COURT OF APPEAL FOR ONTARIO

CITATION: Cadieux v. Cadieux, 2025 ONCA 405
DATE: 20250604
DOCKET: COA-24-CV-0467

George, Favreau and Gomery JJ.A.

BETWEEN

Kalob Cadieux by his litigation guardian Lucie Saint-Phard**, Lucie Saint-Phard personally**, and Jakin Cadieux by his litigation guardian Lucie Saint-Phard**

Plaintiffs

(Respondents**)

and

Patrick Cadieux, Scott Ray*, Kenworth Toronto Leasing Ltd.*, United Petroleum Transport Ltd.*, City of Ottawa**, Intact Insurance Company, and Federated Insurance Company of Canada

Defendants

(Appellants*/Respondents**)

David A. Zuber and Patrick Essig, for the appellants

Robert M. Ben, Darcy R. Merkur, Ian W. Furlong, and Ava N. Williams, for the respondents Kalob Cadieux by his litigation guardian, Lucie Saint-Phard, Lucie Saint-Phard and Jakin Cadieux by his litigation guardian Lucie Saint-Phard

Stephanie Doucet, for the respondent City of Ottawa

W. Colin Empke, for the respondent Patrick Cadieux[1]

Joseph Y. Obagi and Elizabeth A. Quigley, for the Intervener Ontario Trial Lawyers Association

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[1] Mr. Empke appeared but made no written or oral submissions on behalf of Patrick Cadieux.

Heard: December 19, 2024

On appeal from the order of Justice Alexandre Kaufman of the Superior Court of Justice, dated April 2, 2024, with reasons reported at 2024 ONSC 1938.

George J.A.:

[1] This appeal arises from proceedings commenced after a motor vehicle accident. The plaintiffs entered into a settlement known as a Pierringer agreement[2] (the "Agreement") with one of the defendants. The motion judge approved the Agreement, and the pleadings were then amended according to its terms. The non-settling defendants appeal the motion judge's order. The intervener, the Ontario Trial Lawyers Association, made submissions with respect to the implications of Pierringer agreements in multi-party litigation.

BACKGROUND

[2] On April 25, 2010 the appellant Scott Ray was operating a tractor-trailer northbound along Merivale Rd. in Ottawa towards its intersection with Fallowfield Rd. The truck operated by Mr. Ray was leased by his employer, the appellant United Petroleum Transport Ltd. The defendant, Patrick Cadieux, was travelling eastbound on Fallowfield Rd. in a minivan. By his own admission, Mr. Cadieux entered the intersection on a red light and collided with Mr. Ray's truck. Mr.

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[2] *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. S.C. 1963).

Cadieux's minor children, Kalob Cadieux and Jakin Cadieux, were passengers in the minivan and suffered catastrophic injuries.

[3] Expert evidence confirmed that Mr. Cadieux entered the intersection eight seconds after the light had turned red. It is therefore highly likely that Mr. Cadieux will be found primarily liable.

[4] The statement of claim was issued in April 2012. In addition to the appellants, the plaintiffs named the City of Ottawa ("Ottawa") as a defendant, alleging that it was negligent in the design of the intersection. The plaintiffs retained liability experts in an effort to establish Ottawa's liability. The appellants filed their statement of defence and crossclaim in June 2012. Ottawa filed its statement of defence and crossclaim in March 2013.

[5] The plaintiffs commissioned a Cost of Care Report for Kalob, which estimates that his future care costs alone could exceed $14M. This amount surpasses the combined insurance coverage for Mr. Cadieux and United Petroleum; United Petroleum has $5M in coverage, while Mr. Cadieux's insurer, Intact, has confirmed coverage of $2M. Ottawa is self-insured and thus not subject to any third-party limit.

THE PIERRINGER AGREEMENT

[6] On October 27, 2023 the plaintiffs and Ottawa entered into the Agreement. The Agreement provided that the plaintiffs would amend their claims such that the

non-settling defendants would remain jointly and severally liable only to the degree of their collective fault. The objective was to eliminate any crossclaim for contribution and indemnity against Ottawa:

> [T]he claims advanced by the Plaintiffs against the Remaining Defendants will only be in respect of any collective joint and several liability of the Remaining Defendants and the Plaintiffs shall only seek recovery of damages as against the Remaining Defendants to the extent of the Remaining Defendants' degree of fault for any damages that may be adjudged to have been sustained by the Plaintiffs.

[7] The Agreement also provided that the trial court had full authority to apportion liability among all defendants, including Ottawa.

PROCEEDINGS BELOW

The Appellants' Position

[8] The appellants objected to the approval of the Agreement, arguing that if approved they could end up having to pay not only their share of damages but also a higher portion of Mr. Cadieux's share than they would without the Agreement.

[9] Under s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, a successful plaintiff is entitled to receive judgment for all damages from any tortfeasor, but the tortfeasors may seek contribution or indemnity from each other according to their respective degree of fault. The Agreement, by removing Ottawa from the mix, leaves the appellants at risk of insufficient recovery from their co-tortfeasor. In other words, if the Agreement is approved it is likely that the appellants will have

to pay Mr. Cadieux's portion, and if he turns out to be insolvent not only will they be unable to recover from Mr. Cadieux any amount exceeding his policy limits they will not be able to seek contribution from Ottawa.

Motion Judge's Decision

[10] The motion judge rejected the appellants' argument that the Agreement substantially prejudiced them. He approved the Agreement and granted leave to amend the statement of claim pursuant to its terms. The motion judge provided three reasons for doing so: 1) because of the several possible outcomes at trial the purported prejudice to the appellants might never materialize; 2) declining to approve the Agreement would undermine the policy objective of promoting agreements – which is important in complex multi-party litigation – and this policy objective outweighed any speculative prejudice; and 3) it is preferrable to address any prejudice the appellants might suffer at trial once the consequences of the Agreement are known.

[11] On that last point, the motion judge referred to and relied on *M.(J.) v. B.(W.)* (2004), 71 O.R. (3d) 171 (C.A.), in which this court held that courts could apportion the liability of settling defendants even if they are no longer parties to the action. The motion judge concluded that: "[i]f there were a remedy available to litigants in [the appellants'] position, it would be preferrable to address the prejudice at trial."

ISSUES

[12] This appeal gives rise to two issues:

1. Did the motion judge err by approving the Agreement when it could lead to United Petroleum, a non-settling party, being liable to pay a higher share of the underfunded amount arising out of the potential insolvency or impecuniosity of joint tortfeasor, Mr. Cadieux?

2. What procedural orders, if any, should be made to facilitate Ottawa's participation at trial?

DISCUSSION

Issue 1. Did the motion judge err by approving the Agreement?

[13] It is useful to start by discussing the nature of a Pierringer agreement and specifically what they are designed to achieve. Pierringer agreements are a valuable tool to encourage settlement in multi-party litigation. They shield the settling defendant from any claims by non-settling defendants for contribution and indemnity because the settling defendant is assured to only pay damages commensurate with their degree of fault found at trial: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, 359 D.L.R. (4th) 381, at para. 23. To achieve this, essential terms include 1) the plaintiff limiting its claim against any non-settling defendant to their several liability, 2) the settling defendant no longer seeking contribution and indemnity from any non-settling defendant, and 3) the

plaintiff indemnifying the settling defendant against any claim over by a non-settling defendant: *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181, 54 C.C.L.T. (4th) 183, at para. 52.

[14] There is a strong public interest in encouraging, and upholding, Pierringer agreements as they contribute to "reducing litigation's stubbornly endemic delays, expense and stress": *Sable*, at paras. 1 and 11; *M.(J.)*, at para. 65. Furthermore, by carving itself out of further exposure a Pierringer agreement allows a defendant to achieve finality.

[15] Although not all Pierringer agreements require court approval by their own terms, approval is often necessary to amend pleadings and to stay or dismiss crossclaims: *Allianz v. Canada (Attorney General)*, 2017 ONSC 4484, 139 O.R. (3d) 424, at para. 10.

[16] In what circumstances should a court decline to approve a Pierringer agreement? It would only be appropriate to do so when the agreement significantly prejudices a non-settling defendant and when that prejudice outweighs the public interest in encouraging settlements.

[17] There would be significant prejudice when, for example, the terms of the Pierringer agreement materially curtail the non-settling defendant's ability to know and present their case, or to pursue their own settlement: *Sable*, at para. 27. The prejudice must be more than the disadvantages to a non-settling defendant that

are inherent in the basic form of a Pierringer agreement, such as their defence no longer being assisted by the settling defendant or the settling defendant no longer sharing in any joint and several liability.

[18] As they did in the court below, the appellants use the following scenario to illustrate how they are prejudiced by the Agreement: if the damages ordered exceed Mr. Cadieux's policy limits, and if Mr. Cadieux is unable to personally pay them, the appellants would be jointly liable to the respondents for Mr. Cadieux's share of the judgment without any contribution from Ottawa.

[19] The appellants argue that the law of restitution demands a proportionate sharing of the underfunded amount caused by a co-tortfeasor's insolvency. They ask us to either set aside the motion judge's order and decline to approve the Agreement, or allow them to argue, after liability has been apportioned by the trial court, that a proportionate reduction be made to their share of the underfunded amount to reflect their degree of fault vis-à-vis Ottawa's.

[20] In my view, the motion judge did not err in rejecting the appellants' claim of prejudice, nor did he err in declining to grant them permission to argue for a proportionate reduction.

[21] The prejudice alleged and the availability of proportionate reduction must both be assessed in the context of the *Negligence Act*. Section 1 of the *Act* provides that:

> Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at faut or negligence.

[22] This section makes clear that a victim is entitled to full compensation from any one concurrent tortfeasor. It also makes clear that liability, as among co-tortfeasors, is several and that they can seek contribution and indemnity from each other to the degree to which they are respectively at fault. In other words, the plaintiff is to be made whole, and the risk that the tortfeasor from whom the plaintiff claimed full damages has to pay more than their own share of fault is on that tortfeasor. The effect of this section is that a tortfeasor may well have to "pay 100% of the plaintiff's damages and recover no indemnity" from co-tortfeasors who are "not pursued by cross-claim, third party action or separate action" or "not creditworthy or insured": *Endean*, at para. 49, citing *Taylor v. Canada (Health)*, 2009 ONCA 487, 95 O.R. (3d) 561, at paras. 18-20. See also *Chinook Group Ltd. v. Foamex International Inc.* (2004), 72 O.R. (3d) 381 (S.C.), at para. 6.

[23] The appellants' alternative argument that they should be permitted to seek, at trial, a proportionate reduction based on the apportionment of liability, is

precluded by the *Negligence Act* as it could result in the plaintiffs receiving less than the total judgment obtained.

[24] This court in *Renaissance Leisure Group Inc. v. Frazer* (2004), 242 D.L.R. (4th) 229 considered the argument that the *Negligence Act* does not contemplate the need to spread risks in situations of insolvency or impecuniosity: at para. 52. Acknowledging the Ontario Law Reform Commission's recommendation that courts be expressly allowed to divide the share of an insolvent tortfeasor *(Report on Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ministry of Attorney General, 1988), at pp. 47-48),[3] Sharpe J.A. emphasized that the Ontario Legislature has yet to act on it. Sharpe J.A. ultimately held that there was no basis to apportion damages in relation to someone not involved in the same suit.

[25] The appellants rely on Sharpe J.A.'s comment at para. 52 that "[t]he situation as among wrongdoers who are all sued and all found to be jointly and severally liable … may be different". This, however, does not apply here as the settling defendant in this case, Ottawa, will <u>not</u> be jointly and severally liable with the appellants should the Agreement be approved.

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[3] Saskatchewan's *Contributory Negligence Act*, RSS 1978, c C-31, as an example, expressly provides for the kind of proportionate reduction that the appellants seek here: see s. 3.1(2).

[26] Acknowledging that Ontario's *Negligence Act* does not explicitly provide for a proportionate reduction, the appellants argue that it is available as a form of restitution rooted in equity. They point to *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, where the majority held at paras. 70-73 that the *Insurance Act*, R.S.O. 1990, c. I.8, by providing for the designation of beneficiaries, does not oust equitable rights that others may have in policy proceeds. The essence of the appellants' argument on this point is that the *Negligence Act* likewise does not extinguish its claim in equity here.

[27] Assuming for the moment that there is an enrichment and corresponding deprivation, and that s. 1 of the *Negligence Act* does not meet the "irresistible clearness" standard to serve as a juristic reason for the enrichment (*Moore*, at para. 70), I would still reject this argument. That is because, if the alleged enrichment is said to flow to the plaintiffs, the *Negligence Act* expresses the clear policy objective to make them whole even if it subjects one of the tortfeasors to the risk of overpaying their share of liability. And, if the alleged enrichment lies with Ottawa, the proportionate reduction the appellants seek would be tantamount to putting Ottawa back in the position of joint liability, which would remove a key incentive for defendants in multi-party litigation to settle, thereby undermining the public interest in encouraging settlements.

[28] I note further that co-tortfeasors being liable to each other with respect to their degree of fault has been in effect under Ontario's *Negligence Act* since 1930.

In my view, the longstanding and well-established principle that the risk of an insolvent or impecunious tortfeasor falls onto other joint tortfeasors (and not the victim), as the necessary implication of a statutory requirement, cannot itself give rise to prejudice.

[29] The appellants' argument that the Agreement gives rise to prejudice is based partly on the understanding that it would otherwise be entitled to seek "equitable restitution" for unsatisfied portions of Mr. Cadieux's liability. As I already explained, such a claim is not available with or without the Agreement. I therefore reject the submission that the appellants suffered substantive prejudice by virtue of them losing the opportunity to make a restitution claim.

[30] As I note above, a Pierringer agreement does not inherently prejudice non-settling defendants. As Zarnett J.A. explains in *Endean*, at para. 53, the design of Pierringer agreements reduces plaintiffs' recovery from the non-settling defendant by the degree of fault attributable to the settling defendant, which "effectively put(s) the non-settling defendant in the same economic position as if it paid the plaintiff in full and recovered any indemnity from the settling defendant". Put differently, the settling defendant no longer sharing joint liability also frees the non-settling defendant from any liability for the fault of the settling defendant.

[31] When there is an insolvent or impecunious co-defendant, there is always a risk of having to pay more than one's proportionate share. This was a risk to

Ottawa, as well as the appellants, from the start of the litigation. And if the objective is indeed to encourage settlements, as the Supreme Court puts it in *Sable*, at para. 29, “someone has to go first”, and in this case Ottawa did. The ability to avoid joint liability with an insolvent or impecunious co-defendant is an incentive to settle and should not give rise to prejudice.

[32] This is particularly important because complex multi-party litigation often relies on the first settlement to trigger what the intervener calls “cascading settlements”. The public interest in facilitating such an outcome outweighs any prejudice the appellants can be said to have suffered.

[33] The motion judge therefore did not err in approving the Agreement.

Issue 2. What procedural orders, if any, should be made to facilitate Ottawa’s participation at trial?

[34] The second issue to address is the appellant’s request for certain procedural orders, including that representatives of Ottawa attend trial as fact witnesses if summoned; that Ottawa make available its discovery evidence; that Ottawa be deemed adverse in interest to the non-settling defendants; and that the appellants be permitted to bring a motion to have Ottawa waive privilege over its liability experts.

[35] While some of these proposals seem sensible, I would not disrupt the motion judge’s decision to leave these procedural issues to the trial judge or the case management judge.

CONCLUSION

[36] I would dismiss the appeal.

[37] Costs are payable by the appellants to the plaintiffs in the all-inclusive amount of $7,500, and to Ottawa in the all-inclusive amount of $5,000. No costs are sought by the Intervener and none are ordered.

Released: June 4, 2025 “J.G.”

“J. George J.A.”
“I agree. L. Favreau J.A.”
“I agree. S. Gomery J.A.”