NOVA SCOTIA COURT OF APPEAL
Citation: Kameka v. Williams, 2009 NSCA 107

Date: 20091022
Docket: CA 305131
Registry: Halifax

Between:

Norman Kameka and Thomas Hayes

Appellants

v.

Ervin R. Williams

Respondent

Judges:	Oland, Fichaud, Beveridge, JJ.A.
Appeal Heard:	June 16, 2009, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is allowed with costs per reasons for judgment of Beveridge J.A.; Oland, J.A. concurring; Fichaud, J.A. concurring under separate reasons
Counsel:	Ms. Elissa Hoverd, for the appellants Mr. Tony W. Mozvik, for the respondent

Reasons for judgment:

OVERVIEW

[1] On June 3, 2005 the motorcycle being driven by Ervin Williams was extensively damaged in an accident involving a van driven by Norman Kameka. Williams sued Kameka in Small Claims Court and obtained a judgment against Kameka for $6,257.68, the full amount he claimed for damage to his motorcycle. Williams then started an action against Kameka and the owner of the van, Thomas Hayes, in the Nova Scotia Supreme Court claiming damages for personal injuries he says were caused by the accident. The defendants applied to Edwards J. seeking dismissal of the claim on the basis of *res judicata*. The learned Chambers judge dismissed the application. The defendants now appeal to this court.

CHRONOLOGY OF EVENTS

[2] At noontime on June 3, 2005 Mr. Williams was driving his new-to-him motorcycle on a four lane street in Sydney. Traffic was heavy. He says a taxi van, trying to make a left turn, pulled into his lane directly in front of him. To try to avoid a collision, Williams "dumped" his motorcycle onto the pavement, causing extensive damage to the bike and significant personal injuries to himself. Mr. Kameka was the driver of the taxi van. He claimed he was not turning left, but right, and in any event, he did not cross over into Williams' lane. He took the position that the accident was entirely the fault of Williams who panicked when there was no need to do anything.

[3] Williams, with the assistance of counsel, brought a claim against Kameka in Small Claims Court. His Notice of Claim was filed September 11, 2006. Attached to the Notice was a Statement of Claim identifying the parties, and seeking damages for the cost of repairs to his motorcycle. He pleaded that the collision and resulting damage was caused solely by the negligence of Kameka. Particulars of negligence were itemized.

[4] Kameka was also represented by counsel. A Statement of Defence was filed on May 7, 2007, denying any negligence and placing the blame for any loss or damage on the shoulders of Mr. Williams. A hearing was duly held on May 22, 2007 before an adjudicator of the Small Claims Court. In a written decision, the

adjudicator found Kameka 100 percent liable for the accident and ordered him to pay for the repairs to the motorcycle in the claimed amount of $6,257.68 plus costs. Kameka paid Williams on August 17, 2007. Williams signed a satisfaction piece acknowledging payment in full.

[5] On May 29, 2008 Williams commenced an action in the Nova Scotia Supreme Court. The Statement of Claim contained the same itemized allegations of negligence as set out in the Small Claims Court Notice of Claim, this time claiming that due to the negligence of Kameka he had suffered serious injuries to his shoulder, ribs, and foot requiring hospitalization and extensive medical treatment, resulting in continuing disability. Williams said he would be relying on the findings of the Small Claims Court adjudicator whereby Kameka was found liable for the accident. The claim was for pecuniary damages, special damages, and non pecuniary damages.

[6] Williams also asserted that the registered owner, Mr. Hayes, was liable for the accident and resultant injuries because he had failed to properly maintain the van and he had permitted its operation in a negligent manner.

[7] Kameka and Hayes did not file a defence. Instead they brought an interlocutory application for an order striking the claim under Rule 14.25 of the *Nova Scotia Civil Procedure Rules* (1972) as being vexatious, or an abuse of process, or for a preliminary determination under Rule 25.01 that the claim be struck.

[8] The application was heard by Edwards J. on October 27, 2008. Decision was reserved. The learned Chambers judge released a tightly-worded written decision dated December 2, 2008. He reasoned as follows:

> [5] The Defendants rely on ***Cahoon v. Franks***, a 1967 decision of the Supreme Court of Canada (1967) 63 DLR (2d) 274. When ***Cahoon*** was decided, there was no Small Claims Court. ***Cahoon*** does not therefore address the particular circumstances before me.
>
> [6] From the outset, it would have been obvious to the Defendant (who was represented by Counsel) that the Plaintiff was going to the SCC to recover only his property loss. Aside from nominal general damages, that was all the SCC jurisdiction allowed (see SCC Act ss. 9(a) and 11). The Defendant had the option to appeal the SCC's finding on liability but failed to do so. The Defendant is now

> stuck with that determination.
>
> [7] It could not have been a surprise to the Defendant when the Plaintiff started the present action for general damages.
>
> [8] Two Nova Scotia decisions, ***Gough v. Whyte*** (1983) 56 NSR (2d) 68 (N.S.S.C.) and ***Big Wheels Transport and Leasing Ltd. v. Hansen*** (1990), 102 NSR (2d) 371 (N.S.C.A.) [*sic*] support the Plaintiff's right to proceed.

ISSUES:

1. What is the appropriate standard of review?

2. Does the doctrine of *res judicata* preclude the respondent from pursuing his claim for damages in the Supreme Court?

3. What is the significance of the respondent adding a claim against the owner of the vehicle in the Supreme Court action?

POSITION OF THE PARTIES

[9] The appropriate standard of review is not in issue. This Court will not interfere on an appeal from a discretionary interlocutory order unless the judge has applied a wrong principle of law or a patent injustice would result. (See for example *National Bank Financial Ltd. v. Potter* (2005), 238 N.S.R. (2d) 237; *Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143.) Since the issues in this case involve legal principles, the effective standard of review is correctness.

[10] The appellants' position has already been referred to. In a nutshell, they say negligence that causes damage to a victim creates but one cause of action, not different causes of action, depending on the head of damage being claimed. The respondent chose to litigate his cause of action in the Small Claims Court and, by the doctrine of *res judicata*, his claim or cause of action became merged into that judgment, and that no special circumstances exist that would allow him to again sue. The learned Chambers judge erred in law in failing to apply the appropriate legal principles.

[11] The respondent acknowledges that *res judicata* is a fundamental principle in

our judicial system, but it is not a rigid doctrine, and that if the relief sought in the second proceeding was not available in the first, *res judicata* does not apply. He contends that because general damages for personal injuries were not available in Small Claims Court, he is not estopped by the doctrine of *res judicata* from proceeding in the Supreme Court for this remedy or relief. In fact, he relies on the doctrine of *res judicata* to say that the appellant cannot dispute liability due to the finding of the adjudicator in the Small Claims Court. He says the Chambers judge correctly determined that he was not precluded from seeking general damages for his personal injuries in the Supreme Court.

ANALYSIS

Doctrine of res judicata

[12] The respondent is correct to acknowledge the significance of the doctrine of *res judicata*. It is a common law principle dating back hundreds of years. As G. Spencer Bower observed in his original text, *The Doctrine of Res Judicata* (London: Butterworth & Co., 1924) at 218 *et seq*, it is a doctrine that, if not founded upon Roman law, is fortified and illustrated by it. The doctrine's long-standing existence was commented on by Binnie J., in giving the judgment of the court in, *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44:

> [20] The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21 § 17 *et seq*. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

[13] Detailed statements can be found of the constituent elements necessary to establish that the doctrine of *res judicata* is applicable (see for example George

Spencer Bower and Sir Alexander Turner, *The Doctrine of Res Judicata*, 2nd ed. (London: Butterworths, 1969) at para. 19). These were compressed by the Alberta Court of Appeal in *420093 B.C. Ltd. v. Bank of Montreal*, [1995] A.J. No. 862 where O'Leary J.A. wrote:

> [18] A prior judicial decision will not raise an estoppel by *res judicata*, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and the subject-matter; (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.

[14] Once a *res judicata* has been established, its effects must be considered. Where there have been previous proceedings between the parties or their privies, it is open to either or both of the litigants to claim that any subsequent proceedings are governed in whole or in part by the decision from the previous proceeding. Every judicial decision that meets the criteria of *res judicata* operates both as an estoppel, preventing any party from disputing matters already determined, and as a merger. In the latter case, no further claim may be brought upon the same cause of action (G. Spencer Bower and Turner, *ibid*., at para. 2-4). This is sometimes referred to as cause of action estoppel (see *Thoday v. Thoday*, [1964] 1 All E.R. 341 per Diplock L.J. at p. 352).

[15] The distinction between a *res judicata* and its effects is well explained in *Phipson on Evidence*, 14th ed. as follows (pp. 862-3):

> There is a distinction to be drawn between a *res judicata* and its effects. A judgment which fulfils the criteria set out above is properly called a *res judicata*, but it operates both positively and negatively. First, it prevents the successful party from bringing a fresh suit on the same cause of action. This is the doctrine of merger, whereby the plaintiff's cause of action is transmuted into the judgment he obtains. Secondly, it debars the unsuccessful party from challenging the correctness of that decision, in subsequent proceedings. This is a true estoppel, estoppel *per rem judicatam*.
>
> Unfortunately the term "cause of action estoppel" is sometimes applied to both these different aspects of judgment. It would be more satisfactory if it were reserved for the second type of effect that a *res judicata* may have. As some of the cases mentioned in this chapter show, the terminological confusion has caused

> confused substantive results. Moreover, the development of "issue estoppel" can be understood only if it is seen as an aspect of cause of action estoppel used in this second sense.
>
> In practice, there is now no difference analytically between issue estoppel and cause of action estoppel used in the sense mentioned here. It is only the relative importance of the issue to which the estoppel relates which determines its proper title. For obvious reasons, the development of the law of estoppel has not been paralleled by a similar extension of the law of merger, and it is convenient to deal with merger before turning to the much larger body of authority dealing with estoppel.
>
> Where a suit is brought upon a particular cause of action, judgment in favour of the claimant extinguishes all rights arising from that cause of action: *transit in rem judicatam*—the claimant's rights all flow from the judgment in substitution for the rights flowing from the cause of action.
>
> The parties are by this rule, in general, estopped as to their whole case, and will not be permitted to reopen the same subject-matter of litigation merely because they have from negligence, inadvertence, or even accident, omitted a part of their case. For this reason, the principle is also sometimes referred to as the doctrine of former recovery. Its rationale is that if an issue could and should have been raised in particular litigation, it is vexatious, having let it go by, to seek to raise it in subsequent proceedings. Thus plaintiffs may not split their cause of action; nor their relief, nor set up facts which were available for them under any of the issues tried in the former action.

[16] It was once considered settled that the doctrine of *res judicata* was quite rigid in its application. One of the oft quoted statements of the applicability of the doctrine is that of Wigram, V.C. in *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313, [1843-60] All E.R. Rep. 378:

> In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or event accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a

> judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[17] Cromwell J.A., as he then was, reviewed the apparent inflexibility of the doctrine of *res judicata* in *Hoque v. Montreal Trust Co. of Canada*, [1997] N.S.J. 430. Dr. Hoque and companies controlled by him, granted mortgages and entered into related agreements with Montreal Trust. Hoque defaulted on these contracts and made an assignment in bankruptcy. Montreal Trust then commenced foreclosure actions on the mortgages. The trustee in bankruptcy did not defend and final orders of foreclosure issued. After being discharged from bankruptcy, Dr. Hoque commenced an action against Montreal Trust alleging breach of fiduciary duty, contract, improper disclosure of confidential financial information, and having acted in an abusive and oppressive manner. Montreal Trust applied for dismissal of the action on the basis that the issues raised in it could have been dealt with in the foreclosure actions. The Chambers judge refused.

[18] On appeal, the court held that the Chambers judge erred in law and should have struck all of the Statement of Claim with the exception of claims that were not inconsistent with the orders of foreclosure, namely breach of the duty to keep and maintain confidential information, and that Montreal Trust acted in an abusive and disrespectful manner. Cromwell J.A. expressed the view that the doctrine *res judicata* required a more nuanced approach than an automatic bar to all matters that *could* have been raised in a previous proceeding. He wrote:

> [64] My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.

[19] Even though the foreclosure proceedings were in the hands of the trustee, and the plaintiff therefore had no effective control over the previous proceedings,

the doctrine of *res judicata* applied to bar the allegations the trustee did not make in the foreclosure proceedings.

[20] The need for some degree of flexibility was also recognized by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc., supra*. in relation to issue estoppel. The appellant said she had been fired from her position as an employee with the respondent. She claimed that her employer owed her approximately $300,000 in unpaid commissions. Negotiations failed. She applied under the *Employment Standards Act* of Ontario for her unpaid wages and commissions. The employment standards officer investigated her complaint. While investigation was outstanding, the appellant also started an action for wrongful dismissal that included a claim for unpaid wages and commissions. The respondent provided documents and a response to the employment standards officer. These were never provided to the appellant. The officer dismissed the claim for unpaid commissions. The appellant did not pursue the statutory appeal route. The Ontario courts held that the appellant's action for unpaid commissions was barred by issue estoppel. Binnie J., for a unanimous court, disagreed.

[21] The respondent did not argue cause of action estoppel, only issue estoppel. Binnie J. wrote that the rules governing issue estoppel should not be mechanically applied, in light of the underlying purpose of balancing the public interest in finality of litigation with the public interest in ensuring justice is done on the facts of a particular case. Binnie J. found that the preconditions to establishing issue estoppel had been met. The appellant nonetheless argued that the court should exercise its discretion to refuse to apply the doctrine. Binnie J. agreed that there can be no doubt that the court has such a discretion. It is to be exercised to ensure that the proper operation of issue estoppel is not at the cost of real justice in the particular case. He set out seven factors that were relevant to the exercise of the court's discretion in the context of an issue having been resolved in a prior earlier administrative tribunal proceeding. Binnie J. reflected that the final and most important factor was to consider if, given the entirety of the circumstances, the application of the doctrine would work an injustice. He found it would, in light of what he termed "the stubborn fact" the appellant's claim for commissions worth $300,000 had never been properly considered and adjudicated.

Application of these principles

[22] How and if the doctrine of estoppel by *res judicata* might apply to prevent the respondent from again suing the appellant Kameka depends on whether the present suit is in relation to the same or a different cause of action (there is certainly no suggestion it is an entirely new cause of action). If it is a different cause of action, consideration would have to be given to whether the party should have raised it in the earlier proceeding. However, if the suit is based on the same cause of action, it has become merged into the judgment the respondent obtained in the Small Claims Court.

[23] The respondent sued on the basis of negligence and sought damages for the personal property loss caused. He now alleges the same act of negligence but claims damages for personal injuries caused. At one time there was authority for the proposition that a claim of negligence from a motor vehicle accident did give rise to two separate causes of action, one for injury to the person, and one for damage to property (*Brunsden v. Humphrey* (1884), 14 Q.B.D. 141 (C.A.)). The English Court of Appeal has since concluded that *Brunsden v. Humphrey* is no longer good law (see *Talbot v. Berchshire Country Council*, [1994] Q.B. 290; *Wain v. F. Sherwood & Sons Transport Ltd.*, [1998] EWCA Civ 905,[1999] PIQR P 159).

[24] More significantly, the Supreme Court of Canada in *Cahoon v. Franks*, [1967] S.C.R. 455 unanimously held that *Brunsden v. Humphrey* was no longer good law in Canada and should not be followed. As a result, there can be no doubt that there is only one cause of action for a single wrongful or negligent act.

[25] The learned Chambers judge brushed away the import of *Cahoon v. Franks* by the simple assertion that when that case was decided, there was no Small Claims Court and that *Cahoon* therefore did not address the particular circumstances before him. With respect, this is not a legitimate basis to distinguish the principle established by *Cahoon v. Franks*. The fact that there was no Small Claims Court in 1967 is irrelevant to the applicability of the concept that there is but one cause of action available from a single negligent act. Many inferior courts have had monetary or other jurisdictional limits. It does not preclude the application of the doctrine of *res judicata*.

[26] There have been numerous cases where a plaintiff has successfully brought a claim in a Small Claims Court, or other court of limited jurisdiction, for property

damage arising from a motor vehicle accident and, as a consequence, barred from bringing a subsequent action in a superior court for damages for personal injury arising out of the same accident.

[27] For example, in *Cox v. Robert Simpson Co. Ltd. et al.* (1973), 40 D.L.R. (3d) 213, [1973] O.J. No. 2168 (C.A.), the plaintiff was struck from behind by a vehicle owned by Simpsons. The plaintiff, acting on his own, advanced a claim for the cost of repairs to his vehicle under the *Division Courts Act* (subsequently renamed the *Small Claims Court Act*). The defendant paid the monies claimed into court and the plaintiff accepted the payment. He then sued in County Court alleging personal injuries, seeking special and general damages. His claim was dismissed due to his earlier claim. Arnup, J.A., for the court, concluded that the plaintiff's cause of action could not be split. He wrote:

> "'The factual situation' which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action."

[28] The same result occurred in virtually identical circumstances in *Daniel v. Hess*, [1965] S.J. No. 196 (Dist. Ct.); *Baker v. Spain*, [1973] B.C.J. No. 712 (Co. Ct.); *Bashnick v. Mitchell et al*, [1981] S.J. No. 1384 (Q.B.), affirmed 69 Sask. R. 311 (C.A.); *Newton v. Allen*, 2005 NBQB 192; *Malcolm v. Carr* (1997), 200 A.R. 53 (C.A.); and *Avalon Bookkeeping Services Ltd. et al v. Furlong*, 2004 NLCA 46.

[29] The respondent does not strenuously argue that the Chambers judge was correct in this aspect of his reasons. Instead he says the judge was right to rely on *Gough v. Whyte* (1983), 56 N.S.R. (2d) 68, [1983] N.S.J. No. 42 (N.S.S.C.T.D.) and *Big Wheels Transport and Leasing Ltd. v. Hansen*, [1990] N.S.J. No. 364 (N.S.S.C.T.D.) as supporting the right to proceed in Supreme Court for recovery of damages for his personal injuries. With respect, neither of these decisions offer legitimate support for the right of the respondent to now proceed in Supreme Court.

[30] In *Gough v. Whyte* a motor vehicle accident caused extensive damage to the plaintiff's car, a 1974 BMW. He was insured with Wausau Insurance Company. The policy included collision coverage, subject to a deductible of $250. The plaintiff advanced a claim to his insurer for the damage to his car. Wausau paid the

plaintiff approximately $6,000, less the deductible. Wausau gave notice to the defendant of its subrogated claim. A few months later the plaintiff, acting on his own, started a proceeding in Small Claims Court asserting a claim for damages, including the amount of his deductible. A hearing was held. The adjudicator awarded $1,850 to the plaintiff. The defendant paid the award. Wausau was completely unaware of the Small Claims Court proceeding. When Wausau subsequently sued in Supreme Court, in the name of the plaintiff, on its subrogated claim, the defendant argued that the matter was *res judicata* as a result of the Small Claims Court judgment.

[31] Grant J. was the Chambers judge. The insurer, by contract and statute, was subrogated to all of the rights of the insured and entitled to bring an action to enforce those rights. Grant J. referred to some of the problems that arise when an insured and insurer independently take proceedings.[1] Grant J. acknowledged the principles of insurance law that appear to create the risk of liability for an insured who has prejudiced his insurer. He expressed the problem as:

> [9] Here, the problem is that the insurer, shortly after payment to the insured, informed the defendant of its subrogated claim. However, before that claim was settled the insured went to the Small Claims Court and got a judgment for his deductible and other associated damages against the defendant. Meanwhile, the defendant, having knowledge of the insurers' subrogated claim paid the judgment of the Small Claims Court, thus setting up his defence of *res judicata* to try to defeat the larger claim of which he had previous knowledge.
>
> [10] Should the plaintiff, having received his $2,000.00, be required to hand over $6,000.00 to his insurer while the defendant hides behind his prior judgment?

[32] Grant J. referred to the twin rationales for the doctrine of *res judicata* – that of public policy to ensure there is an end to litigation and to prevent a party from being vexed twice for the same cause, but that the rule could be departed from in special circumstances. He then found that there were special circumstances. Grant J. expressed his conclusion as follows:

> [27] I find that to permit the plaintiff to continue would not contravene public policy. I find that to permit the defendant, in this case, to hide behind the Small

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[1] The various difficulties are discussed by Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham: LexisNexis Butterworths, 2004) at p. 340 *et seq.*

> Claims Court judgment would be a breach of public policy. The defendant had knowledge of the insured's claim before the Small Claims Court action was started.
>
> [28] I find that special circumstances exist in this case which permit the plaintiff to continue notwithstanding the judgment of the Small Claims Court.

After having found special circumstances to exist, thereby permitting the plaintiff to proceed in Supreme Court, Grant J. found the Small Claims Court not to be a court of competent jurisdiction. He wrote:

> [30] I find the Small Claims Court is not a Court of competent jurisdiction such as to place its judgment in these circumstances to estop the plaintiff's action on a defence of *res judicata*. I find that to do so would permit a grave injustice to be done. To be a court of competent jurisdiction I find it must not only be competent to determine the issues but must also be competent to grant the appropriate relief. Here it cannot do so.

[33] The comments of Grant J. about the jurisdiction of the Small Claims Court must be considered to be *obiter*. If the Small Claims Court was somehow not a court of competent jurisdiction, there would have been no need to make any finding of special circumstances. If not a court of competent jurisdiction, the doctrine of *res judicata* would have no application whatsoever. The suggestion that the Small Claims Court was not a court of competent jurisdiction was not followed by Kelly J. in *Shanks v. J.D. Irving Ltd. (c.o.b. Irving Equipment)*, [1985] N.S.J. No. 119, nor by Roscoe J., as she then, was in *Big Wheels, supra*. In my view, there is no basis to conclude that the Small Claims Court is not a court of competent jurisdiction to hear and decide allegations of negligence.

[34] In *Big Wheels Transport and Leasing Ltd. v. Hansen, supra,* an accident resulted in damage to two vehicles but no personal injuries. Hansen sued in Small Claims Court seeking compensation for the damage done to his vehicle. The adjudicator found both drivers to have been negligent and apportioned liability equally. He ordered Big Wheels to pay Hansen one half of his loss. Big Wheels then sued Hansen in Supreme Court seeking $8,514 as compensation for special damages to its truck, towing costs, and replacement rental fees. It alleged that Hansen was wholly at fault. Hansen brought an application for a determination whether issue estoppel applied, thereby limiting his exposure to half of the claimed damages as a result of the Small Claims Court finding.

[35] Roscoe J., as she then was, heard the application. She rejected the argument that the Small Claims Court did not have jurisdiction, as the quantum of damages was in excess of its monetary limit (at that time, $3,000). She held that the Small Claims Court did have jurisdiction to hear and determine the issue of liability, the requirements for issue estoppel had been met, and Big Wheels was not at liberty to reopen the issue. Cause of action estoppel was not argued by Hansen.

[36] The last argument advanced by the respondent is that cause of action estoppel did not apply since the Small Claims Court did not have jurisdiction to deal with the remedy it now seeks in Supreme Court, general damages for personal injuries. In support of its argument it relies on an excerpt from Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham: LexisNexis Butterworths, 2004). The author discusses cases where a subsequent action may not be estopped even though the factual context is the same if those facts support separate rights and hence more than one cause of action. No quarrel can be had in that conclusion. However, the author then sets out a list of what he refers to as additional principles of cause of action estoppel. The one relied on by the respondent is (p. 170):

> (2) The court must be competent to grant the appropriate relief for cause of action estoppel to apply.

[37] Two cases are cited in support of this proposition, *Evans v. Campbell* (1993), 77 B.C.L.R. (2d) 211 (C.A.) and *Gough v. White, supra*. For reasons already set out, *Gough v. White* does not stand for this proposition. The respondent also lays considerable stress on *Evans v. Campbell.* With respect, the decision does not really assist the respondent. The factual background is far from detailed. Hutcheon J.A. gave the unanimous reasons for dismissing the appeal.

[38] The appellants were members of a small law firm. The respondent sued them in Small Claims Court for $2,815.17 that she claimed was owed to her for her share of fees. The claim was described as being one of debt. The claim did not go to trial. The respondent and appellants agreed to settle the debt claim. The respondent refused to sign a general release of claims. There was a consent dismissal of the Small Claims action. Some weeks later she commenced an action in Supreme Court. The claim was for general and aggravated damages, declaratory relief concerning commissions on files, and that the appellants had been unjustly

enriched and held monies as constructive trustees.

[39] Hutcheon J.A., in an oral decision, noted that the Small Claims proceeding had been a consent dismissal. He also referred to the fact that there were a number of items in the relief being requested beyond the jurisdiction of the Small Claims Court and that in these circumstances the principle in *Henderson v. Henderson, supra*, did not apply.

[40] There may well have been sound reasons that the doctrine of cause of action estoppel did not prevent the respondent from proceeding. The first that comes to mind is the Small Claims Court claim was for debt owing from a contract, while the second claim asserted unjust enrichment, a different cause of action. Secondly, the first claim did not result in a judgment in the sense of a judicial pronouncement, but was merely a compromise or settlement that did not create a *res judicatum*[2].

[41] However one may interpret the decision in *Evans v. Campbell*, to the extent it is taken to suggest that the fact a remedy being sought in the second suit was not available in the first, as a sufficient basis, without more, to prevent the normal application of the doctrine of *res judicata*, I would decline to follow it.

[42] In any event, the remedy the respondent now seeks in the Supreme Court action was in fact available in Small Claims Court. The only remedy identified by the respondent as not being available to him in Small Claims Court was an award of general damages for his claimed personal injuries. As will shortly be demonstrated, this is not accurate. The Small Claims Court is specifically empowered to grant a judgment that includes general damages.

[43] Section 9 of the Act provides, in part:

> 9 A person may make a claim under this Act

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[2] The case law on when a settlement that leads to a consent order or judgment can be said to create an estoppel seem to depend on the type of dispute that was resolved and even the intention of the parties in entering into the agreement. See, for example, *Spender (Guardian ad litem of) v. Spender*, [1999] B.C.J. No. 910 (S.C.); *Unilever PLC v. Proctor & Gamble Inc.* (1993), 47 C.P.R. (3d) 479 (F.C.T.D.); aff. 61 C.P.R. (3d) 499 (C.A.); *Escobar v. Yacey* 1998 ABQB 599; *Provident Properties Inc v. Tinley Properties Ltd.*, [1991] B.C.J. No.166 (C.A.).

> (a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars **inclusive of any claim for general damages** but exclusive of interest;
>
> (b) notwithstanding subsection (1) of Section 5, for municipal rates and taxes, except those which constitute a lien on real property, where the claim does not exceed twenty-five thousand dollars exclusive of interest;
>
> (c) requesting the delivery to the person of specific personal property where the personal property does not have a value in excess of twenty-five thousand dollars; or
>
> (d) respecting a matter or thing authorized or directed by an Act of the Legislature to be determined pursuant to this Act.

There are clear limits on the amount that an adjudicator can award for general damages. Sections 10 and 11 of the Act provide:

> 10 Notwithstanding Section 9, no claim may be made under this Act
>
> (a) for the recovery of land or an estate or interest therein;
>
> (b) in respect of a dispute concerning the entitlement of a person under a will, or settlement, or on an intestacy;
>
> (c) for defamation or malicious prosecution;
>
> (d) which involves a dispute between a landlord and a tenant to which the Residential Tenancies Act applies, other than an appeal of an order of the Director of Residential Tenancies made pursuant to Section 17C of that Act; or
>
> (e) **for general damages in excess of one hundred dollars**.
>
> 11 Notwithstanding any enactment or procedural rule, **where a claim is for general damages or includes a claim for general damages, the claim for general damages or the portion of the claim relating to general damages is deemed to be a claim for an amount not exceeding one hundred dollars.**

[44] The respondent's real complaint about proceeding with the whole of his claim in Small Claims Court is that the court could not provide to him an *effective*

remedy. With all due respect, this is no reason to depart from well established common law principles that require a plaintiff not to litigate in installments. No valid reason has been suggested as to why the plaintiff could not have simply brought his claim in the court having jurisdiction to deal effectively with all aspects of his claim, the Supreme Court.

[45] As noted earlier, the doctrine of *res judicata* is not a completely inflexible one. The court has a discretion not to apply it if special circumstances exist. The respondent did not, either before the Chambers judge or in its written or oral presentation in this court, suggest the existence of special circumstances.

[46] There is a reference by the Chambers judge that it would have been obvious to the defendant only property damage was in issue in the Small Claims Court and it therefore could not have been a surprise when the plaintiff started the action for general damages. Given the circumstances, I need not canvass in any length the manner in which the court's discretion might be exercised to permit a subsequent action to proceed.

[47] The Supreme Court of Canada in *General Motors v. Naken*, [1983] 1 S.C.R. 72 observed that such a discretion is very limited in its application. In my opinion, prior awareness or notice of a further likely claim can hardly, on its own, constitute special circumstances (see for example *Malcolm v. Carr*, [1997] A.J. No. 485 (C.A.) and *Furlong v. Avalon Bookkeeping Services Ltd.,* 2004 NLCA 46). Nor does advisor error amount to such, even if the party may have no recourse against that advisor (*Wain v. F. Sherwood & Sons Transport Ltd., supra).*

[48] The reason offered by the respondent for first proceeding in Small Claims Court was to obtain recovery for the property damage without delay, with the intention of later pursuing damages for the plaintiff's personal injuries in Supreme Court, and this was the practice in Nova Scotia. No support was offered as to the purported existence of such a practice. If such a practice did exist, it is unsupportable.

[49] Based on the straightforward application of well established common law principles, the respondent's claim for general damages for his personal injuries became merged into the Small Claims Court judgment. He is therefore estopped from proceeding with the same cause of action again.

Small Claims Court

[50] The panel raised with the parties what role, if any, the provisions of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 might play in determining the issues in this appeal. The respondent argued that the principles of *res judicata* should not be applied to prevent him from proceeding for property damage in the Small Claims Court and then general damages in Supreme Court. He advocated that to do so would be to frustrate the goal of the *Small Claims Court Act* to provide speedy inexpensive access to justice.

[51] With respect, the outcome dictated by the principles of *res judicata* is fully supported by the provisions of the *Small Claims Court Act*. The *Act* clearly designed the Small Claims Court in order to permit informal, inexpensive, and expeditious hearings of disputes (see s. 2 of the *Act*). Historically, the monetary amounts that could be pursued were relatively small. With the current limit at twenty-five thousand dollars, it is difficult to categorize the amount as small. There is a specific prohibition in the *Act* against dividing a claim into two or more claims in order to bring it within the jurisdiction of the court. Section 13 provides as follows:

> 13 A claim may not be divided into two or more claims for the purpose of bringing it within the jurisdiction of the court.

[52] The *Act* obviously anticipated that the court would be resorted to by lay litigants, specifically authorizing a claimant or a defendant to appear in person or by agent as well as by counsel (see s. 16). Indeed, the *Act* allows claimants as young as 16 years of age to prosecute or defend claims (see s. 17). In my opinion, the legislature sought to ensure that litigants, including lay individuals, unfamiliar with the intricacies of *res judicata* would understand they could not bring successive claims. This is accomplished by s.13 and by s. 30 of the *Act*. Section 30 reads:

> 30 An order in an action brought for the balance of an account, or for a part of a claim where the residue is abandoned to bring the claim within the jurisdiction of an adjudicator, is a full discharge of all demands in respect of the account for the balance of which such claim was brought or for the whole claim, as the case may be.

[53] A litigant would thus be able to understand that she could not divide her claim into two or more to bring the total claim within the monetary limit of the court; and, in addition, if she brought only part of her claim, any order she may obtain is a discharge of the balance. Of course, if the claimant was unsuccessful, the common law doctrine of *res judicata* would prevent her from proceeding with a claim in another court based on the same cause of action.

[54] In this case, while it could be said that the respondent divided his cause of action into a claim for compensation or recovery for his damage to his personal property and a claim for recovery of damages for personal injuries, the division was not for the purpose of bringing his claim within the jurisdiction of the Small Claims Court.

[55] The respondent did not want to advance a claim for personal injury in the Small Claims Court. He believed he could prosecute his claim for property damage in the Small Claims Court and then seek general damages for his personal injuries in the Supreme Court. To use the language of s.30 of the *Act*, I am not satisfied that he abandoned the "residue" to "bring the claim within the jurisdiction of an adjudicator".

[56] I find nothing inconsistent between the purpose and goals of the *Small Claims Court Act* and the principles of *res judicata*. Those principles dictate that the claim by Williams against Kameka became merged into the judgment Williams obtained in the Small Claims Court, subject only to the discretion of the court to permit a successive action if special circumstances exist.

[57] I have had the advantage of reading in draft the reasons of my colleague Justice Fichaud wherein he concludes that the provisions of the *Small Claims Court Act* preclude the respondent from bringing his action against Williams in the Supreme Court. With respect, I am unable to agree with his conclusion.

[58] I have found the provisions of the *Act* to be consistent with the common law. Indeed, in some circumstances it is arguable that the provisions of s. 30 may well be an independent source to accomplish what the common law may otherwise provide. I prefer to base my reasons on the common law for the reasons I have already expressed.

[59] In addition, the provisions of the *Act* were not argued at all before the Chambers judge, nor fully before this court. There are important consequences. The common law has long admitted a judicial discretion to allow a successive action in special circumstances. The conclusion arrived at by my colleague Justice Fichaud would suggest that the legislature intended (as they are presumed to know the law) to do away with the long established discretion that exists to ensure finality to litigation is respected, but justice can be done between the parties.

SIGNIFICANCE OF ADDING THE OWNER, HAYES, IN THE SUPREME COURT ACTION

[60] As noted earlier, the doctrine of *res judicata* only applies to preclude relitigation of a cause of action or issue where the parties or their privies in the subsequent proceeding are the same persons, or their privies, involved in the prior proceeding. Hayes was not a party in the proceedings by Williams in the Small Claims Court. The parties made no submissions with respect to this issue in this court. No mention is made of this issue by the Chambers judge. As will soon be evident, he can hardly be faulted for not having done so.

[61] Subsequent to the hearing of this appeal, the parties were requested to make supplementary submissions on whether this issue was addressed before the Chambers judge and, for the purposes of this appeal, the significance, if any, of the addition of the owner as a party in the Supreme Court action. The last of these submissions was filed on September 4, 2009.

[62] The parties agree that this issue was not discussed in argument before the Chambers judge. The appellants say that the issue was addressed in their written submissions to the Chambers judge, where they pointed out the addition of the owner in the Supreme Court action, but contended it made no difference to their application to strike. The appellants also say the respondent's written submissions before Edwards J. were simply silent about this issue. Before this court, the respondent does not contend otherwise.

[63] The appellants' supplementary submissions are straightforward. They argue that the respondent's accident gave rise to a single cause of action that has merged into the Small Claims Court judgment. Although Hayes was not a party to the

claim in Small Claims Court, he is a privy of Kameka and, hence, protected to the same extent as Kameka by the doctrine of *res judicata*. Further, even if not a privy, it would be an abuse of process to permit the respondent to avoid the dictates of *res judicata* by merely adding another party where he could have taken action against that party in the prior claim.

[64] The respondent appears to concede that the decision of the Supreme Court of Canada in *Cahoon v. Franks, supra*, could be applied to prevent Williams from bringing a subsequent claim against Hayes in the Nova Scotia Supreme Court. He goes on to argue that Hayes should not be considered a privy as Hayes could not have been added as a party to the first action because the relief sought against him was for general damages in excess of the $100 limit in Small Claims Court. The respondent also argues that *Cahoon v. Franks* was "rejected" in Nova Scotia by *Gough v Whyte, supra*, and *Big Wheels Transport and Leasing Ltd. v. Hansen, supra*, and that given the ambiguity in the law it would be unfair to deny him the opportunity to proceed against Hayes; in other words, there exist special circumstances.

[65] In my opinion, the arguments of the respondent are without merit. There was no ambiguity in the law. *Gough v. Whyte* and *Big Wheels Transport Ltd. v. Hansen* did not, nor could they, reject the Supreme Court of Canada decision in *Cahoon v. Franks*.

[66] However, given the actual claims advanced by the respondent against the owner Hayes, I am not convinced that the appellants are entirely correct in their analysis, but the outcome will remain the same.

[67] The question as to who is a privy, and hence bound by, or able to assert cause of action or issue estoppel, is not always an easy one. Spencer Bower and Turner, *ibid.*, discuss the issue as follows:

> **241** Estoppel *per rem judicatam* operates for, or against, not only the parties, but also those who are privy to them in blood, title or interest.
>
> **242** There is a dearth of authority as to who are privies so as to be bound by a *res judicata*. Privies include any person who succeeds to the rights or liabilities of the party upon his death or insolvency or who is otherwise identified with his or her estate or interest; but it is essential that he who is

> later to be held estopped must have had some kind of interest in the previous litigation or its subject matter.

[68] The mere fact that Hayes was not a named party does not preclude a conclusion he is a privy of Kameka and, hence, able to assert that the cause of action by Williams against him became merged into the Small Claims Court judgment. In *Comeau v. Breau*, [1994] N.B.J. No. 74 (N.B.C.A.), the plaintiff sued personal defendants alleging breach of contract and were successful. The plaintiff then, along with a corporate entity, brought a second action framed in tort against the same personal defendants, an additional individual and a corporation. Ryan J.A. wrote the majority judgment. He observed the action was crudely pleaded in tort, but this made no difference. Rice J.A., in a separate concurring judgment wrote:

> [14] I am not attracted to the argument that the parties are not the same in both actions and that, for that reason, *res judicata* does not apply. Even if it could be maintained that Memramcook (not a party to the first action) had a separate cause of action against the defendants in the second action it holds that right as privy to Comeau. As for the defendants in the second action who were not parties in the first action, they too are parties only as privy to the other defendants named in both actions.

[69] Ryan J.A also concluded that, on the facts of the case, cause of action estoppel applied. The mere fact that there were new parties added as defendants was not sufficient to avoid the rule, as these additional defendants were known to the plaintiff at the time of the original suit.

[70] In *Ontario v. National Hard Chrome Plating Co.*, [1996] O.J. No. 93 (Gen. Div.), an action was commenced against two corporate defendants and one individual. This action was stayed. The plaintiff then brought a second action against the same defendants, but added three additional individuals who were former directors of National Hard Chrome. The plaintiff discontinued the second action against some of the defendants. The remaining defendants moved to strike the action against them. Day J. found it would be an abuse of the court's process to permit the claim to proceed and struck the action. With respect to the mutuality requirement of *res judicata* he wrote:

> [23] The issue estoppel branch of res judicata can apply even where parties are not identical. This will essentially be the case where the court examines the

> history of the proceedings between the parties, and in light of such examination, determines that they are not different parties in substance: See *Martin-Brower of Canada Limited v. Ontario (Regional Assessment Commission, Region No. 15*), [1993] O.J. No. 1848 (G.D.) at p. 9, 16; *Donmor Industries, supra,* at p. 505.
>
> [24] With respect to the issue as to whether the defendants can be held to be "the same party" as in the earlier action, the court must consider that the additional defendants were privy to the first action. This is based on the fact that such parties could clearly have been added to the first action and that it is not a sufficient basis to relegate the matter in light of the fact that the directors are now named personally. In *Verlysdonk v. Premier Petrenas Construction Company Limited* (1987), 60 O.R. (2d) 65 (H.C.J.) at p. 69, the principle is asserted that in determining whether a party is "privy" to an earlier proceeding, a privy is "a person having a participation in some act so as to be bound thereby for a participation in interest." In determining whether a party had a participatory interest in the outcome of the proceeding, the courts have held that the essential question to be determined is whether the outcome of the action could affect the liability of such parties. The additional defendants named in the claim were officers and directors of either of the two companies and therefore could have on the same arguments raised in the second action been liable on that basis in the first action.
>
> [25] It would be a clear abuse of process if litigants could avoid the doctrine of *res judicata* by merely adding as parties others against whom the initial claim could have been taken. The additional defendants in the current action were known or should have been known to the plaintiff at the time of the first action: See *Reddy v. Oshawa Flying Club, supra,* at p. 6-7.

[71] Ordinarily, when an injured party seeks to claim damages against the driver of a motor vehicle, he or she also asserts a claim against the owner, relying on the deeming provisions of the *Motor Vehicle Act*, R.S.N.S. 1989, c.293 (s.248(3)) to assist in establishing the owner's vicarious liability for the alleged negligence of the driver (see *Nixon v. Robert and O'Brien* (1983), 59 N.S.R. (2d) 245 (S.C.T.D.). Here the respondent made no such claim against the owner.

[72] The claim by the respondent against the appellant Hayes was that the accident and resultant injuries and damages were caused solely by the negligence of Hayes in that:

a. he failed to properly maintain and equip the van;

b. he permitted Kameka to operate the van in a negligent manner;

c. such other negligence as may appear.

[73] If the respondent had advanced a claim against the appellant Hayes seeking to recover damages on the basis of vicarious liability, it is my opinion that the action must be struck. A claim against Hayes on the basis of vicarious liability would have been an allegation that the appellants were joint tortfeasors. At common law the action would be unsustainable. In *Tort Law*, 2nd ed. (Toronto: Carswell 1996), Professor Klar discusses what is meant by joint tortfeasors (p. 393):

> A person may be injured by the joint act of two or more joint tortfeasors or by the independent acts of several, concurrent tortfeasors.
>
> A joint tort will arise in two general areas. The first is where one person is vicariously liable for the torts committed by another. This occurs as between master and servant, and principal and agent. Vicarious liability may also be imposed by statute, the most common example being the deemed agency provisions of provincial motor vehicle statutes, which state that owners of vehicles are liable for the negligent acts of those driving their cars with the owners' consent. In all of these cases, the tortfeasor and the person who is vicariously liable for the former's acts are joint tortfeasors.

See also the seminal work by Glanville L. Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-law Dominions* (London: Stevens & Sons, 1951).

[74] The common law rule with respect to joint tortfeasors was succinctly put by Lord Salmon in *Wah Tat Bank v. Chan Cheng Kum*, [1975] 2 All ER 257 (J.C.P.C.) at p 260:

> According to the common law rule, anyone who suffered damage by reason of a tort jointly committed by a number of persons was deemed to have but one cause of action which merged in the first judgment which he might recover in respect of it: *King v Hoare* per Parke B. Once he recovered final judgment against any tortfeasor his cause of action in respect of that tort disappeared. He was accordingly barred from subsequently recovering judgment against any other joint tortfeasor responsible for that tort whether in an action commenced before, at the same time as or after the action in which a final judgment had already been

> recovered.

[75] Professor Klar discussed the rationale for the common law rule as follows (pp. 395-6):

> There were as well procedural consequences flowing from the joint tort relationship. The liability of joint tortfeasors is derived from one cause of action. Therefore, at common law, once one joint tortfeasor was sued and judgment was entered, the plaintiff could not institute another action against one of the other joint tortfeasors. This was based on the principle of *transit in rem judicatam*. If the plaintiff failed to sue all of the joint tortfeasors, and could not execute in full against the ones who were sued, the judgment could not be satisfied. This did not apply to several, concurrent tortfeasors, since the plaintiff's cause of action against each was separate.

[76] Despite the well recognized and desirable goals of avoiding inconsistent verdicts and multiplicity of actions, the common law, while permitting joint tortfeasors to be sued separately, long required several concurrent tortfeasors to be sued separately (see Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at p. 7). The judgment bar rule was not applicable *per se,* but a satisfied judgment against a concurrent tortfeasor did preclude a further judgment. Professor Williams, *ibid*., described the situation as follows (para. 10, pp. 37-38):

> The rule under consideration was confined to joint tortfeasors, for mere judgment against one of several concurrent tortfeasors did not, where it was not satisfied, discharge the others. As we shall see, this rule for several concurrent tortfeasors still remains.
>
> Independently of the maxim *transit in rem judicatam*, it was formerly held that if A wrongfully sells X's chattel to B, and X sues A for money had and received, and recovers judgment, this waiver of the tort bars X's remedy against B, even though his judgment in the first action remains unsatisfied. This has now been overruled, and at the present day nothing but a satisfied judgment bars the second action.

[77] The difference between joint and concurrent tortfeasors was explained by Williams as (para. 1):

> The term 'joint tortfeasor' is, in essence, well understood. Two or more tortfeasors are joint tortfeasors (*a*) where one is the principal of or vicariously

> responsible for the other, or (*b*) where a duty imposed jointly upon them is not performed, or (*c*) where there is concerted action between them to a common end. Except in the case of nonfeasance in breach of a joint duty, parties cannot be joint tortfeasors unless they have mentally combined together for some purpose.
>
> Where tortfeasors are not joint they are necessarily 'several,' 'separate,' or 'independent.' Several (i.e. separate or independent) tortfeasors are of two kinds: several tortfeasors whose acts combine to produce the same damage, and several tortfeasors whose acts cause different damage. The latter are outside the scope of this work, except in so far as reference to them is necessary in order to throw into relief the rules relating to the former.

[78] In the case at bar, the allegation that the appellant Hayes caused damage to the respondent by his failure to prevent the negligent conduct of Kameka, (assuming, without deciding, that such an allegation is in fact sustainable), is suggestive of liability as a joint tortfeasor.

[79] However, the claim by the respondent that damage was caused to him by the failure of Hayes to properly maintain the vehicle is a completely separate allegation of negligence unconnected to the claim against Kameka, and as such would make them concurrent tortfeasors. The common law would prohibit the first allegation from proceeding, but allow the second if the former judgment was not satisfied.

[80] In my opinion, it is not necessary to decide if the allegations against Hayes and Kameka make them joint or concurrent tortfeasors. Neither is it necessary to come to a conclusion on any of the issues as to whether or not Hayes is a privy of Kameka, or if the claim against Hayes properly belonged in the Small Claims Court action, or is otherwise an abuse of process. For the reasons that follow, the action by Williams against Hayes cannot be sustained and should be struck.

[81] There were a number of aspects of the common law with respect to joint and concurrent tortfeasors that were rightly viewed as unsatisfactory, not the least of which was that if judgment was obtained against one joint tortfeasor, but not satisfied, the injured party had no right of recourse against other wrongdoers. (See, generally, G. Williams, *ibid*., and the Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988)). This led to the widespread introduction of legislative reform throughout the Commonwealth.

[82] In Nova Scotia, the *Tortfeasors Act*, S.N.S. 1945, c.19 (now R.S.N.S. 1989, c.471) adopted the language of the English statute *Law Reform (Married Women and Tortfeasors) Act*, 1935 (25 & 26 Geo. 5, c. 30). The relevant section of the *Tortfeasors Act* is:

> 3. Where damage is suffered by any person as a result of a tort, whether a crime or not,
>
> (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
>
> (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tortfeasors liable in respect of the damage, whether as joint tortfeasors or otherwise, the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and in any of those actions other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the judge presiding at the trial or the court on appeal is of the opinion that there was reasonable ground for bringing the action;
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this Section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[83] In a general way, the *Tortfeasors Act* does away with the prohibition against successive actions against joint tortfeasors. It also permits the court to order contribution amongst tortfeasors. Of significance to the present appeal is s. 3(b) which, while permitting successive actions against both concurrent and joint tortfeasors, limits the amount recoverable to the amount awarded in the first judgment. This is not a case about tortfeasors whose wrongdoing caused different damage. "Damage" in the context of s. 3 of the *Act* is in reference to the existence of harm caused by the wrongdoing of a tortfeasor, not the measure of damages awarded by a court in compensation for the harm.

[84] This was explained by DesRoches J. in *Reeves v. Arsenault* (1995), 136 Nfld. & P.E.I.R. 91 (P.E.I. T.D.) as follows:

> [15] It has been clearly stated by Glanville Williams in his work *Joint Torts and Contributory Negligence* at p. 16 that several concurrent tortfeasors are independent tortfeasors whose acts concur to produce a *single damage*. The word "damage" is defined in *Black's Law Dictionary* as follows:
>
> > *Damage*. Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property. The word is to be distinguished from its plural, 'damages', which means a compensation in money for a loss or damage. An injury produces a right in them who have suffered any damage by it to demand reparation of such damage from the authors of the injury. By damage we understand every loss or diminution of what is a man's own, occasioned by the fault of another. The harm, detriment, or loss sustained by reason of an injury.

[85] See also *Sorenson v. Abrametz* (1987), 64 Sask. R. 224 (C.A.); *Provincial Secretary-Treasurer v. York* (1957), 16 D.L.R. (2d) 198, [1957] N.B.J. 23 (C.A.) at paras. 13-16 per McNair C.J.N.B. (dissenting in result); *Webster v. Ernst & Young*, 2003 BCCA 95 at para. 55, *et seq.*.

[86] From the undisputed record of these proceedings, the respondent obtained a judgment for the damage he claimed to have suffered by reason of the negligence of Kameka. That judgment was paid in full. The subsequent action claims no different “damage” was caused by the alleged negligence of Hayes, merely that there are additional amounts of compensation he now seeks to recover which he failed to advance in the first action. Quite apart from the common law doctrines concerning cause of action estoppel, former judgment, or abuse of process, he no longer has a sustainable cause of action against the appellant Hayes, since the subsequent judgment he is now seeking to obtain can be no more than the first judgment, which has been paid in full.

SUMMARY AND CONCLUSION

[87] In my opinion, the Chambers judge erred in law. Williams had one cause of action against Kameka. Having obtained judgment in the Small Claims Court, his cause of action merged into that judgment. The doctrine of *res judicata* precludes him from again suing Kameka for some other head of damage or remedy flowing

from that cause of action.

[88] With respect to the respondent's claim against the appellant Hayes, whether the allegation is based on Hayes being a joint or concurrent tortfeasor, the respondent is limited by the *Tortfeasors Act* to recovery of the damages awarded in the first judgment. Having been paid the total judgment amount, his claim is unsustainable.

[89] I would grant leave to appeal and allow the appeal with costs. The respondent was awarded costs below of $300. This should be reversed in favour of the appellants. In addition, I would award costs to the appellants in the amount of $1,500 plus disbursements in this court.

Beveridge, J.A.

Concurring:

Oland, J.A.

Concurring Reasons of Fichaud J.A.:

[1] I agree with my colleague's chronology of events, and I have no quarrel with his analysis of the principles of *res judicata*. But, as I will explain, in my respectful view Mr. Kameka's appeal should be determined by the provisions of the *Small Claims Court Act*, and it is unnecessary to resort to the common law of *res judicata*. I agree with my colleague's analysis and conclusion respecting the appeal of Mr. Hayes.

[2] The Legislature considered claim splitting. Section 13 of the *Small Claims Court Act* says:

> A claim may not be divided into two or more claims for the purpose of bringing it within the jurisdiction of the Court.

Mr. Williams divided his claim, omitting general damages from the Small Claims Court action because those exceeded that court's jurisdiction, but seeking the rest in the Small Claims Court, and then claiming the general damages in the Supreme Court. Mr. Williams split his claim by design. I quote his factum:

> 65. In the case at hand, the Respondent's claim of general damages could not be dealt with in the Small Claims Court. Likewise, there was no effort to have the matter dealt with in Small Claims Court. Indeed, no evidence was called relating to his injuries or was any medical evidence adduced to support his injuries. It was the position of the "plaintiff" in this matter the appropriate forum for such a matter would be the Supreme Court.

[3] In my view, s. 13 precludes this claim splitting and, for that simple reason, Mr. Williams' Supreme Court action against Mr. Kameka should be struck.

[4] At the Court of Appeal hearing, Mr. Williams' counsel said that s. 13 prevents claim splitting only where both divided actions are brought in the Small Claims Court. If s. 13 said "bringing them" instead of "bringing it", I might agree with counsel's submission. But the words "bringing it" contemplate that only one split claim is brought in the Small Claims Court. Section 13 precludes claim splitting in general, including a division into one claim in the Small Claims Court and another in the Nova Scotia Supreme Court, if the overall case is divided in order to fit a claim into the jurisdiction of the Small Claims Court.

[5] The plain meaning of a legislative provision is considered consistently with

its statutory context and its legislative objective: *R. v. Sharpe*, [2001] 1 SCR 45 at ¶ 33; *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees' Union Local 324*, [2003] 2 SCR 157 at ¶ 41. My interpretation of s. 13's plain meaning is supported by the other provisions of the *Small Claims Court Act* that discuss concurrent actions in the Small Claims Court and Supreme Court, and by the legislative objective.

[6] Section 15 bars concurrent claims in the Small Claims Court and the Supreme Court of Nova Scotia:

> The Court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with Section 19.

[7] Then subsections 19(2), (3) and (4) state:

> Commencement of claim or transfer of proceeding
>
> 19 . . .
>
> (2) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court or a city court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, the defendant may elect to have the proceeding adjudicated in the Small Claims Court whereupon the prothonotary of the Supreme Court or the clerk of the city court, as the case may be, shall transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.
>
> (3) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, the claimant may elect to have the proceeding adjudicated in the Small Claims Court whereupon the prothonotary of the Supreme Court may transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.
>
> (4) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, a judge of the Supreme Court may transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act. *R.S., c. 430, s. 19; 1992, c. 16, s. 119; 2007, c. 10, s. 10.*

Subsections 19(2), (3) and (4) contemplate that a claim in the Supreme Court may be transferred to the Small Claims Court only in its entirety, and not split into two claims with one in each court. Further, there may be no transfer of anything from the Supreme Court to the Small Claims Court where the Supreme Court action includes a claim for general damages. The plaintiff would have to abandon his Supreme Court claim for general damages before the rest could be transferred to the Small Claims Court.

[8] Section 30 says:

> 30 An order in an action brought for the balance of an account, or for a part of a claim where the residue is abandoned to bring the claim within the jurisdiction of an adjudicator, is a full discharge of all demands in respect of the account for the balance of which such claim was brought or for the whole claim, as the case may be.

The Legislature intended that the order of the Small Claims Court would discharge all demands, in any court, for the balance that exceeded the Small Claims Court's jurisdiction.

[9] Mr. Williams submits that these statutory limitations do not apply when, as here, he delayed the initiation of his general damages claim in the Supreme Court until after he obtained his Small Claims Court judgment.

[10] I disagree with Mr. Williams' submission. Because of ss. 15, 19(2), (3) and (4), Mr. Williams could not have sued concurrently to judgment in both the Supreme Court and Small Claims Court. That he obtained judgment in Small Claims Court before starting his Supreme Court action, does not assist him because that scenario is precluded by s. 13. As s. 13 prohibits the splitting of his claim, once he obtained judgment in the Small Claims Court, there was nothing left to support a second claim against Mr. Kameka in the Supreme Court. His suit to judgment in the Small Claims Court legally abandoned any unclaimed general damages that exceeded the Small Claims Court's jurisdiction.

[11] Mr. Williams' submission would mean that a plaintiff could first sue to judgment in Small Claims Court to establish liability, then sue again in the Supreme Court for general damages that exceed the jurisdiction of the Small

Claims Court, and issue estoppel would bind the Supreme Court with the Small Claims Court's ruling on liability. This was the ruling of the chambers judge here, who said:

> 6 ...The Defendant had the option to appeal the SCC's finding on liability but failed to do so. The Defendant is now stuck with that determination.

[12] In my respectful view, Mr. Williams' submission contradicts the objective of the *Small Claims Court Act*. Section 2 states the Legislature's purpose:

> 2 It is the intent and purpose of this Act to constitute a court wherein claims up to but **not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively** but in accordance with established principles of law and natural justice. R.S., c. 430, s. 2. [emphasis added]

Sections 9(a) and 11 of the *Act* define the Small Claims Court's statutory jurisdiction over general damages:

> 9 A person may make a claim under this Act
>
> (a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest;

Section 11 deems a general damages claim to be "an amount not exceeding one hundred dollars".

[13] Mr. Williams' submission would turn the Small Claims Court into a gatekeeper, tasked to decide the preliminary issue of liability for the more substantial general damages claim to come in the Supreme Court. That is not the Small Claims Court's role envisaged by the Legislature. The double lawsuits would be the opposite of the informal and inexpensive adjudication intended by s. 2. Under Mr. Williams' approach, the Small Claims Court would make liability rulings that the Supreme Court would be "stuck with" by issue estoppel, in actions that are really about general damages exceeding the Small Claims Court's monetary jurisdiction. The submission's consequences would thwart the legislative objective.

[14] In the *Small Claims Court Act*, the Legislature directed there may not be

concurrent or successive claims in either order, each leading to a judgment, one in the Small Claims Court and another in the Supreme Court, from a single cause of action such as this motor vehicle accident. In my view, and here I respectfully depart from my colleague, this legislative intent is clear regardless of the common law and whether or not Mr. Williams believed that his Small Claims Court action had the legal effect of abandoning the prospect of a later Supreme Court action.

[15] In fairness to the chambers judge, s. 13, was not cited in support of the motion. So the judge's reasons did not consider it. Nonetheless, the result of the judge's decision is, in my respectful view, inconsistent with the *Small Claims Court Act* and therefore contains an error in law. The *Small Claims Court Act*'s provisions respecting claim splitting were squarely put to counsel at the hearing in the Court of Appeal, and counsel had the opportunity to comment fully on their meaning and effect.

[16] I would grant leave to appeal, allow the appeal, grant the defendants' motion to dismiss Mr. Williams' claim, and award costs as stated by Beveridge, J.A.

Fichaud, J.A.