt a burning sensation and began to bleed profusely. Mellanby continued to fight with Geoff Chapple. Peripherally, he saw someone to his right, in the area where the appellant Frazer and Frank Chapple were fighting, swing at him. After the fight was over, Mellanby became aware that his left arm was badly cut.

(a) The First Trial

[10] Mellanby sued Renaissance and Pinkerton's of Canada Limited, a company that provided security services at the Muskoka Sands Inn, in negligence. Mellanby also sued Frank and Geoff Chapple. Each defendant counterclaimed against the plaintiff and crossclaimed against various of the other defendants for contribution and indemnity. Frank and Geoff Chapple also counterclaimed against Frazer, Rosenberg, Manko, and several other parties, including Renaissance, for negligence.

[11] The master struck Frank and Geoff Chapple's statement of defence and counterclaim for default prior to the trial. As a result, Frazer was not a party to the first action by the time it reached trial, as no other party asserted any claim against him. Frank Chapple took no part in the trial, either as a witness or as a party. Mellanby settled

with Pinkerton's before trial but the crossclaims of the other defendants for contribution from Pinkerton's continued. By agreement, the Mellanby claim against Geoff Chapple was dismissed.

[12] Jarvis J. found that the injuries sustained by Frazer and Mellanby were caused by the deliberate act of Frank Chapple wielding a broken glass as a weapon. He also found that Renaissance had breached its duty of care and failed to live up to its duties imposed by the *Liquor Licence Act*, R.S.O. 1990, c. L.19 and the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2. The crossclaim against Pinkerton's was dismissed on the basis that there was no contract between Renaissance and Pinkerton's with respect to security inside the bar. No fault was attributed to Geoff Chapple on the basis that he did not inflict wounds on Mellanby or Frazer, and that his role in the altercation was not directly connected to the chain of causation that led to those injuries. Jarvis J. found Mellanby to be contributorily negligent on the basis that he should have foreseen the chance of personal injury and taken care to avoid that risk. Mellanby was awarded damages of $801,605 with responsibility apportioned as follows: Mellanby, 35 per cent; Renaissance, 15 per cent; Frank Chapple, 50 per cent. The joint and several liability of Renaissance and Frank Chapple amounted to $521,043.25 (65 per cent of the damages).

[13] Renaissance filed a notice of appeal. Following settlement discussions, Mellanby acknowledged full satisfaction of the judgment, including interest and costs, for the all-inclusive sum of $475,000.

(b) The Second Trial

[14] Shortly after the judgment was handed down in the first trial, and prior to filing a notice of appeal and settling with Mellanby, Renaissance commenced the second action, claiming contribution and indemnity from Frazer on the basis that he was negligent for provoking the fight.

[15] Frazer moved for summary judgment dismissing the action on the ground that Renaissance was attempting to re-litigate issues previously decided by Jarvis J., and that the action amounted to an abuse of process. Southey J. dismissed the motion, holding that section 8 of the *Negligence Act*, R.S.O. 1990, c. N.1 permitted defendants to wait until judgment is given against them before commencing a separate action against an alleged tortfeasor from whom they are entitled to contribution or indemnity. Frazer's motion for leave to appeal to the Divisional Court was dismissed. Frazer was granted leave to amend his statement of defence to counterclaim against the plaintiffs for the damages he suffered during the altercation.

[16] Frazer then moved for a determination of a question of law, pursuant to rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that Renaissance was not entitled to

pursue their claim, but elected to have the motion heard at the commencement of trial. At trial, he decided to address the issue as part of his closing submissions.

[17] During the trial, Cullity J. made the following rulings:

1. The issue of whether the plaintiffs were abusing the process of the court by engaging in multiple unnecessary proceedings and attempting to re-litigate issues was argued fully on the motion for summary judgment. Accordingly, it was *res judicata* in the second action, and the plaintiffs were entitled to seek contribution from Frazer in the second proceedings.

2. The payment of $475,000 was a settlement within the meaning of s. 2 of the *Negligence Act* and Renaissance was entitled to bring the contribution claim under that section.

3. The court was not bound by the factual findings in the first action, including the findings as to the comparative degrees of fault.

4. The degree of fault to be allocated to Frazer should be made by allocating 100 per cent of the fault or negligence among him, Frank Chapple, and Renaissance.

[18] However, after he made the ruling as to the apportionment of fault, this court released its decision in *Martin v. Listowel Memorial Hospital* (2001), 51 O.R. (3d) 384, and the trial judge changed his ruling. He held that *Martin* required him to ignore Chapple's fault as, in the second trial, Chapple was an absent party or, in any event, likely impecunious. The trial judge ruled that in view of *Martin*, 100 per cent of the fault or negligence was to be allocated to, and apportioned between, Frazer and Renaissance.

[19] Cullity J. found Frazer to be a credible witness and, for the most part, accepted his account of the how the fight started, how it progressed, and how his injuries were inflicted. However, on one crucial point, he did not accept Frazer's evidence. Relying on the evidence of James Gibb, Kathy Wiegand and Geoff Chapple, Cullity J. found that Frazer could have avoided the final conflict with Frank Chapple. Cullity J. concluded that after his initial confrontation with Frank Chapple, Frazer left the scene. Then, when he saw that Mellanby, Bryden and Manko were on their way, he joined them and returned to confront Frank Chapple. Cullity J. found that Mellanby's injuries resulted from a fight that Frazer could and should have avoided. He apportioned responsibility for Mellanby's damages as follows: Renaissance, 20 per cent; and Frazer, 80 per cent. This resulted in a judgment in favour of Renaissance for $380,000 (80 per cent of the $475,000 settlement). Cullity J. added that, if contrary to his finding, a proportion of the fault was to be attributed to Frank Chapple, then liability should be apportioned as follows: Frank Chapple, 50 per cent; Frazer, 40 per cent; and Renaissance, 10 per cent.

[20] Frazer's counterclaim against Renaissance was allowed and his damages were assessed at $20,000. Cullity J. held that, in order to determine the degree of Frazer's contributory negligence, the correct approach was to inquire into the extent to which his conduct fell short of the reasonable standard of care in all the circumstances, including the conduct of Frank Chapple, resulting in a 40 per cent reduction. Despite the fact that Renaissance obtained a better result than its offer to settle prior to trial, the trial judge ordered costs on a partial indemnity basis. Frazer appeals the judgment for contribution and Renaissance cross-appeals the cost order.

Legislation

[21] The relevant provisions of the *Negligence Act* provide as follows:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the Court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
>
> 2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the Court that the amount of the settlement was reasonable, and in the event that the Court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.
>
> ….
>
> 8. Where an action is commenced against a tortfeasor or where a tortfeasor settles with a person who has suffered damage as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tortfeasor are defeated by the operation of any statute

> limiting the time for the commencement of action against such other tortfeasor provided:
>
> (a) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and
>
> (b) there has been compliance with any statute requiring notice of claim against such tortfeasor.

[22] I note that s. 8. has since been repealed by the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, ss. 4 and 25 but, of course, that does not affect the outcome of this appeal.

Issues

1. Did the trial judge err in holding that he was not bound by the findings of fact in the first trial and permitting a re-litigation of these issues?

2. Did the trial judge err in finding that if sued, Frazer would have been liable to Mellanby and that he was therefore liable to Renaissance for contribution and indemnity?

3. Did the trial judge err in finding that Frazer's liability to Renaissance should be determined without reference to the apportionment of fault at the first trial?

4. If Frazer is liable to Renaissance for contribution, what is the appropriate amount?

5. Did the trial judge err with respect to costs?

Analysis

Issue 1. Did the trial judge err in holding that he was not bound by the findings of fact in the first trial and permitting a re-litigation of these issues?

[23] Before this court, Frazer concedes that ss. 2 and 8 of the *Negligence Act* entitle Renaissance to bring a subsequent action for contribution.

[24] Frazer does not seriously dispute the trial judge's finding that the second action was brought after a settlement within the meaning of s. 2. Frazer also concedes that for the purpose of the second action, the quantum of the settlement was reasonable. The outstanding issue is the extent to which Renaissance is bound by the judgment and findings in the first trial. Frazer relies on the abuse of process doctrine developed in

Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77, that allows the court to preclude the re-litigation of issues in certain circumstances even where the strict mutuality requirements of issue estoppel or *res judicata* have not been met.

[25] Frazer argues that Renaissance is bound in two ways. First, Frazer submits that Cullity J. was bound by Jarvis J.'s factual findings as to the nature of Frazer's involvement in the fight, and that, on the basis of those findings, Frazer could not be found liable. Second, Frazer argues that Cullity J. was bound by Jarvis J.'s apportionment of fault as among Mellanby, Renaissance and Frank Chapple, and that any apportionment of fault to Frazer must respect and reflect the apportionment made at the first trial.

[26] With respect to the first point, Frazer relies on the following findings from the first trial: (1) Mellanby's injuries were caused by deliberate actions of Frank Chapple; and (2) there was no causal link between Geoff Chapple's behaviour and Mellanby's injuries. Frazer submits that these findings should have precluded Cullity J. from attributing liability to him in the second action. He argues that the finding that Mellanby's injuries were deliberately caused by Frank Chapple breaks the chain of causation between his own conduct and the injuries. Frazer further contends that he played the same role in the fight as Geoff Chapple. Therefore, as Geoff Chapple was found not to be liable at the first trial, Frazer should not have been found liable at the second trial.

[27] I am unable to accept these submissions. When applying the abuse of process doctrine in the present case, we must be mindful of the essential point that Renaissance enjoys the statutory right to bring a subsequent action against Frazer. Frazer's negligence has never been litigated and accordingly, he is not being required to re-litigate a claim that he has already successfully resisted: see *Canam Enterprises Inc. v. Coles*, [2002] 3 S.C.R. 307. Assuming, for the sake of this argument, that the abuse of process doctrine extends to what counsel for Frazer labelled as "foundational findings" in the earlier proceeding, I cannot agree that the nature of Frazer's involvement in the fight falls into that category. Frazer's involvement was certainly part of the narrative at the first trial. However, the question of his responsibility for the injuries suffered by Mellanby was simply not before the court, either directly as a result of a claim by another party, or indirectly as an element or ingredient in some other cause of action.

[28] Moreover, even if one were to take a more generous view of the reach of the abuse of process doctrine, as I read his reasons for judgment, Jarvis J. did not make findings of fact that would exclude the possibility that Frazer might, in some way, have to bear part of the responsibility for the fight. Even on Jarvis J.'s findings, the whole incident arose because of Frazer's persistence about seeking payment for the torn shirt. Moreover, on Jarvis J.'s findings, Frazer could have extricated himself from the argument before it

disintegrated into physical violence. Jarvis J. found that Bryden "realized that a physical confrontation was possible", left to get help, and between one to four minutes later, returned with Manko and Mellanby to help Frazer. When they arrived, Frazer was involved in a "very animated argument" with Geoff Chapple about the torn shirt. Frank Chapple intervened and "pushed [Frazer] with an open hand". It was at this point that Frank Chapple broke the cocktail glass. Frazer then punched Frank Chapple several times without being struck in return. If Bryden was able to foresee that the confrontation with the Chapples could escalate into violence, then Frazer should have done so as well and disengaged in the time it took Bryden to get help from the others and return.

[29] Nor am I persuaded that Frazer's liability would be excluded by Jarvis J.'s finding that Frank Chapple deliberately caused Mellanby's injuries. As I will explain in more detail below, Cullity J. found that the precise manner in which Mellanby's injuries were inflicted could not be determined. However, he also found that it was immaterial how those injuries were caused and that even if they resulted from the deliberate acts of Frank Chapple, Frazer was partly to blame for having provoked a brawl in which injuries to others from broken glass were foreseeable.

[30] I do not agree that Frazer's involvement must be equated with that of Geoff Chapple. It is apparent that they had radically different relationships and interactions with the other protagonists throughout the entire incident. There is nothing inconsistent in finding that Frazer was liable in the face of the finding that Geoff Chapple was not.

[31] I will consider the argument that any apportionment of fault to Frazer must respect and reflect the apportionment made at the first trial below under the heading of Issue 3.

Issue 2. Did the trial judge err in finding that if sued, Frazer would have been liable to Mellanby and that he was therefore liable to Renaissance for contribution and indemnity?

[32] In order to succeed against Frazer for contribution, Renaissance must prove that Frazer "would if sued have been" liable to Mellanby. I have already dealt with Frazer's contention that the trial judge's finding of liability is inconsistent with and barred by the findings at the first trial. When one turns to the evidence led at the second trial, Frazer submits that Cullity J. erred in fact and in law in finding that Renaissance established liability on Frazer's part.

[33] Frazer's first point is that the trial judge made a palpable and overriding error in finding that he provoked the fight. I have already touched on this issue when considering the abuse of process argument and the findings made by Jarvis J. at the first trial. Here, I will focus on the findings made at the second trial.

[34] Frazer argues that none of the witnesses who testified expected a fight to break out and that the trial judge erred in finding that he should have foreseen Chapple's deliberate infliction of injury upon Mellanby with the broken glass. Frazer testified that as he turned away from Frank Chapple, he was pushed from behind, and stumbled into Manko and Mellanby, who were approaching. He insists that he was swept up by their "momentum" and ended up in front of Frank Chapple again. Frazer argues that the trial judge erred in finding that he left the area of the bar where Frank Chapple was standing after an initial confrontation and then returned to confront him again in the company of Mellanby, Bryden, and Manko. Given its importance, I set out here the crucial passage from the trial judge's reasons for judgment:

> The one aspect of Frazer's evidence that I am not prepared to accept is his suggestion that he was not able to avoid the third incident [the fight involving Frazer, Mellanby and the two Chapples]. Quite apart from the inconsistent evidence of Gibb, Geoff Chapple and Kathy Wiegand, his evidence that he turned away from the Chapple Group at the end of the second incident, stumbled into Manko, or Mellanby, and was involuntarily carried forward by the latter's momentum until he ended face to face with Frank Chapple was not corroborated by any members of the Frazer Group and it was, I believe, implausibly self-serving. I find that the most probable conclusion is that he left the scene, saw that reinforcements were on their way and returned to confront Frank Chapple.

[35] It is well established that an appellate court will not interfere with a trial judge's findings of fact absent "a palpable and overriding error": *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. I do not agree that the trial judge's factual findings are tainted by such an error. In my view, the trial judge's reasons reflect a careful assessment and weighing of the evidence. The submission that he misapprehended or disregarded the evidence is unpersuasive. The trial judge found Frazer to be a credible witness but, as the passage quoted above indicates, he did not accept his evidence on the crucial point about how the final confrontation with Frank Chapple unfolded. The trial judge was entitled to reject this important aspect of Frazer's evidence despite his generally favourable assessment of Frazer's credibility.

[36] Moreover, the evidence of James Gibb, Geoff Chapple and Kathy Wiegand supports the trial judge's finding. They all testified that after the initial argument, Frazer returned with his friends to confront Frank Chapple. Gibb was challenged on cross-examination with his prior statements that Manko, not Frazer, was leading the group, but it was still open to the trial judge to accept his evidence that Frazer had turned away and

returned to start the fight. Similarly, although the trial judge preferred the evidence of Frazer to these witnesses on other points, he was entitled to accept their evidence on this point. I would add that while there is disagreement as to the exact sequence of events, it is uncontroverted that Frazer threw the first punch and that Mellanby's involvement in the fracas followed as a direct result of Frazer fighting Frank Chapple.

[37] Frazer places considerable weight on the fact that the trial judge found that Gibb stated that he had seen Frazer leading Mellanby, Manko and Bryden, and said "Here comes the army". As Frazer correctly asserts, at no point in his evidence did Gibb say "Here comes the army". However, both Geoff Chapple and Kathy Wiegand testified that Gibb had uttered that phrase. While perhaps the statement should have been excluded as hearsay, this does not constitute a misapprehension of the evidence; nor does it fundamentally undermine the trial judge's finding so as to warrant the intervention of this court.

[38] Frazer also submits that the trial judge erred in law in finding that, if sued, he would have been liable for the damages suffered by Mellanby. I do not agree with this submission.

[39] I see no legal error in the trial judge's conclusion that Frazer should reasonably have foreseen that his conduct could lead to a brawl in which his friends could become involved and injured. On the facts as found by the trial judge, Frazer could and should have avoided the confrontation with Frank Chapple. It was open to the trial judge to find that Mellanby's injuries were a reasonably foreseeable consequence of and causally linked to Frazer's engagement in the fight with Frank Chapple. The trial judge put it in the following manner at para. 71:

> It is, I believe, immaterial whether Mellanby's injuries occurred because he came in contact with Frank Chapple before he became involved with Geoff Chapple, whether they were inflicted by Frank Chapple while Mellanby was fighting with Geoff Chapple or whether Mellanby was cut by scattered fragments of Frank Chapple's glass during that fight. Given the evidence that there was no other broken glass on the floor, and no other sharp objects in the immediate vicinity, there are no other likely alternatives and, in my judgment, the necessary causal nexus between Frazer's negligence and Mellanby's injuries has been established. Any person who becomes involved in a bar-room brawl must reasonably foresee that glasses may be broken and other persons present may thereby be injured. I am satisfied on the evidence that Mellanby's intervention was motivated by a desire to assist Frazer and that it was reasonably foreseeable by the latter.

[40] I do not agree with the submission that Frank Chapple's actions constituted an intervening act that broke the chain of causation. Where the act that causes the damage is "part of the ordinary course of events", it does not break the chain of causation: *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398 at para. 33. As explained in *Martin v. McNamara Construction Company Limited and Walcheske*, [1955] O.R. 523 at 528-529 (C.A.), quoting from *Haynes v. Harwood*, [1935] 1 K.B. 146: "If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence." The trial judge was entitled to conclude, as he did, that Frank Chapple's actions, whether deliberate or not, were the direct and foreseeable consequence of Frazer's engagement in the brawl and that they were therefore sufficiently causally linked to his breach of the standard of care. This is not a case involving an independent intervening act that is causally unrelated to the defendant's conduct. Here, on the findings of the trial judge, it was Frazer's own conduct that caused the brawl that resulted in Mellanby's intervention, Frank Chapple's response, and Mellanby's injuries. The comments of Dickson J.A. in *School Division of Assiniboine South No. 3 v. Greater Winnipeg Gas Co.*, (1971), 21 D.L.R. (3d) 608 (Man. C.A.), aff'd (1973), 40 D.L.R. (3d) 480 (S.C.C.), are apposite:

> It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable. … When one permits a power toboggan to run at large, or when one fires a rifle blindly down a city street, one must not define narrowly the outer limits of reasonable provision. The ambit of foreseeable damage is indeed broad.

Issue 3. Did the trial judge err in finding that Frazer's liability to Renaissance should be determined without reference to the apportionment of fault at the first trial?

[41] The trial judge initially ruled that Frazer's degree of fault should be determined on the basis that 100 per cent of the fault should be allocated among Frazer, Renaissance, and Frank Chapple. However, the decision of this court in *Martin* was released after his initial ruling and the trial judge considered himself bound by that decision to reverse his initial ruling and apportion 100 per cent of the fault between Frazer and Renaissance, and to apportion none of the fault against Frank Chapple. For the following reasons, I have concluded that the trial judge's initial ruling was correct and that *Martin* does not compel a different result.

[42] By virtue of the terms of the *Negligence Act*, Renaissance is plainly entitled to adopt a "wait and see" strategy and only assert its contribution claim against Frazer after the trial or settlement of the first action. The trial judge found that Renaissance's decision not to assert a contribution claim against Frazer in the first action "was deliberate and motivated by tactical considerations". Although Renaissance was entitled to adopt a "wait and see" strategy, I agree with Frazer's submission that the law should not and does not permit Renaissance to obtain a better result against Frazer than it could have obtained had it asserted its claim against Frazer in the first action. Renaissance should not be permitted to ignore the apportionment of fault made in the first action. Renaissance has a statutory right to assert its claim for contribution against Frazer in a second action, but that statutory right does not go so far as to permit Renaissance to obtain a result in the second proceeding that is inconsistent with the result in the first proceeding. To permit Renaissance to improve its position by asserting its contribution claim in the second action without regard to the apportionment in the first action would encourage a multiplicity of proceedings and violate the integrity of the administration of justice by allowing for inconsistent verdicts. This would amount to an abuse of process, as that doctrine has been elaborated and explained in *C.U.P.E.*

[43] I agree with and adopt the following passage from the trial judge's reasons explaining the basis for his initial ruling on this point:

> I did not see why the Plaintiffs should be able to obtain a greater contribution from Frazer than would have been available if they had made a third party claim against him in the Mellanby action. If, for example, fault would have been apportioned for the purposes of such a claim in accordance with the following percentages – 10 per cent to the Plaintiffs; 60 per cent to Chapple; and 30 per cent to Frazer and Mellanby had recovered in full from the Plaintiffs, they would be able to obtain a much greater contribution (75 per cent) from Frazer by refraining from making the third party claim and, instead, commencing this action against Frazer alone.

[44] In my view, *Martin* does not compel a different result. That case involved a malpractice claim against doctors, a hospital, and ambulance attendants. The doctors brought a third party claim against a nurse. The plaintiffs settled with the doctors before trial and as the nurse was only sued as a third party, the settlement also disposed of any claims against her. The claim against the hospital and ambulance attendants proceeded to trial. The trial judge considered the nurse's involvement and found her to be negligent for the purpose of determining the hospital's vicarious liability. However, the trial judge declined to determine the nurse's degree of fault for the purpose of the *Negligence Act*

claims for contribution because she was not a party to the action. The trial judge held that, as he was unable to determine respective degrees of fault, and applying s. 4 of the *Negligence Act*, the defendants were deemed to be equally at fault, each in the amount of one-third of the award. In view of the terms of their settlement with the doctors, it was in the plaintiffs' interest to maximize the apportionment of fault against the hospital and they appealed. This court allowed the appeal on the ground that the trial judge erred in his application of s. 4 and increased the apportionment of fault against the hospital to 50 per cent. The court explicitly stated that to be sufficient to dispose of the appeal, but went on to comment on the plaintiffs' alternate submission that the trial judge had erred by refusing to allocate a portion of the fault against the nurse. The court stated, at para. 32, that had it been necessary to decide the point, it would not have interfered with the trial judge's refusal to attribute a portion of fault to the nurse as "[t]here is no basis in s. 1 or anywhere in the Act for a judge to attribute a portion of fault to a non-party." The court explained its rationale as follows, paras. 36-38 and 47:

> The effect of a finding of a degree of fault on a non-party could have significant consequences for the other defendants under this section. If the fault is apportioned only among the parties, then if there is a non-party who may also have been at fault and contributed to the damage, a larger percentage of the whole loss may be attributed to each party, so that the entire loss is divided for indemnity purposes, and no gap is left. But if a portion of the fault were attributed to a non-party, or to a party at fault but with a legal defence such as a limitation defence, the defendants who are liable to the plaintiff would be left with no one from whom they could recover that portion of the claim.
>
> Because it is in the interests of the parties to ensure that everyone potentially liable is joined in the action, in practice, it is therefore most unlikely that any solvent, known person with the potential to be found at fault, would not be joined in the action as a party in some capacity. Section 5 of the Act makes special provision for adding parties, again to ensure that all parties who should be contributing to compensate the plaintiff for the loss are joined in the action which fixes everyone's responsibility.
>
> Therefore, the circumstances where a non-party might be found at fault will be unusual and rare.
>
> …
>
> To resolve any perceived uncertainty, the Law Reform Commission stated that it was its view and that it recommended that under s. 1, no degree of fault be

> apportioned to an "absent concurrent wrongdoer" (p. 187). We agree with the conclusion of the Law Reform Commission.

[45] It was on account of these comments that the trial judge changed his initial ruling. In my view, he erred in so doing for the following reasons.

[46] First, the facts of the present case are distinguishable from the situation addressed by this court in *Martin*. In *Martin*, the plaintiff made no direct claim against the nurse. In the present case, Frank Chapple had been sued and found liable. The second action cannot be viewed in isolation and as if it were the only judicial determination of the apportionment of fault. Frank Chapple was not a party to the second action, but he cannot be viewed as an "absent party" in the sense contemplated in *Martin* because there has already been a judicial determination of his fault in the first trial.

[47] Second, and importantly, the comments in *Martin* that triggered the trial judge's reconsideration of his initial apportionment ruling were made in the context of an action commenced under s. 1 of the *Negligence Act*, which is concerned with joint and several liability among party defendants for damages sustained by a tort victim. In *Martin*, the court was concerned about the possibility of a "gap" for indemnity purposes as among concurrent wrongdoers, each found to be at fault and 100 per cent liable to the plaintiffs.

[48] Different considerations apply to this contribution action under s. 2 of the *Negligence Act*, which is only concerned with the several liability of concurrent tortfeasors. Frazer was not sued by Mellanby. He is not liable for 100 per cent of Mellanby's damages but is only liable to Renaissance for contribution to the extent of his apportioned share of fault. As Frazer is not jointly and severally liable to Mellanby, the reasoning in *Martin* has no application. As between defendants, liability is several, not joint, and a defendant cannot be required to pay more than his or her share of a tort victim's damage or loss in accordance with the apportionment of fault.

[49] The trial judge offered a second reason, also based upon the reasoning in *Martin*, for apportioning fault as between Renaissance and Frazer without regard to Chapple. He held, at para. 40, that there was a distinct possibility that Chapple was insolvent and that his insolvency would also produce a "gap" from which Renaissance should be protected.

> If degrees of fault are apportioned only between the parties to an action for contribution, unfairness arising out of the possibility of a "gap" because of a defence, such as limitations, or because of insolvency, will be averted. The court's comments [in *Martin*] were directed at the possibility - and not the proven existence – of a gap.

[50] In my view, the trial judge erred both in fact and in law on this point. I will deal first with the facts. There is virtually no evidence of Frank Chapple's alleged insolvency. The only evidence led at trial on the point was that Geoff Chapple was asked whether his father could have paid 50 per cent of the $800,000 judgment. He answered: "No, my father's essentially bankrupt." When Frazer's counsel attempted to cross-examine him on the point, counsel for Renaissance objected and the trial judge ruled that the cross-examination was not helpful: "[W]hy should I give any weight on any issue as to whether Mr. Chapple does or does not know that his father owns shares of the Cable Company?" In re-examination, Geoff Chapple admitted that he knew very little about his father's financial affairs, although he did testify during his examination-in-chief that his family owns a cottage in Lake Muskoka. Even together with Frank Chapple's failure to defend the first action, it is my view that this falls well short of evidence sufficient to justify significantly increasing Frazer's exposure to the contribution claim of Renaissance.

[51] The trial judge, at para. 40, recognized that "Geoffrey Chapple's evidence … fell short of proving that his father is insolvent", but he added that as he read the decision in *Martin*, the court was of the view that even the mere possibility of a "gap" was sufficient. I do not read *Martin* as establishing the proposition that the mere possibility that one tortfeasor may be insolvent affects the allocation of fault as between tortfeasors. Solvency is mentioned only in passing in *Martin* at para. 37, and even there the court merely states that the absent tortfeasor problem in an action under s. 1 of the *Negligence Act* should be rare because any tortfeasor with assets is likely to be joined in the action.

[52] Frazer argues that the language of the *Negligence Act* does not contemplate risk spreading based on insolvency or ability to pay, relying on the comment by David Cheifetz, "Allocating Financial Responsibility Among Solvent Concurrent Wrongdoers" (2004), 28 Advocates Q. 137 at pp. 328-32. I note that in its exhaustive study on the subject of contribution, *Report on Contribution Among Wrongdoers and Contributory Negligence*, (Toronto: Ministry of Attorney General, 1988) at pp. 47-48, the Ontario Law Reform Commission concluded that it would be equitable to allow the court to divide the share of a wrongdoer "insolvent or otherwise unavailable to satisfy her share of liability" between the remaining wrongdoers in proportion to their respective degrees of fault. However, the legislature has not yet acted on that recommendation. The situation as among wrongdoers who are all sued and all found to be jointly and severally liable to the plaintiff may be different but I can see no basis for dividing the share of an insolvent wrongdoer in the circumstances of the present case. As I have explained above, Frazer was never sued by Mellanby, and his exposure to liability is to Renaissance for contribution assessed according to his own degrees of fault or negligence.

Issue 4. If Frazer is liable to Renaissance for contribution, what is the appropriate amount?

[53] The Renaissance action against Frazer is brought upon the settlement with Mellanby and as the settlement is a reasonable one and is net of Mellanby's contributory negligence, it represents the starting point: see *Nesbitt v. Beattie*, [1955] O.R. 111 (C.A.); *Wickham v. State Transport Authority*, [1991] S.A.S.C. 3120 (Supreme Court of South Australia), cited in Cheifetz, *supra*. In my view, the appropriate amount of Frazer's liability to Renaissance for contribution should respect the allocation of fault against Renaissance in the first action and, to the extent that it is consistent with that goal, also respect Cullity J.'s findings as to the proper apportionment as among Renaissance, Chapple, and Frazer in the second action: see *Ingles v. Tutkaluk Construction Ltd*., [2000] 1 S.C.R. 298 at para. 57. The settlement amount of $475,000 represents Mellanby's recovery after deduction for contributory negligence. The apportionment in the first action against Renaissance (15 per cent) becomes 23 per cent when applied to the damages after deduction for Mellanby's contributory negligence. For the reasons I have already stated, Renaissance should not be permitted to avoid the finding that it was 23 per cent responsible for Mellanby's net damages, nor should Renaissance be permitted to obtain a more favourable result against Frazer in this action than it could have obtained in the first action. This means that Frazer's share should be taken from the remaining 77 per cent. In Cullity J.'s alternative apportionment, he found that Frazer bore 40 per cent of the fault while Chapple bore 50 per cent. I would maintain that ratio and hold that 77 per cent of the $475,000 settlement, or $365,750, be divided to maintain the ratio of 4 to 5. The result is that Frazer's apportionment should be $162,555.50.

Issue 5. Did the trial judge err with respect to costs?

[54] The cross appeal as to costs was not pressed in argument. In any event, in view of the conclusion that I have reached with respect to the extent of Frazer's liability to Renaissance, there would be no basis to award full indemnity costs.

Conclusion

[55] For these reasons, I would allow the appeal and vary the judgment by deleting the sum of $380,000 in para. 1 and substituting the sum of $162,555.50. The appellant, having achieved substantial success, is entitled to his costs of the appeal, which I would fix at $30,000 inclusive of disbursements and GST.

"Robert J. Sharpe J.A."
"I agree J.M. Labrosse J.A."
"I agree E.A. Cronk J.A."

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