Endean v. *St. Joseph's Hospital (ONCA)*: A Contextual Approach to Partial Settlement Agreements

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Taylor v. Canada (Health) Revisited

The Ontario Court of Appeal in *Taylor v. Canada (Health)* dealt with the apportionment of fault to non-parties, and also the ability of a defendant alleged tortfeasor to claim contribution and indemnity against another alleged tortfeasor pursuant to Section 5 of the *Negligence Act*.[i] [ii]

In *Taylor*, the statement of claim specifically plead that the defendant was liable only for "those damages that are attributable to its proportionate degree of fault". The Court of Appeal held that no contribution rights arose because the defendant would not be required to pay more than its proportionate share of the plaintiff's potential damages.

As a result, the Court of Appeal upheld the motion Judge's striking of a third party claim as disclosing no reasonable cause of action when considering Section 5 of the *Negligence Act*.

The Purpose of Partial Settlement Agreements

Since *Taylor* the Supreme Court of Canada has reviewed the purpose of Partial Settlement Agreements (eg. pierringer agreements) and their essential provisions in the case of *Sable Off-Shore Energy Inc. v. Ameron International Corp.*[iii]

One of these noted essential provisions is that the plaintiffs continue their action, but limit their claim to the non-settling defendants several liability.

In review of the essential provisions of a partial settlement agreement, the Ontario Court of Appeal in the recent case of *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181 discusses the resulting bar order as fulfilling the purpose of putting the non-settling defendant in the same economic position as it had been, if it had to pay the plaintiff in full, and recover indemnity from the settling defendant (ie simply removing the settling defendant from the payment equation).[iv]

The Question in *Endean*

In *Endean*, the Court was asked to consider whether following a pierringer agreement (between the defendant oral surgeons and the plaintiffs) and resulting amendment of the statement of claim by the plaintiffs, the only remaining defendant in the action (the hospital) would also remain liable for damages caused by non-party tortfeasors.

At trial in 2017, the hospital was found 5% at fault. 20% was apportioned to the oral surgeons and 50% to the manufacturer, with 25% to the distributor. Neither the manufacturer nor the distributor were ever parties to the actions and both were in fact bankrupt.

The plaintiffs had entered into a partial settlement agreement in 2013 with the oral surgeons. They maintained their action against St. Joseph's Hospital. The partial settlement agreement provided for dismissal of the action against the oral surgeons, and resulted in the dismissal of the crossclaims between the hospital and oral surgeons.

The statement of claim was amended to limit the claim against the hospital to its several or proportionate share of joint liability to the plaintiffs, and the plaintiffs claims were restricted "such that the plaintiffs would only claim those damages, if any, arising from actions or omissions of the defendant hospital".

On appeal, the hospital relied on the terms of the partial settlement agreement, the consequential amendment of the statement of claim, and the decision in *Taylor* to argue that the plaintiff's recovery was restricted to the 5% apportionment of fault against the hospital.

Justice Zarnett, in writing for the Court of Appeal, found that the trial judge erred in apportioning fault to the manufacturer and distributor and then reducing the recovery of the plaintiffs as result of that apportionment.

Justice Zarnett writes that the right of indemnity is not something which affects the plaintiffs. The Court, in return to *Taylor*, notes that if the second wrong-doer is not pursued by crossclaim, third party action or separate action or, if the second wrong-doer pursued is not credit-worthy or insured, the first wrong-doer will still have to pay 100% of the plaintiff's damages and recover no indemnity.

Athey v. Leonati **Revisited**

The Court of Appeal states that in practical terms the full-compensation principle set out in *Athey v. Leonati,* provides that the plaintiff may recover 100% of their losses from any

defendant who caused or contributed to a particular injury, regardless of the degree of fault of that defendant, and regardless of whether others, parties or non-parties, were also at fault.[v]

The Court in *Endean* reviews the resulting interplay with Section 1 of the *Negligence Act*, which provides that although the defendants remain jointly and severally liable to the plaintiff, each can exercise their statutory right to have fault apportioned among the wrong-doers such that indemnity will flow between them to their proportionate degrees of fault.

Endean Contribution and Indemnity Context

In *Endean* the Court notes that prior to the partial settlement agreement, the hospital and oral surgeons had crossclaimed against each other, and were therefore both at risk of having to pay 100% of the plaintiff damages. At the time of the partial settlement agreement, neither of them had proceedings for indemnity against the manufacturer or distributor and further, there would be no practical means of collecting any indemnity even if they had.

Furthermore, while the partial settlement agreement in *Endean* provided for the plaintiffs' claim to be amended to claim only from the defendants those damages, if any, arising from the acts or omissions of the defendant hospital, the court found those terms must be read in light of the context of the other provisions of the settlement agreement which demonstrated that it was only intended as a term of settlement that the plaintiffs not recover from the hospital anything attributable to the fault of the oral surgeons.

These terms included a provision of the partial settlement agreement, and resulting "bar order", which read that the apportionment of fault would be "among all defendants named in the statement of claim".

Further terms considered that the plaintiffs might be members of a class action against the distributor, and provided that the plaintiffs would reduce their claims against the hospital to take into account "the amounts they recovered from the distributor under the class action settlement".

The Court found that, taken as a whole against the evidentiary background, the partial settlement agreement and amended statement of claim did not require that the plaintiffs reduce their claims against the hospital by the proportionate fault of the manufacturer and distributor and thus, improve the position of the hospital.

In other words, the agreement and amendment did not authorize reduction of recovery to the plaintiffs due to the fault of persons other than the settling defendants (the oral surgeons).

Proportional Payment of Plaintiff's Damages

However, because prior to the partial settlement agreement, the hospital and the oral surgeons had each crossclaimed against the other and were both in the same positions, *vis à vis* the manufacturer and distributor, the Court accepted the hospital's argument on their proportional payment of the plaintiffs' damages.

The Court held that because the partial settlement agreement was designed to protect the hospital from paying more than its proportionate share, to the same degree as its prior crossclaim against the oral surgeons would have, were the hospital be required to pay 80% of the plaintiffs' damages (100% less the 20% apportioned to the oral surgeons), the hospital would be paying more than its proportionate share relative to the fault of the oral surgeons.

As a result, the Court of Appeal replaced the 5% payment of the plaintiff's damages by the hospital to 20% (based on the trial Judge's findings as between the hospital and oral surgeons – the surgeons being four time more at fault).

Take-Away

Ultimately the Court of Appeal found that the trial judge erred in relying on *Taylor* in these circumstances. While *Taylor* is authority for the apportionment of fault to non-parties, Justice Zarnett writes that the issue is not whether or not a court may do so, but under what circumstances the Court should do so.

The Court tells us in *Endean* that the proposition in *Taylor* is not so broad that it should entitle the apportionment of fault to non-parties and reduce the plaintiff recovery by that apportioned share of fault in all cases. The Court does not tell us however that this can never happen. *Taylor* remains good law in this contextual approach to partial settlement agreements.

[i] *Taylor v. Canada (Health),* 2009 ONCA 487
[ii] *Negligence Act, RSO 1990, c N.1*
[iii] *Sable Off-Shore Energy Inc. v. Ameron International Corp.,* [2013] 2 SCR 623, 2013 SCC 37
[iv] *Endean v. St. Joseph's General Hospital,* 2019 ONCA 181
[v] *Athey v. Leonati,* [1996] 3 S.C.R. 458