CITATION: Laudon v. Roberts, 2009 ONCA 383
DATE: 20090507
DOCKET: C48648

COURT OF APPEAL FOR ONTARIO

Weiler, Juriansz and MacFarland JJ.A.

BETWEEN:

Rick Laudon

(Respondent) Plaintiff

And

Will Roberts and Keith Sullivan

(Appellant) Defendants

Martin Forget and Linda Matthews for the appellant, Keith Sullivan

Bernard P. Keating and J. Ralston for the respondent, Rick Laudon

Edward J. Chadderton for the respondent, Will Roberts

Heard: December 10, 2008

On appeal from the judgment of Justice Guy P. DiTomaso of the Superior Court of Justice dated March 17, 2008.

MacFarland J.A.:

[1] This is an appeal from the judgment of DiTomaso J. dated March 17, 2008.

[2] The issue raised by this appeal is whether a plaintiff is obliged to deduct from a jury's damage award the payment he received pursuant to a "Mary Carter" agreement (MCA)[1] with one of two defendants whom he alleged to be jointly and severally liable for his injuries.

OVERVIEW

[3] On August 2, 2002 the plaintiff was a passenger in a boat being operated by the defendant Sullivan when it was struck by another boat operated by the defendant Roberts. As the result of that collision the plaintiff suffered injuries.

[4] On March 20, 2006 the plaintiff entered into a form of MCA with the defendant Roberts. In accordance with the terms of that agreement, Roberts paid to the plaintiff the total sum of $438,000 including $35,000 for legal fees inclusive of GST, and $38,000 for disbursements also inclusive of GST.

[5] The case proceeded to trial and a jury assessed the plaintiff's total damages at $312,021.00 and found the plaintiff 11% contributorily negligent for such damages and assessed the remaining liability 50% against Roberts and 39% against Sullivan.

[1] The agreement in issue is technically not a true "Mary Carter" agreement. This agreement has no provision whereby the contracting defendant is to recover some of the monies paid in the event the plaintiff recovers more than he/she was paid under the agreement. Such a term is common to Mary Carter Agreements. However, because the parties used that term to describe the agreement in issue, the same terminology is used in these reasons.

[6] The trial judge refused to deduct the amount paid to the plaintiff by Roberts under the MCA from the damage award and instead awarded the plaintiff judgment against the defendant Sullivan in the sum of $121,688.19 or 39% of $312,021 (exclusive of pre-judgment interest).

[7] Sullivan appeals from that judgment and asserts that the trial judge erred in failing to deduct the settlement monies from the judgment sum and thereafter failing to dismiss the action against Sullivan and award him his costs against the plaintiff.

[8] For the reasons that follow I would allow the appeal, set aside the judgment dated March 17, 2008 and in its place issue a judgment dismissing the action against the appellant and award him his costs of the trial against the plaintiff.

THE FACTS

[9] Rick Laudon, the plaintiff, commenced an action against Will Roberts and Keith Sullivan, the defendants, after he was injured in a boating accident. Roberts and Sullivan separately defended the action and cross claimed against each other.

[10] In March, 2006, the plaintiff settled the claim against Roberts for $365,000 inclusive of damages and interest. The terms of the settlement did not require the plaintiff to repay any part of this settlement, regardless of the jury's verdict.

[11] The trial commenced in early October, 2006. At the outset of the trial, the parties advised the trial judge of the settlement with Roberts; however, the amount of the settlement ($365,000) was to remain undisclosed until the jury rendered its verdict.

[12] On October 11, 2006, the parties asked the trial judge to rule on an issue of law, namely whether the amount paid by Roberts in settlement of the action must be deducted from the damages assessed by the jury. The trial judge ruled that it should not be deducted. On October 18, 2006, the trial judge ordered a dismissal of Sullivan's and Roberts' cross claims against each other on consent.

[13] At the outset of the continuation of the trial in April, 2007, Sullivan advised the trial judge and Roberts that he intended to move to set aside the ruling of October 11, 2006 on the ground that relevant case law had not been before the court. The motion was heard on consent of the parties on May 10, 2007. However, the trial judge denied leave pursuant to his earlier order on October 19, 2006 in which he stipulated that no motions would be permitted prior to the trial without leave of the court, such leave to be sought no later than 60 days before the commencement of the trial. He noted that granting leave to bring the motion would potentially prejudice the plaintiff.

[14] Following the trial, the jury apportioned liability as follows: Sullivan – 39%; Roberts – 50% and the plaintiff 11%. Total damages were awarded at $312,021 ($277,698 net of the plaintiff's contributory negligence).

[15] The plaintiff's motion for judgment in accordance with the jury's verdict was opposed by the defendant Sullivan on the basis that having received $365,000 from Roberts, the plaintiff had been fully compensated for his loss. The trial judge granted the motion for judgment and, after factoring in prejudgment interest, entered judgment against Sullivan in the amount of $144,464.

ANALYSIS

Timeliness of the Appeal

[16] In oral argument on appeal, for the first time, the respondents raised the issue that the within appeal was time-barred.

[17] They say that the deductibility of the money paid to the plaintiff by the defendant Roberts pursuant to the MCA was decided by the trial judge at the outset of the trial in his ruling dated October 12, 2006 and that the Notice of Appeal, having been filed April 16, 2008, is out of time. They submit the appeal should be quashed on this basis.

[18] After a jury had been selected and before evidence was called the appellant brought a motion before the trial judge for "a determination as to what effect the agreement has on the plaintiff's recovery against the defendant Sullivan." At this point in time there was of course no verdict. No findings of liability had been made. The various scenarios put to the trial judge could only be hypothetical. Nevertheless the ruling was

made that the agreement between Roberts and the plaintiff did not affect what amount Sullivan would be obliged to pay the plaintiff. The trial judge noted:

> … I reject the proposition that the non-contributing party can rely upon the agreement between Roberts and Laudon so that Sullivan will not be held liable to the plaintiff for any damages unless the jury assesses Laudon's damages at more than the amount paid by Roberts under the agreement.

[19] On the 18th of October, 2006 the trial judge decided further motions relating to Roberts' participation in the trial and limited his participation as set out in those reasons. Because there was insufficient time remaining in the sittings to complete the case, on October 19, 2006 the case was adjourned to April 10, 2007. The jury that had been selected on October 10, 2006 was discharged.

[20] In May, 2007 after the trial was well underway, the appellant Sullivan moved to have the trial judge reconsider his ruling made October 12, 2006. The appellant submitted that in making his ruling on October 12, 2006, the trial judge was not provided with relevant and binding authority on point. The trial judge refused to reconsider his ruling on several bases including the fact that he had already decided the issue.

[21] On November 21, 2007, the verdict of the jury was received and when the plaintiff moved for judgment in accordance with the verdict the appellant Sullivan objected. He argued that because the plaintiff had not recovered more at trial than he had been paid pursuant to the MCA, the action should be dismissed against Sullivan and that Sullivan should have his costs against the plaintiff.

[22] The trial judge rejected Sullivan's argument and found that his ruling of October 12, 2006 was dispositive of the issue and that the authorities submitted to him since that ruling did not alter his conclusion. Judgment was granted in accordance with the verdict of the jury, the terms of which required Sullivan to pay the plaintiff 39% of the damages awarded. It is from this judgment that the appellant appeals.

[23] In my view the motion brought at the outset of trial and which resulted in the October 12, 2006 ruling was premature. At that point in time the trial had not yet begun and all that was required was full disclosure of the agreement,[2] excepting only the monetary amount paid. Once this occurs, a trial judge will then consider the nature of the participation of the paying defendant -if any - and what conditions – if any - should be placed on that participation.

[24] It is not appropriate, before the trial has begun and before any damage assessment has been made, to make any order in relation to the deductibility of the amount paid to the plaintiff pursuant to a MCA. The time for that order to be made is after the jury's verdict has been received or, in a judge alone trial, after judgment assessing the damages has been received. Until then, the issue of deductibility can only be hypothetical.[3]

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[2] *J. & M. Chartand Realty Ltd*. v. *Martin*, [1981] O.J. No. 739; *Bodnar v. Home Insurance Co.*, [1987] O.J. No. 2365.

[3] In *Holmes v. Hanna*, [2001] BCSC 1228 at para. 26 in relation to the amount of a settlement made among the plaintiff and three of five defendants before trial, the court noted that the plaintiff was right not to disclose the amount of the settlement at that point, but he should have asked that consideration of the deduction issue be deferred, until after liability had been apportioned, and damages assessed. In my view, that is the proper time to resolve this issue.

[25] There can be no question that a trial judge has full authority, during the course of a trial, to revisit rulings made earlier in the proceedings and there may be any number of reasons for so doing. In view of that jurisdiction, it is my view that rulings made intra-trial do not become final for the purposes of appeal until judgment has been entered. Such an approach is a sensible one which would preclude litigants having to adjourn trial proceedings mid-stream, as it were, to appeal particular rulings. The time-honoured practice of reserving to the conclusion of trial the appeal of various rulings made during the proceedings is sound in that it preserves court time and costs. For examples of this practice see: *Khan v. Pfuegel* (1984), 44 C.P.C 154; *Button v. Jones* (2004), 73 O.R. (3d) 364; and *Predie v. Paul Sadlon Motors Inc*. 2005 CanLII 8696 (Ont. S.C.)

[26] Even if I am wrong, in the particular circumstances I would have no difficulty finding that the appellant meets the test for an order extending time to file the appeal and would grant such an order.

Deductibility of Monies Paid Under MCA

[27] It is the fundamental principle of tort law in this country that an injured plaintiff should be neither over nor under, but fully compensated by way of damages for injury sustained by the negligence of others. McLachlin J. writing for the majority in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at paragraph 94 put it this way:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair

> compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle.

[28] In *Ratych, supra* the central facts are succinctly set out in the headnote as follows:

> The respondent, a police officer, was injured in a motor vehicle accident involving the police cruiser he was driving and a vehicle driven by the appellant. He was unable to work for several months because of his injuries but continued to be paid pursuant to the terms of his collective agreement and did not lose any accumulated "sick credits". The respondent successfully sued the appellant for damages for lost wages. The trial judge and the Divisional Court both found that they were bound by a decision of the Ontario Court of Appeal (*Boarelli v. Flannigan* (1973), 36 D.L.R. (3d) 4). The Court of Appeal refused leave to appeal without written reasons. The central issue here was whether payments made by an employer during the period when a plaintiff could not work should be brought into account in assessing his damages for loss of earnings.

[29] The provincial appellate courts were divided on whether such payments should be deducted from an overall damage award and the Supreme Court was called upon to resolve the conflict in the law. The court decided the case on the basis of provable loss. There was no evidence that the plaintiff had given up a benefit in exchange for the wage payment received and had no obligation moral or otherwise to repay the benefit. His employer had advanced no subrogated claim. The court concluded at paragraph 72:

> The difficulty in this case is that neither a loss nor a contribution equivalent to payment of an insurance policy is established in this case. The question thus is essentially this – must the plaintiff demonstrate a loss or contribution in order to recover, or is the court permitted to assume that because he was paid his earnings throughout his absence form work, he has in fact paid a quid pro quo and consequently suffered an equivalent loss?
>
> In my view, it is inconsistent with the principles governing the recovery of damages in tort that the court should assume that because a benefit has been conferred by a third party, the plaintiff has suffered an equivalent loss. I know of no principle which could support such an assumption. The rule remains as it has always been – a plaintiff is obliged to prove his or her loss.

[30] The court concluded that the plaintiff police officer had failed to establish a loss compensable in damages and set aside the judgment that awarded damages for loss of earnings.

[31] It is from this basic premise underlying tort law that the analysis must begin.

[32] MCAs are not new in this country. Their usage began in the United States and as is so often the case eventually found their way here.

[33] United States jurisprudence on the use of MCAs and their effect is not helpful. Rules about their usage vary from state to state. In some states the use of such agreements is prohibited, in others not only permitted but permitted to remain secret and in still others, the use permitted but disclosure required.

[34] A history of the evolution of these agreements is found in the decision of Ferrier J. in *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725. At p. 737 of his reasons Ferrier J. makes two general observations with which I agree:

> Further, it is trite that parties are free to contract and to settle lawsuits; the court will not lightly interfere with such settlements freely entered into by the parties
>
> Also, it is trite that the court encourages settlement of all issues and when that is not achieved encourages settlement of as many issues as possible.

[35] In a similar vein the late Chief Justice Callaghan remarked in *Sparling v. Southam Inc*. (1989), 66 O.R. (2d) 225 at 230:

> … the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interest of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.

[36] A MCA is a type of agreement which partly settles a lawsuit. It permits participating or contracting claimants to settle their claims while maintaining their claims against remaining or non-contracting participants. A plaintiff who enters such an agreement with one of several defendants receives a certain recovery and maintains the chance to better that recovery in proceeding against the remaining defendants. On the other side, the contracting (paying) defendant buys peace at a sum certain and in the usual MCA, although not in this case, the opportunity to recover some part of the money they

paid if the plaintiff succeeds in recovering more than the contracting defendant has paid. It is thought such agreements bring additional pressure on those non-contracting parties to settle the lawsuit.

[37] By the agreement in issue, the defendant Roberts paid the plaintiff $365,000 for damages and interest.[4] In consideration for this payment the plaintiff agreed not to claim from Roberts any amount in excess of that sum – "in any circumstances, regardless of the result at trial in the main action or crossclaims." Other terms included:

- the plaintiff was to indemnify and hold Roberts harmless from any judgment in the cross-claim for contribution or indemnity in favour of the co-defendant, Sullivan, for damages and interest owing to the plaintiff;

- the plaintiff agreed to an order dismissing the action without costs against Roberts;

- in the event that Roberts was found liable to pay the co-defendant Sullivan his costs of the cross claim, the liability for same would be borne solely by Roberts;

- Roberts would not be required to pay the plaintiff any part of the plaintiff's costs, other than those already paid pursuant to the MCA; and

[4] There were other payments for legal fees and disbursements which are not relevant for present purposes.

- Roberts would not seek payment from the plaintiff of any costs.

[38] In addition the agreement contained a number of terms that related to Roberts' participation in the continuing trial proceedings.[5]

[39] The existence of a MCA significantly alters the relationship among the parties to the litigation. Usually the position of the parties will have changed from those set out in their pleadings. It is for this reason that the existence of such an agreement is to be disclosed, as soon as it is concluded, to the court and to the other parties to the litigation. The reason for this is well stated in *Petty, supra*, at 737-738:

> 32 The answer is obvious. The agreement must be disclosed to the parties and to the court as soon as the agreement is made. The non-contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and evidence to be led by them. The non-contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the plaintiff and the contracting defendants. In short, procedural fairness requires immediate disclosure. Most importantly, the court must be informed immediately so that it can properly fulfil its role in controlling its process in the interests of fairness and justice to all parties.

[40] One of the early English cases considered the effect of a payment by one of two joint tortfeasors. In *Bryanston Finance v. de Vries*, [1975] 2 All E.R. 609 Lord Denning stated:

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[5] The agreement is annexed as Schedule A to these reasons.

> 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 in 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. I do not think that it should depend on whether the sum was paid under a covenant not to sue or a release, such as was discussed in *Duck v. Mayeu* and *Cutler v. McPhail*. That is an arid and technical distinction without any merits. It is a trap into which the unwary fall but which the clever avoid. It should be discarded now that we have statutory provision for contribution between joint wrongdoers. The right solution nowadays is for any sum paid by the one wrongdoer under the settlement to be taken into account when assessing damages against the other wrongdoer. If the plaintiff recovers more, he gets the extra. If he recovers less, he loses and has to pay the costs. And as between the joint wrongdoers themselves, there can be contribution according to what is just and equitable...

[41] In the case of *Dixon v. British Columbia*, [1979] B.C.J. No. 304, the court had occasion to consider the effect of a payment made prior to trial, to a plaintiff by one of two defendants. In that case, the plaintiff suffered injuries when he fell on the deck of a ferry. The plaintiff had purchased a bus ticket from the defendant bus line. His journey was to have been by bus and ferry. The defendant bus company contracted with the defendant ferry to transport the bus and passengers from Vancouver Island to the British

Columbia mainland. The bus was driven aboard the ferry, where passengers were told to disembark. The defendant bus driver directed the passengers toward a safe route to the deck of the ferry. The plaintiff followed the route but slipped and fell in a pool of oil on the ferry deck and suffered injuries. Each of the defendants argued the other was liable. Before trial the ferry owner paid a financial settlement to the plaintiff in return for an agreement by the plaintiff not to proceed with the action.

[42] The defendant bus line took the position that the settlement with the ferry owners was a bar to proceeding against the other tortfeasor. In the alternative they argued the amount paid by the ferry owners should be deducted from the amount awarded. The British Columbia *Contributory Negligence Act* answered the defendant bus line's argument as would s. 2 of the *Negligence Act* in this province.

[43] Counsel for the plaintiff in *Dixon* took the position that where the plaintiff: (1) has given good consideration for the benefit received; (2) has assumed the burden of the transaction; and the transaction in no way prejudices the position of the remaining defendant vis-à-vis the plaintiff, then the remaining defendant is not entitled to take the benefit of the transaction, by setting off against the damages for which it would otherwise be liable, the sum received by the plaintiff. A similar argument was advanced on behalf of the plaintiff in this court.

[44] In responding to this argument Ruttan J. stated at para. 47:

> But the court is not concerned with any advantages to be gained by either defendant. The issues as between the defendants can be settled by Third Party proceedings. The settlement made by the plaintiff and the monies received by the plaintiff from the first defendant arise directly out of the very action in which all parties are involved. This is not a situation where the plaintiff has been injured and is receiving benefits from an independent insurance policy which he has maintained for himself, or has received any *ex gratia* payments from a third party such as an employer. But the payments here are directly related to the plaintiff's claim against both defendants, i.e. for damages for the injuries he suffered by their joint torts. He may not recover more than the quantum fixed by the Court at the time of trial.

[45] In its reasons the court referred to *Lawson v. Burns* (1976), 70 D.L.R. (3d) 735 a libel action where one of three defendants paid the plaintiff $7500 by way of settlement before trial. Damages were awarded in favour of the plaintiff in the sum of $10,000 against the remaining defendant. Aikins J. concluded that the remaining defendant was entitled to have the settlement sum taken into account so that the judgment against him was limited to the sum of $2500.00.

[46] Similar results are found in *Holmes v. Hanna*, [2001] BCSC 1228; *Logan v. Canada Safeway Ltd*., [2006] BCSC 1733; *Ashcroft v. Dhaliwal*, [2007] 10 W.W.R. 326; *Deslauries v. Ginn*, [1986] B.C.J. No. 3028; *Edmonton (City) v. Lovat Tunnel Equipment Inc.*, [2000] 4 W.W.R. 714.

[47] Ontario jurisprudence in recent years since *Petty* seems only to have concerned itself with procedural issues arising from the existence of MCAs rather than the deductibility issue, issues such as the order in which remaining parties will present their

evidence, who may cross-examine whom and the like. See *Beresford-Last v. Dwork*, [2000] O.J. No. 5506.

[48] The most recent jurisprudence on point is *Ashcroft v. Dhaliwal* [2007] 10 W.W.R. 326, affirmed by the British Columbia Court of Appeal (2008), 298 D.L.R. (4th) 509.[6] The facts in *Ashcroft* are somewhat unusual. The appellant *Ashcroft* was injured in two car accidents about one year apart. The trial judge described the second accident as "relatively minor" compared to the first. The appellant settled her claim arising from the second accident and at trial sought only an assessment of damages for the first accident.

[49] The trial judge in *Ashcroft* framed the issues before him as follows at paragraph 5 of his reasons:

> This case raises the issue of whether the present defendants are liable for Mrs. Ashcroft's cumulative injuries, including those received in the second accident. If so, then a subsidiary issue arises: what should be done in regard to the money Mrs. Ashcroft has been paid in settlement of the second accident. Should it be deducted from the damages assessed in the present proceeding?

[50] After carefully reviewing the facts, the medical evidence and the law the trial judge concluded:

> … the injuries Mrs. Ashcroft suffered in the first accident were the foundation upon which the injuries in the second accident caused exacerbation and aggravation.

[6] Application for leave to appeal to the Supreme Court of Canada dismissed with costs (without reasons) February 19, 2009, *Ashcroft v. Dhaliwal*, [2008] S.C.C.A. No. 488

> If I am wrong in this reasoning, then in my view, the "material contribution" approach must apply because Mr. Dhaliwal's negligence caused injuries to Mrs. Ashcroft which exposed her to the risk of further injury.
>
> Either way, I find the causal connection between the defendant's driving and all the injuries suffered by Mrs. Ashcroft has been established.

[51] The trial judge held that the first accident defendants were fully liable for the entirety of the injuries and their consequences caused to Mrs. Ashcroft. In reaching this conclusion he used the approach in *Athey v. Leonati*, [1996] 3 S.C.R. 458. The trial judge assessed damages and then considered the issue of deductibility at paragraph 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 a net amount only. See *B.(M) v. British Columbia*, [2003] 2 S.C.R. 477…
>
> 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] In the Court of Appeal the issue was stated by Huddart J.A. as follows:

> 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.

She concluded:

> 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.

[53] In the case of *M.B. v. British Columbia*, [2003] 2 S.C.R. 477 a unanimous court held that the plaintiff's social assistance benefits should be deducted from his damage award made against the Crown. Ultimately the court overturned the finding of liability against the Crown arising from the fact the plaintiff had been sexually abused while in foster care. Notwithstanding its dismissal of the action the court discussed the deductibility issue "… in the interest of providing guidance".

[54] In its reasons the court reviewed the jurisprudential history both in Canada, in England and elsewhere on the deductibility of social benefits received by victims of tort. At paragraph 41 of the reasons stated:

> In *Lincoln v. Hayman*, [1982] 2 All E.R. 819, the Court of Appeal held that a statutory income support payment received by the plaintiff was deductible from an award for past loss of earnings. Lord Waller, at p. 823, gave a helpful statement of why deductibility was necessary to avoid double recovery. The rationale that he put forward there seems also to apply to the case at bar:

> When he [the plaintiff] became unemployed he did not lose the total of his wages because part of that loss was replaced by supplementary benefit. If the supplementary benefit is not taken into account and deducted the plaintiff will recover more damages than he has suffered. It will be a fortuitous windfall.
>
> Similarly, in *Hodgson v. Trapp*, [1989] 1 A.C. 807, the House of Lords stated that statutory benefits in the form of mobility and attendance allowances were deductible from a tort damage award, on the grounds that "[t]o allow double recovery … at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground" (p. 823, *per* Lord Bridge).

[55] Clearly in this case the settlement monies received are on account of the same damage for which the plaintiff continued his proceeding against Sullivan, the non-contracting defendant. The plaintiff's total damages have been assessed by a jury at $312,000 which is less than the amount he received from Roberts the contracting defendant. To permit the plaintiff to recover any amount from Sullivan would result in double-recovery to the plaintiff. I am satisfied that the law in this country is well-settled. Double recovery, save in a few narrow exceptions which have no application to the facts here, is not permitted.

[56] Accordingly I would allow the appeal and set aside the judgment below.

RESPONDENT ROBERTS REQUESTED RELIEF

[57] In his factum Roberts seeks the following relief:

> 17. If the rulings are overturned the respondent would request one of two forms of relief:
>
> (a) that the judgment funds payable by the defendant Sullivan be paid over to the co-defendant Roberts by way of reimbursement.
>
> (b) that the matter be returned for retrial to allow the cross-claims to be tried properly between the defendants.

[58] The short answer to this request is that because he did not cross-appeal no relief is available to Roberts. Rule 61.07 provides:

> (1) A respondent who,
>
> (a) seeks to set aside or vary the order appealed from; or
>
> (b) will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than the order appealed from,
>
> shall, within fifteen days after service of the notice of appeal, serve a notice of cross-appeal (Form 61E) on all parties whose interests may be affected by the cross-appeal and on any person entitled by statute to be heard on the appeal, stating the relief sought and the grounds of the cross appeal.
>
> …
>
> (3) Where a respondent has not delivered a notice of cross-appeal, no cross-appeal may be heard except with leave of the court hearing the appeal.

[59] This is not a case where leave should have been granted at the outset of the appeal. The issues raised are such that it would be most unfair to the other parties who would have had no opportunity to respond fully to those issues.

[60] In any event I am satisfied on reading the record here that Roberts clearly abandoned any right to recover anything from Sullivan even if there were any basis for a cross-claim.

[61] In his ruling made October 18, 2006 at paragraph 10 there of the trial judge stated:

> On Friday, October 13, 2006, Mr. Heyd, counsel for Roberts, confirmed that Roberts would not be seeking contribution and indemnity from Sullivan. Also, Mr. Heyd confirmed that Roberts would not be defending Sullivan's cross-claim against him. Later that day, Mr. Forget, counsel for Sullivan, confirmed that Sullivan would not be claiming costs of his Cross-claim against Roberts.

[62] At paragraph 26 of the October 18th ruling, the trial judge put it this way:

> By way of reply, it was confirmed that Roberts was completely protected in respect of costs and was not liable in respect of costs to either Sullivan or the Plaintiff. Counsel for Roberts confirmed that Roberts was not seeking contribution or indemnity for himself and was not asking for money from Sullivan.

The trial proceeded on that basis. It is not open to the respondent Roberts, at this stage to change his position. He committed to a position and must live with that decision.

[63] Further there is nothing in the agreement between the plaintiff and Roberts which suggests that Roberts will pursue his crossclaim against Sullivan. In paragraph five of the agreement the plaintiff agrees to indemnify and hold Roberts harmless "from any Judgment in the Crossclaim for contribution and indemnity in favour of the Co-Defendant, Keith Sullivan, for damages and interest owing to the Plaintiff." At paragraph 11 of the agreement, the costs of the cross-claim are covered where it is acknowledged that Roberts may be liable to pay Sullivan's costs of Roberts' cross-claim and that Roberts is to be liable for such costs.

[64] While the agreement is silent in respect of Sullivan's cross-claim the subsequent events referred to in paragraph 63 above whereby Sullivan abandoned any claims against Roberts for the cost of his (Sullivan's) cross claim is a complete answer to any issue raised in that respect.

[65] In all the circumstances, and for the above reasons, even if Roberts had cross-appealed I would have dismissed the cross-appeal.

[66] For these reasons I would allow the appeal, set aside the judgment below and in its place judgment should issue dismissing the action against Roberts without costs and against Sullivan with costs, such costs to be paid by the plaintiff.

[67] The appellant is entitled to his costs of the appeal which I would fix in the sum of $10,000 inclusive of disbursements and GST.

RELEASED: May 7, 2009 “KMW”

“J. MacFarland J.A.”
“I agree K. M. Weiler J.A.”
“I agree R. G. Juriansz J.A.”

Schedule "A"

Mary Carter Agreement

Court File No. 02-B5188

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

RICK LAUDON

Plaintiff

- and -

WILL ROBERTS and KEITH SULLIVAN

Defendants

AGREEMENT

The Plaintiff and Defendant, Will Roberts, hereby agree as follows:

1. The Defendant, Will Roberts, will pay to the Plaintiff, regardless of the result at trial, the sum of $365,000.00 for damages and interest, which amount is inclusive of the advance payment previously made to the Plaintiff in the amount of $20,000.00. Additional funds in the amount of $345,000.00 shall paid to the Plaintiff forthwith.

2. The Defendant, Will Roberts, will pay to the Plaintiff, regardless of the result at trial, the sum of $35,000.00 for legal fees (inclusive of Goods and Service

Tax), $38,000.00 for disbursements (inclusive of Goods and Service Tax), for a total of $73,000.00, for costs, which amount is inclusive of disbursements and all Goods and Service Tax payable. The funds shall be paid to the Plaintiff forthwith.

3. The Plaintiff shall repay to the Defendant, Will Roberts, all of those disbursements or any portion thereof as itemized on Schedule “A” attached, which are adjudged to be payable by the Co-Defendant Keith Sullivan to the Plaintiff, or which are agreed by settlement to payable by the Co-Defendant, Keith Sullivan, to the Plaintiff. The Plaintiff shall argue that these disbursements are payable by the Co-Defendant, Keith Sullivan, on the basis of the same percentage of liability attributed to the Co-defendant, Keith Sullivan.

4. The Plaintiff will not claim from the Defendant, Will Roberts, any amount in excess of those amounts set out in paragraphs 1 and 2 above, nor is the Plaintiff entitled to receive any amount in excess of those amounts set out in paragraphs 1 and 2, above, from the Defendant, Will Roberts, in any circumstances, regardless of the result at trial in the main action or Crossclaims.

5. The Plaintiff shall indemnify and hold the Defendant, Will Roberts, harmless from any Judgment in the Crossclaim for contribution or indemnity in favour of the Co-Defendant, Keith Sullivan, for damages and interest owing to the Plaintiff.

6. The Plaintiff agrees to an Order dismissing the action without costs as against the Defendant, Will Roberts.

7. The Defendant, Will Roberts, will not argue, cross-examine any witnesses or call any evidence at trial to suggest that the Plaintiff was contributorily negligent.

8. The solicitor for the Plaintiff and the solicitor for the Defendant, Will Roberts, will in their written and oral submissions, which includes opening and closing addresses, affirmatively state that it is their respective positions that liability for the collision ought to be found on a 50% - 50% basis as against Will Roberts and Keith Sullivan, and that there is no contributory negligence on the part of the Plaintiff.

9. The Defendant, Will Roberts, shall not argue, cross-examine any witnesses at trial whether called by the Plaintiff or by the co-defendant, Keith Sullivan, or call any evidence at trial to contest the damages of the Plaintiff.

10. The solicitor for the Defendant, Will Roberts, in his written and oral submissions, including opening and closing addresses, shall make no submissions with respect to the damages claimed by the Plaintiff.

11. The Plaintiff and the Defendant, Will Roberts, acknowledge that the Defendant, Will Roberts, may be found liable to pay to the co-defendant, Keith Sullivan, his costs of the crossclaim. The liability, if any, for those costs will be born solely by the Defendant, Will Roberts.

12. The Defendant, Will Roberts, shall not be required to pay to the Plaintiff any portion of the Plaintiff's costs, save and except for the amount set forth in paragraph 2. The Plaintiff shall indemnify and save harmless the Defendant,

Will Roberts, with respect to any costs adjudged to be payable by the Defendant, Will Roberts, to the Plaintiff.

13. The Defendant, Will Roberts, will not seek payment from the Plaintiff of any costs.

14. The Plaintiff and the Defendant, Will Roberts, agree to jointly advocate that the Plaintiff's trial costs ought to be paid solely by the co-defendant, Keith Sullivan.

15. The Defendant, Will Roberts, shall attend trial for opening addresses and to give evidence. Counsel for the Defendant, Will Roberts, Richard Arthur Norman Heyd, shall be present for opening and closing addresses.

16. The Plaintiff acknowledges that subject to the Court's discretion, the solicitor for the Defendant, Will Roberts, may absent himself from that part of the trial concerning the damages of the Plaintiff.

17. Counsel for all parties and the Trial Judge will be advised of the complete details of this Agreement, omitting the monetary terms and a sealed copy of this Agreement (omitting the monetary terms) will be filed with the Registrar at the opening of trial, to be opened at the discretion of the Court following the Court's determination of the liability and damages issues at trial.

DATED at Barrie, Ontario this 20 day of March, 2006.

"Richard Heyd"

Carroll Heyd Chown
Per: Richard Arthur Norman Heyd

Solicitor for the Defendant, Will Roberts

"Bernard Keating"

Ares Professional Corporation
Per: Bernard Keating

Solicitor for the Plaintiff

SCHEDULE "A"

RICK LAUDON - March 14, 2006

DISBURSEMENTS	$ 157.00
Statement of Claim	$1,521.36 (GST)
Process Server	$ 231.50 (GST)
Soldiers Memorial Hospital	$ 175.00 (GST)
Markham Stouffville Hospital	$ 14.50 (GST)
Reisler Franklin (schedule a documents)	$ 22.75 (GST)
Carroll Heyd Chown (photocopies of records)	$ 335.00(GST)
Southlake Regional Health Centre	$ 140.19 (GST)
Dr. Maier	$ 75.00 (GST)
Front Street Medical Centre	$ 20.00 (GST)
Dr. Kimberley Sandercock Dr.	$ 150.00 (GST)
Dr. Samuel Wong	$ 685.25 (GST)
Sudbury Regional Hospital (records and x-rays)	$ 548.92 (GST)
Dr. Natasha Zajc	$1,175.00 (GST)
Custom Rehabilitative & Assessment Services	$ 80.00 (G8T)
Dr. K. Leung	$1,500.00 (GST)
Dr. Charles Tator	$ 140.19 (GST)
Dr. Patricia Henderson	$2,111.25 (GST)
Dr. David Murphy	$3,200.00 (GST)
Dr. Howard Jacobs	$3,131.00 (GST)
S. Brown & Associates	$2,950.00 (GST)
Dr. Morris Charendoff	$ 65.00
OHI P list of decoded services	$ 163.55 (GST)
KHM MRIs	$ 75.00
Wal-Mart Prescription Printout	$ 293.00
Trial Record	$ 40.00 (GST)
MVA Report	$ 5.00
Officers Notes	$ 33.00
York Region Social Assistance File	$ 36.07
Simcoe County Social Assistance File	$ 450.00
OPP Photographs	$1,694.00 (GST)
Mike Kavanagh (includes estimate for updated rpt)	$1,592.49 (G8T)
Jury Research	$2,233.00
Summons to Witness and Attendance Fees	$7,201.80 (G8T)
Artery Studios	
Office recovery	
Photocopies	$1,560.75 (GST)
Faxes	$ 53.48 (G8T)
Postage	$ 181.67 (GST)
Courier	$ 395.99 (G8T)
Long Distance	$ 47.32 (G8T)
Simcoe Court Reporting - discovery & transcripts	$ 592.00 (GST)
Exact Transcription - discovery & transcripts	$ 587.50 (GST)
Transaction Levy	$ 50.00 (GST)
Subtotal	$35,714.53

GST on $32,367.46	$ 2,265.72
TOTAL	**$37,980.25**