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Case of Note – Contribution and Indemnity rights only arise where Defendant required to pay more than its proportionate share of the Plaintiff’s damages

In *Taylor v Canada (Minister of Health)* 95 O.R. (3d) 561 the Ontario Court of Appeal dismissed the Defendant’s appeal of a motion dismissing a third party claim for contribution and indemnity.

The Plaintiff brought an action against Health Canada for damages allegedly suffered from the implantation of a surgical device into her jaw; specifically, that its negligent regulation of the devices was the cause of her injuries.

The Plaintiff limited her claim against the Defendant to those damages that were attributable to its **proportionate degree of fault** [emphasis added]. The Defendant, in turn, brought a Third Party action against the dental surgeon who performed the surgery and the hospital where the surgery was performed, seeking contribution and indemnity from those parties. The Third Parties brought a motion for dismissal under Rule 21 and were successful. The Defendant appealed.

In its reasons for dismissing the Appeal, the Court made it clear that contribution rights only arise where a Defendant is required to pay more than its proportionate share of the Plaintiff’s damages. As the Plaintiff here had limited her claim against the Defendant to its proportionate share of liability, it did not have a right to contribution and indemnity from the Third Parties. The Court also determined that it was within its jurisdiction to apportion fault among all three potential tortfeasors, despite the fact that the dental surgeon and hospital were not named in the action.

The Defendant, citing *Athey v Leonati* [1996] 3 S.C.R. 458 and section 5 of the *Negligence Act*, argued in its appeal that the Plaintiff’s injuries were indivisible and if it was not able to bring a Third Party action against the surgeon or the hospital, it may unfairly be held liable for the negligence of those parties.

In response to this argument, the Court said that, because of the Plaintiff’s “circumscribed” pleading, neither *Athey*, supra, nor section 5 of the *Negligence Act*, applied. The Court used the following example: If a plaintiff, injured by parties A, B and C, elects only to sue C for all of her damages, despite C only being 20% responsible for the plaintiff’s injuries, would be liable for 100% of the plaintiff’s damages. C; however, under its statutory right to apportionment under section 5 of the *Negligence Act*, can limit its losses by adding A and B as third parties, whereby it can recover the 80% portion for which it is not responsible, from those parties. In such case, the court will, under section 1 of the *Negligence Act*, apportion fault among the parties, so that they may make contribution and indemnify each other in the degree to which they are found at fault.

Using the example above, if the plaintiff claimed for only C's portion of her damages, which amounts to 20% of her total damages, C does not have a right to seek contribution and indemnity from other parties as it has only been required to compensate the plaintiff for its proportionate share of her total damages.

The Defendant also argued that the Court had overstepped its jurisdiction in apportioning fault against the dental surgeon and hospital, though they were not parties to the action. The Defendant relied on the Court of Appeal decision in *Martin v Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384, [2000] O.J. No. 4015 (C.A.), where at paragraph 32 the Court said: "there is no basis in s. 1 [of the *Negligence Act*] or anywhere in the *Act* for a judge to attribute a portion of fault to a "non-party."

In rejecting this argument, the Court distinguished *Martin v Listowel*, supra; on the grounds that the passage cited by the Defendant was dicta and therefore not binding on the Court and that subsequent decisions of the Court had overtaken that view. With reference to *M. (J) v. B. (W.)* (2004), 71 O.R. (3d) 171, [2004] O.J. No. 2312 (C.A.), the Court said "in different factual settings, this court held that a judge has jurisdiction under s.1 of the *Negligence Act* to apportion fault against a person who is not a party to the action and can exercise this jurisdiction in an appropriate case."

January 15, 2010