Gendron v. Thompson Fuels, [2017] ONSC 6856

While it is universally accepted that double recovery is not permitted, the courts have not directly dealt with the *application* of the rule against double recovery to cases involving contributory negligence on the part of the plaintiff.

This issue was addressed in *Gendron v. Thompson*, a case concerning a leak of a home furnace oil tank that seriously damaged the plaintiff's home and the adjacent environment.

In the ensuing subrogated action, we acted for the plaintiff, Gendron, against the defendants Granby (the manufacturer of the oil tank) and Thompson Fuels (fuel oil supplier).

One week prior to trial, we negotiated a Pierringer Agreement between the plaintiff and the tank manufacturer, Granby. Pursuant to the terms of the agreement, Gendron's claim against Granby would be settled in exchange for payment of settlement funds (the "Settlement Amount"), with the action continuing only against Thompson Fuels.

We succeeded at trial, and obtained a judgment in favour of Gendron against Thompson Fuels (See ***Gendron v. Thompson Fuels*, 2017 ONSAC 2009**). The judgment apportioned liability as follows: (1) Thompson Fuels – 40%; (2) Granby – 0%; (3) Gendron's contributory negligence – 60%;

Based on the parties' agreement on damages, Thompson Fuels' liability translated to the following amounts:

- Total Damages - $2,161,570
- **Thompson Fuels (40% liable) - $901,747**

1) The Issue

Following trial, Thompson took the position that the rule against double recovery entitled it to a set-off of the Settlement Amount from the amount of the judgment. While we agreed, in principle, that double recovery should be avoided, we took a very different position on the *application* of this principle to the facts of this case from that put forward by Thompson. Specifically:

Our Position	Thompson's Position
Double recovery only occurs if the plaintiff receives more than 100% of its total loss (in this case, $2,161,570). Gendron will recover only 40% of its total loss from Thompson Fuels. Unless the settlement agreement with Granby is for more than the remaining 60% ($1,259,823), Gendron will not recover more than 100% of his loss, and there	Since the plaintiff was found to be 60% at fault, the plaintiff is entitled to only 40% of the damages assessed. Double recovery starts when Gendron's compensation exceeds 40% of its total damages (here, anything over $901,747) To avoid double recovery, the settlement with

will be no double recovery. Thompson Fuels is not entitled to any set-off.	Granby should be set-off to reduce the amount to be paid by Thompson Fuels.

2) The Issue

Accordingly, the question for the court was whether double recovery started at 40% of the loss (i.e. the amount of loss apportioned to Thompson Fuels), or at 100% of loss (i.e. the plaintiff's total loss)?

3) The Reasons

Although the authorities tendered on behalf of Thompson Fuels in support of its position (including *Ashcroft v. Dhaliwal* and *Bedard v. Amin*) confirmed the principle against double recovery, since neither case dealt with contributory negligence on the part of the plaintiff, these decisions were of no assistance to Charney J. in the case at bar.

Laudon v. Roberts, 2009 ONCA 383

Laudon was the only appellate authority that was of assistance to Charney J.'s analysis, since, unlike *Ashcroft* and *Bedard*, *Laudon* involved contributory negligence on the part of the plaintiff.

In *Laudon*, where we acted for the successful appellant, the Court of Appeal was dealing with a modified "Marry Carter" agreement, which, not unlike the Pierringer agreement, involved the plaintiff continuing his action against one co-defendant, after having reached a settlement with the other. The following facts in *Laudon* were pertinent to the issues before Charney J. in the present case:

- the plaintiff settled with the Settling Defendant for $365,000 (the Settlement Amount).
- total damages awarded by the jury were **$312,000** (i.e. $53,000 *less* than the Settlement Amount).
- **the plaintiff was found to be 11% liable**, the settling defendant 50% and **our client, the Non-Settling Defendant – 39% liable**.
- the plaintiff was thus awarded a net judgment of **$277,698** (89% of $312,000) and the judgment against the non-settling defendant was $121,688 (39% of $312,000).
- the trial judge refused to deduct the amount paid to the plaintiff by the Settling Defendant, and ordered the Non-Settling Defendant to pay the entire $121,688.
- The trial judge's ruling would thus see the plaintiff collect: $365,000 (from the Settling Defendant) *plus* $121,688 (from the Non-Settling Defendant) for a total of $486,688 where the total damages awarded by the jury where $312,000.

In *Laudon,* the Court of Appeal allowed our appeal on behalf of the Non-Settling Defendant on the basis that the trial judge's decision permitted double recovery. The Court of Appeal then deducted the settlement amount from the ***total*** damages award, ***not damages net of contributory negligence***. This was clear from the following excerpt in the decision:

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

It was our submission, accepted by Charney J., that the above statement confirms that the Court of Appeal used the ***total damages*** assessed by the jury (**i.e. 312,000**), and not damages net of contributory negligence (i.e. $277,698, being 89% of $312,000) – as the point of double recovery. His Honour also accepted our submission that the Court of Appeal was deliberate in choosing this method, and that it was instructive with respect to the issue before him.

4) Conclusion

In the absence of any further appellate authority on the issue, Charney J. considered himself bound by the methodology used by the Court of Appeal in *Laudon*.

Accordingly, he accepted our argument that the principle against double recovery is based on the damages caused by the defendants ***without*** reference to any contributory negligence on the part of the plaintiff. Phrased another way, the plaintiff's total assessed loss, *without* deducting the plaintiff's contribution, ought to be used as the point for calculating any double recovery. Here, the Non-Settling Defendant – Thompson, was not entitled to any set-off, as long as the Settlement Amount was less than 60% of Gendron's total assessed loss.