Toronto Law Journal

Apportionment of Damages in Negligence and Contract

Mary Paterson & Rebecca Orsini, Osler, Hoskin & Harcourt LLP

Can damages be apportioned between defendants when one defendant is liable in negligence for the same damage caused by another defendant's breach of contract? Although the case law is sparse and inconsistent and grounded in different theories, the answer appears to be yes.

Apportionment in Tort Law

It is well established in tort law that a defendant is liable for any injuries caused or contributed to by their[1] negligence.[2] When a defendant is negligent, they are liable for 100% of the resulting loss.

If the plaintiff's injury is caused or contributed to by two or more persons, provincial negligence statutes expressly permit the apportionment of damages between negligent defendants as well as claims for contribution and indemnity between them. These statutes also permit apportionment to contributorily negligent plaintiffs.[3] However, these statutes do not expressly apply to apportionment between negligence and non-tortious causes, which has led to some interesting and contradictory case law.

In *Athey v Leonati*, the Supreme Court of Canada held that there is no apportionment between negligent and non-culpable causes. In *Athey*, the appellant's back injury was caused by the defendants' negligence but was compounded by a pre-existing condition. The respondents argued that the appellant's loss should be apportioned between the negligent cause (the car accidents) and the non-culpable cause (the pre-existing condition).[4] The Court held that such apportionment was not fair, explaining:

> Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose

---

1 Rather than using singular gendered pronouns, we will use "they/their" throughout this article.

2 *Athey v Leonati*, [1996] 3 SCR 458 at para 12, 140 DLR (4th) 235 (SCC) [*Athey*].

3 In some provinces, contributory negligence is dealt with in a separate statute. See generally, Ontario: *Negligence Act*, RSO 1990, c N.1; Alberta: *Tortfeasors Act*, RSA 2000, c T-5, *Contributory Negligence Act*, RSA 2000, c C-27; Manitoba: *The Tortfeasors and Contributory Negligence Act*, CCSM c T90; Saskatchewan: The *Contributory Negligence Act*, RSS 1978, c C-31; British Columbia: *Negligence Act*, RSBC 1996, c 333; New Brunswick: *Tortfeasors Act*, RSNB 2011, c 231, *Contributory Negligence Act*, RSNB 2011, c 131; Nova Scotia: *Tortfeasors Act*, RSNS 1989, c 471; *Contributory Negligence Act*, RSNS 1989, c 95; PEI: *Contributory Negligence Act*, RSPEI 1988, c C-21; Newfoundland and Labrador: *Contributory Negligence Act*, RSNL 1990, c C-33; Yukon: *Contributory Negligence Act*, RSY 2002, c 42; Northwest Territories: *Contributory Negligence Act*, RSNWT 1988, c C-18; Nunavut: *Contributory Negligence Act*, RSNWT (Nu) 1988, c C-18.

4 *Athey*, *supra* note 2 at para 12.

> of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.[5]

In *Hans v Volvo Trucks North America*, Saunders JA questioned whether *Athey* applied "to all non-tortious contributing causes or only to those contributing causes for which another party has no liability. Does it apply, for instance, where one party's liability sounds in tort and the other party's liability sounds in contract?"[6] That is the question we explore in this article.

Judicial Approaches to Apportionment Beyond Tort

Limiting *Athey* to its facts, courts have apportioned loss between tortious and culpable but non-tortious causes by taking two different approaches: first, some courts have extended contributory negligence legislation to apportion liability; second, some courts have apportioned using common law contractual principles.[7]

Contributory Negligence Legislation

The first approach to apportioning liability between negligence and breach of contract (for example) has been to extend contributory negligence legislation to the contractual claim. This approach interprets the term "fault" in the legislation broadly to encompass both tort and contract.[8]

The dissenting opinion in *Smith v McInnis* is most commonly cited to support interpreting the legislation broadly. *Smith* dealt with apportionment between two contractual causes, however the dissent considered the application of tort law principles of apportionment. The issue was whether a third party was liable in contract to the defendant, and if so, what damages would be owed.

The majority found that the third party was not liable at all and did not consider the question of apportionment. However, Pigeon J, writing for the dissent, found the third party liable and went on to consider the possible bases for apportionment. He held that the *Contributory Negligence Act* in Nova Scotia was not limited to tortfeasors. Pigeon J considered the "inspiration" for the Act, and found that the term "fault" should be interpreted according to civil law principles, in particular the principle of causality.[9] Accordingly, "[t]o the extent that the damage suffered by a plaintiff is due to his own fault, it is held not to have been caused by the fault of the defendant."[10]

---

5 *Ibid* at para 20.
6 *Hans v Volvo Trucks North America Inc*, 2018 BCCA 410 at para 68.
7 *Petersen Pontiac Buick GMC (Alta) Ltd v Campbell*, 2013 ABCA 251 at para 37 [*Petersen*]. See generally *Smith et al v McInnis et al*, [1978] 2 SCR 1357, 91 DLR (3d) 190 (SCC) [*Smith*]; *Doiron v Caisse Populaire D'Inkerman Ltee* (1985), 17 DLR (4th) 660, 61 NBR (2d) 123 (NB CA) [*Doiron*].
8 *Smith*, *supra* note 7 at para 56; *ACA Cooperative Association Ltd v Associated Freezers of Canada Inc* (1992), 93 DLR (4th) 559 at para 112, 113 NSR (2d) 1 (NS CA) [*ACA Cooperative*].
9 *Smith*, *supra* note 7 at paras 54-56.
10 *Ibid* at para 56.

A similar finding was made in *ACA Cooperative Association Ltd v Associated Freezers of Canada Inc*, in which some defendants were liable in tort and others were liable in both contract and tort. The Nova Scotia Court of Appeal held that the term "fault" in the *Contributory Negligence Act* was broad enough to include both tort and contract.[11] The Court stated that "[u]nder s. 4 of the Contributory Negligence Act the court has a duty to apportion negligence liability among the parties responsible whether in tort or contract. On the present facts it is not possible to make a meaningful division."[12]

This approach has been followed in courts in most of the common law provinces,[13] but has also been criticized. In *Doiron v Caisse Populaire d'Inkerman Ltee*, La Forest JA (as he then was) questioned the use of contributory negligence legislation saying there was virtually no justification for the approach.[14] In his view, extending negligence legislation into the realm of contract ignored the legislation's purpose, which was to "avoid the injustice and rigidity of an absolutist concept of fault in negligence law."[15] La Forest JA criticized *Smith*, stating:

> The important fact is that there is no authority requiring the application of absolutist common law tort notions of responsibility to contracts. Indeed, as Pigeon J. observes, there never developed in contract law the rigid rules against apportionment of loss that prevailed in tort law and, in fact, loss was apportioned in the rare cases where separate breaches of contract contributed to a single loss. So there does not seem to be any inherent requirement in contract law dictating an absolutist doctrine of liability.[16]

Perhaps for this reason, in Ontario, the application of negligence legislation to contractual claims has been soundly rejected. In *Dominion Chain Co v Eastern Construction Co* ("*Giffels*"), the Ontario Court of Appeal held that while the term "fault" in section 2(1) of *The Negligence Act* was likely broad enough to capture breach of contract, the term "tort-feasors" in other parts of the Act limited the ambit of the term "fault".[17] Instead, Ontario courts found a different way to apportion damages between negligence and breach of contract: using common law contractual principles.

---

11 *ACA Cooperative*, *supra* note 8 at para 112.

12 *Ibid* at para 121. S.4 of the Nova Scotia *Contributory Negligence Act* states "Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault."

13 *Doiron*, *supra* note 7 at para 40 contains a list of case law that follows this approach.

14 *Ibid* at para 49.

15 *Ibid* at para 51.

16 *Ibid* at para 55

17 *Dominion Chain Co v Eastern Construction Co* (1976), 12 OR (2d) 201 at para 9, 68 DLR (3d) 385 (ON CA), aff'd on other grounds [1978] 2 SCR 1346, 84 DLR (3d) 344 (SCC) [*Giffels*]. This decision was affirmed by the SCC but the Court did not make a finding on this point. Ontario cases since have consistently followed this approach: *Treaty Group Inc v Drake International Inc*, [2005] OJ No 5232, 144 ACWS (3d) 383 (ON SC); *Cosyns v Smith* (1983), 146 DLR (3d) 622, [1983] OJ No 3006; *Parkhill Excavating Limited v Robert E. Young Construction Limited*, 2017 ONSC 6903 [*Parkhill*].

Common Law Contractual Principles

Two common law contractual principles have been used to justify apportionment between tort and contract: the principle of causation and the principle of reasonable foreseeability.[18]

The principle of causation was used in *Smith* as a secondary justification for apportionment. Pigeon J explained that contributory negligence was never a defence in contract.[19] However, according to the principle of causality, separate breaches of contract contributing to the same loss allow a trial judge to apportion damages between the two defendants, even though they breached different contracts.[20] Pigeon J theorized that the rationale for the apportionment was the same in contract and negligence: to prevent a party at fault from escaping liability.[21] Therefore, at least in the case of separate breaches of contract contributing to the same loss, apportionment is permitted.[22]

In contrast, the New Brunswick Court of Appeal in *Doiron* relied on the reasonable expectations of the parties. *Doiron* dealt with a breach of contract flowing from the plaintiff's negligent behaviour. La Forest JA stated that extending apportionment to contractual breaches would not be the rule in all cases, but would depend on "the public expectations about the type of contract involved as well as the particular expectations one must assume the parties had having regard to all the circumstances, including the relationship of the parties, their past dealings, the nature of the contract, and so on."[23] In a subsequent case, the Alberta Court of Appeal found this analysis "persuasive" in the context of apportionment between multiple defendants liable in tort and contract, and apportioned the damages.[24]

Conclusion

As the cases discussed above show, the law on apportionment between contractual and tortious causes of action remains unsettled. The Supreme Court of Canada has not yet commented on the various methods of apportionment applied to contractual claims or between negligence and contractual claims, other than in *obiter*; in *Giffels*, the SCC declined to rule on the Court of Appeal's rejection of a broad interpretation of negligence legislation in favour of using contract law causation principles.[25] Regardless of this uncertainty, one outcome is clear: if two people are culpable, the court will find a way to apportion damages to both of them.

---

18 *Parkhill*, *supra* note 17 at para 209.
19 *Smith*, *supra* note 7 at para 51.
20 *Ibid* at para 57.
21 *Ibid*.
22 *Ibid*.
23 *Doiron*, *supra* note 7 at paras 62 and 64.
24 *Petersen*, *supra* note 7 at para 49.
25 *Dominion Chain Co v Eastern Construction Co*, [1978] 2 SCR 1346 at para 14, 84 DLR (3d) 344 (SCC). Although Laskin CJ was prepared to assume for the purposes of the case that when two contractors "each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss".