COURT OF APPEAL FOR ONTARIO

CITATION: Endean v. St. Joseph's General Hospital, 2019 ONCA 181
DATE: 20190308
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Rouleau, van Rensburg and Zarnett JJ.A.

BETWEEN

Paulette M. Endean, Frank William Endean and Debbie Endean

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

St. Joseph’s General Hospital

Defendant (Respondent/
Appellant by way of cross-appeal)

AND BETWEEN

Janet Hearsey by her Litigation Guardian Leslie Hearsey and Leslie Hearsey

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

St. Joseph’s General Hospital

Defendant (Respondent/
Appellant by way of cross-appeal)

AND BETWEEN

Stephen Karam, Estate Trustee of the Estate of Andrew Karam

Plaintiff (Appellant/
Respondent by way of cross-appeal)

and

St. Joseph's General Hospital

Defendant (Respondent/
Appellant by way of cross-appeal)

AND BETWEEN

Sherry Lind, Gino Deamicis, Lorraine Lind by her Litigation Administrator Crystal Lind, Lauri Lind, Crystal Lind, Donald Deamicis and Daniel Deamicis

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

St. Joseph's General Hospital

Defendant (Respondent/
Appellant by way of cross-appeal)

Brian Moher and Monica Zamfir, for the appellants/respondents by way of cross-appeal

Stephen Wojciechowski and Dawne Latta, for the respondent/appellant by way of cross-appeal

Heard: January 9, 2019

On appeal from the judgments of Justice F. Bruce Fitzpatrick of the Superior Court of Justice, dated April 27, 2017, with reasons reported at 2017 ONSC 2632, and from the costs order, dated December 1, 2017, with reasons reported at 2017 ONSC 7190.

Zarnett J.A.:

Introduction

[1] The appellants Paulette Endean, Janet Hearsey, Andrew Karam and Sherry Lind each had surgery at the respondent St. Joseph's General Hospital ("the hospital") in the mid 1980's. Each was implanted with a Vitek Proplast Teflon Interpositional implant ("the implant"), a device designed to replace a meniscus inside the temporomandibular joint (TMJ). The TMJ is a complex load bearing joint located between the skull and jaw which is central to, among other things, a person's ability to talk, chew, swallow, and yawn.

[2] The implant caused injury to each of these individuals. It delaminated inside the TMJ, leaving particulate residue which, over time, caused degenerative bone loss. All four individuals had perforations in their skull in the area of their TMJ.

[3] In 1996 and 1997, the appellants commenced actions against the hospital and the oral surgeons who actually did the implant surgery and follow up care ("the Endean, Karam, Lind, and Hearsey Actions"). The hospital and the oral surgeons cross-claimed against one another in all four actions.

[4] In 2013, the appellants reached settlements with the oral surgeons. A Pierringer Order was made in each action, which affected the way the actions would continue against the hospital. The Pierringer Orders dismissed the actions against the oral surgeons and the cross-claims between the hospital and the oral surgeons. They provided that each of the appellants' claims "are restricted such that [the appellants] will only claim those damages, if any, arising from the actions or omissions of the Defendant Hospital."

[5] The Pierringer Orders required the statement of claim in each action to be amended to limit the claim against the hospital to its several liability or proportionate share of joint liability to the appellants. The appellants' recovery would be limited to the damages, costs and interest attributable to the hospital's several liability, or proportionate share of joint liability, as may be proven at trial. And the Pierringer Orders required the appellants to acknowledge, in their amended pleadings, that the court at trial had the authority to adjudicate upon the apportionment of fault among all defendants who had been named in each action, i.e., the hospital and the oral surgeons. The Pierringer Orders made specific provision for the obtaining and use of evidence by and about the oral surgeons at a trial between the appellants and the hospital.

[6] In 2016, the actions came to trial together. The parties agreed at the outset to bifurcate the trial, dealing first with the issue of liability.

[7] The trial judge:

a) Dismissed the Endean, Karam, and Lind Actions on the basis that each had been commenced beyond the two year limitation period in the *Public Hospitals Act* ("the *PHA*"), R.S.O. 1980 c. 410, s. 28 and R.S.O. 1990, c. P.40, s. 31;

b) Held that the Hearsey Action was not barred by the *PHA* limitation period, because Ms. Hearsey had received a follow up treatment at the hospital within two years of the commencement of her action;

c) Found that the hospital was negligent in acquiring the implants and the oral surgeons were negligent in failing to take due care when assessing the viability of the implant and in the manner they followed up with patients after becoming aware of problems. He apportioned fault between them as follows: 5% of the fault to the hospital, 20% of the fault to the oral surgeons. He also apportioned 50% of the fault to the manufacturer of the implant, Vitek Inc., for making a defective product, and 25% of the fault to the distributor of the implant, Instrumentarium, who purchased it from the manufacturer and sold it to the hospital without due enquiry as to whether it was an approved product. Neither the manufacturer nor the distributor were ever parties to the actions and both were bankrupt;

d) Granted judgment in the Hearsey Action against the hospital for 5% of the damages that were to be assessed in the second phase of the trial; and

e) Granted costs in favour of the hospital in each of the Endean, Karam and Lind Actions.

[8] The appellants appeal, raising the following grounds:

a) The trial judge erred in dismissing the Endean, Karam and Lind Actions on the basis of the *PHA* limitation period. They raise two points under this issue. First, they say that the two year limitation period in the *PHA* did not apply, because the limitation period related only to actions for negligence in the admission, care, treatment or discharge of a patient. The trial judge, they argue, situated the negligence of the hospital in its purchase of the implant, which should have been subject to the six year limitation period in the former *Limitations Act*, R.S.O. 1990, c. L.15. Second, they argue that even if the *PHA* applied, the trial judge should have found that the limitation period was extended under the doctrine of fraudulent concealment.

b) The trial judge erred in rejecting their argument that the hospital was liable for breaching a duty to recall patients once it was advised of problems

with the implant. They say that if this theory of liability were accepted, it would affect the apportionment of liability and the limitation period.

c) The trial judge erred in apportioning fault to the manufacturer and the distributor, and thus restricting recovery in the Hearsey Action (and the other actions if they were improperly dismissed) to only 5% of the damages to be assessed.

[9] The hospital cross-appeals. It argues that the Hearsey Action should also have been dismissed on the basis of the *PHA* limitation period. What the trial judge relied upon to bring the action within time was not “treatment”, but simply a diagnostic test. Second, it argues that the trial judge erred in failing to include HST in the cost awards made in its favour in the Endean, Lind, and Karam Actions.

[10] For the reasons that follow I would allow the appeal in part. I would not disturb the trial judge’s finding that the Endean, Karam, and Lind Actions were barred by the *PHA* limitation period. In my view, the trial judge did not err in applying that limitation period or in rejecting the argument of fraudulent concealment. Nor did the trial judge err in rejecting the argument that the hospital breached a duty to recall. The trial judge did err, however, in apportioning fault to the manufacturer and distributor and reducing the recovery of the appellants in the Hearsey Action as a result of that apportionment. I would vary the judgment in the Hearsey action as described below.

[11] I would dismiss the cross-appeal. Contrary to the assertions of the hospital, in the circumstances of this case Ms. Hearsey's follow up appointment should not be ignored in determining when her treatment ceased and thus when the *PHA* limitation period commenced to run. Nor is there an error in principle in the trial judge's award of costs.

Analysis

[12] In light of the nature of the grounds of appeal the facts relevant to determining the issues (other than those in the outline above) are set out in relation to each issue discussed below.

(1) The Limitation Period Issues

The Approach of the Trial Judge

[13] Because of the dates the actions were commenced, the argument about limitation periods concerns provisions which are not currently in force but were at the relevant times.

[14] The *PHA* limitation period applied by the trial judge provided as follows:

> Any action against a hospital or any nurse or person employed therein for damages for injury caused by negligence in the admission, care, treatment or discharge of a patient shall be brought within two years after the patient is discharged from or ceases to receive treatment at the hospital and not afterwards.
>
> (Between 1985 and 1990 this was s. 28 of the *PHA*, R.S.O. 1980, c. 410. From 1990 forward, this was s. 31

> of the *PHA*, R.S.O. 1990, c. P.40. The limitation period provision was repealed in 2004, as a result of the enactment of the *Limitations Act, 2002*, S.O. 2002, c. 24.)

[15] The trial judge rejected the appellants' argument the *PHA* limitation period is subject to a discoverability principle. Thus, it was irrelevant that the appellants had no idea anything was wrong with them until 1994 at the earliest and commenced their actions within two years of knowing the implant had failed and caused them damage. For the non-applicability of the discoverability principle to the *PHA*, the trial judge relied upon: *Von Cramm Estate v. Riverside Hospital of Ottawa* (1986), 32 D.L.R. (4th) 314, 17 O.A.C. 218 (C.A.); *Hay v. Canadian Red Cross Society,* [2004] O.J. No. 2887 (S.C.); and *Purtell v. Royal Ottawa Hospital*, [2005] O.J. No. 2965 (S.C.), aff'd 2007 ONCA 367, leave to appeal denied, 2007 S.C.C.A. No. 362.

[16] In *Von Cramm*, Cory J.A. (as he then was) made it clear that the discoverability principle did not apply to the *PHA*. He noted the harshness of applying a limitation period in a situation where, as was the case in *Von Cramm* and is the case here, a plaintiff could not have known or reasonably known of the negligence of the hospital until after any limitation period had expired. But that result was the product of the clear wording of the *PHA*. The limitation provision was enacted to protect public institutions. Any amelioration of the harshness of it expiring before a cause of action was discoverable was required to come from the Legislature, not the courts: see p. 318.

[17] Although *Von Cramm* was decided before *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, in my view the trial judge was correct to find that the discoverability principle did not apply to the *PHA*. *Peixeiro* approved the application of the discoverability principle to limitation provisions which, properly interpreted, turned in some way on the injured person's knowledge for their commencement: see pp. 562-566. But the courts in both *Hay* and *Purtell* held that *Peixeiro* did not make the discoverability principle applicable to the *PHA*, because its limitation period runs from a fixed event unrelated to either the plaintiff's knowledge or the basis of the cause of action: see *Hay*, at paras. 14-16, and *Purtell*, at paras. 36-37. In this court, the appellants did not challenge the conclusion that the discoverability principle was inapplicable to the *PHA*.

[18] The trial judge then considered when a person ceases to receive "care" or "treatment" for the purpose of determining when the *PHA* limitation period commenced. The trial judge held that the appellants' treatment or care ceased upon their being discharged on the last occasion each attended for a TMJ implant issue. He reasoned that where a later treatment in a hospital can be connected to the one about which negligence is alleged, the time limit runs from the date of the latest treatment, following *Fiorelli v. St. Mary's General Hospital*, [1995] O.J. No. 631 (C.A.).

[19] The trial judge made the following findings on the limitation issue:

a. Ms. Lind received “care” and “treatment” from the hospital on June 17, 1985, June 5, 1986 and November 26, 1991. This included the placement and removal of the implant, and the removal of certain debris from the TMJ that had been at the site of the implant. Although there was evidence that she had attended at the hospital on a number of occasions thereafter, the trial judge made a factual finding that these attendances related to other issues, not the implant or care or treatment of its effects. These findings are not challenged on appeal. Accordingly, the trial judge used November 26, 1991 as the date Ms. Lind ceased to receive care or treatment from the hospital, and thus as the date the *PHA* limitation period began to run. He held that her claim became statute barred on November 27, 1993. The Lind Action, commenced on August 20, 1996, was thus out of time.

b. Ms. Endean attended the hospital only once, for her implant surgery, on October 8, 1985. The removal of the implant was done elsewhere and there were no other treatments at the hospital related to the implant or its effects. Accordingly, the trial judge held that October 8, 1985 was the commencement of the *PHA* limitation period, and it expired on October 9, 1987. The Endean Action, commenced July 11, 1997, was thus out of time.

c. Mr. Karam attended the hospital only once, for his implant surgery, on November 21, 1985. The removal of the implant was done elsewhere and there were no other treatments at the hospital related to the implant or its effects. The trial judge found that November 21, 1985 was the commencement of the *PHA* limitation period, which expired on November 22, 1987. The Karam Action, commenced on March 14, 1997, was therefore out of time.

d. Ms. Hearsey had her implant surgery on March 5, 1986, but attended the hospital for a follow up radiological procedure - a tomogram - on June 9, 1994. The trial judge found the tomogram was related to the failure of the implant, and thus was related to the original treatment she received in 1986. Although no negligence was alleged against the hospital for the way it conducted the tomogram, it was done as a result of the original implant and therefore was clearly connected to the negligence alleged. The trial judge held the tomogram was “treatment”, and therefore the *PHA* limitation period commenced on June 9, 1994 and did not expire until June 10, 1996. The Hearsey Action, commenced on March 21, 1996, was thus in time.

[20] The trial judge considered and rejected the argument that the limitation period should be extended by operation of the doctrine of fraudulent concealment.

He observed that the issue was raised late and not referred to in the appellants' pleadings. But he went on to state that:

> [M]ost importantly, I am not persuaded that the evidence at this trial has proven, or even suggested, that the Hospital was an unscrupulous defendant or that the acts or even failings of any of its employees or directors or agents came anywhere close to what any reasonable person could describe as constituting "fraud" or a "fraudulent concealment".

The Limitation Period Appeal regarding the Endean, Karam and Lind Actions

[21] The appellants attack the trial judge's limitation period conclusions that led him to dismiss the Endean, Karam and Lind Actions on two bases.

[22] First, they argue that the *PHA* limitation period does not apply to the wrong found to have been committed by the hospital; they contend it was not negligence in the care, treatment or discharge of the appellants. They argue that the *PHA* limitation period, a provision that restricts rights of action, must be strictly interpreted: *Fenton v. North York Hydro-Electric Commission* (1996), 29 O.R. (3d) 481, 92 O.A.C. 53 (C.A.), at pp. 11-12. The trial judge found the only negligence of the hospital was its decision to purchase the implants, at a time when they were not approved for sale or use in Canada, without enquiring whether they had received any such approval. For example, the trial judge stated "I agree with the argument of counsel for the plaintiffs that a reasonable person would think 'maybe we should check to see if the device is approved' before it was acquired." The

appellants argue that if one gives the *PHA* a strict reading, the hospital's decision to purchase the implants was not negligence in the treatment or care of a patient, but negligence in a purchasing decision, made before the surgeries of the appellants were even contemplated. That negligence, they argue, would be subject to the limitation period in the former *Limitations Act*, and its overlay of discoverability.

[23] The difficulty with this argument is that the negligence of the hospital in purchasing the implants was not actionable by any of the appellants on its own. It was only actionable because the implants were made available for use by oral surgeons for surgeries performed on Ms. Endean, Ms. Hearsey, Mr. Karam and Ms. Lind at the hospital. The appellants had a claim for negligence against the hospital only because each became a patient of the hospital, receiving treatment and care (that is, a surgical procedure), using devices that had been negligently acquired by the hospital for just such a use.

[24] The trial judge's findings are illustrative of the integral connection between the purchase of the implants, the appellants' care and treatment, the appellants' injuries and the negligence of the hospital. The trial judge found that:

> Given that the device at issue would be placed in a person's body potentially for life and given that there was a government regulatory regime in place allowing or not allowing distribution of a device by manufacturers, failing to inquire about the use of the device is evidence of negligence.

And he found that the negligence in the purchase caused damage to the appellants exactly because "[b]ut for the acquisition of the device, the oral surgeons could not have done the procedure, at least not at [the respondent] Hospital."

[25] In my view, giving the *PHA* the strict reading contemplated by cases like *Fenton* does not alter the conclusion that the *PHA* limitation provision applies here. A negligent act by a hospital before a patient receives care or treatment, which becomes actionable only because it enables a treatment at the hospital that causes injury, is negligence in the care or treatment of the patient within the meaning of the *PHA* limitation provision.

[26] Accordingly, I would not give effect to this ground of appeal.

[27] Second, the appellants argue that the trial judge erred in rejecting their argument of fraudulent concealment. They point to the hospital having become aware of problems with the implants five years before the appellants. The trial judge's error, they say, flowed from his having approached the issue as though what was required was conduct that was "fraudulent" in the common law sense.

[28] I agree with the appellants that the doctrine of fraudulent concealment does not require common law fraud. As the Supreme Court of Canada said in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 390:

> [W]here there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought

> to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud.

[29] I also agree with the appellants that the doctrine of fraudulent concealment could apply to the *PHA* limitation period. In this court's decision in *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47, the majority held that the doctrine of fraudulent concealment has no room to operate where the provisions of the *Limitations Act, 2002*, which are subject to a codified discoverability test, apply: see para. 71. But, at para. 64, the majority did not question the applicability of the doctrine of fraudulent concealment to other statutes:

> This court has held that the principle of fraudulent concealment is available in cases involving limitation periods contained in statutes other than the (*Limitations Act, 2002*) including: s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23: *Giroux Estate*; *Roulston v. McKenny*, 2017 ONCA 9, 135 O.R. (3d) 632; the limitation period under the *Real Property Limitations Act*, R.S.O. 1990, c. L.15: *Anderson v. McWatt*, 2015 ONSC 3784, at para. 77, appeal dismissed 2016 ONCA 553; and the limitation period created by s. 82(2) of the former *Employment Standards Act*, R.S.O. 1990, c. E.14: *Halloran v. Ontario (Employment Standards Act Referee)* (2002), 217 D.L.R. (4th) 327 (C.A.), at para. 35.

[30] However, I disagree with the appellants that the doctrine applies in the circumstances of this case. In *Zeppa*, the majority adopted the following description of the doctrine at para. 62:

> A succinct, but comprehensive, summary of the elements of the principle is found in the decision of Perell J. in *Colin v. Tan*, 2016 ONSC 1187, 81 C.P.C. (7th) 130 at paras. 44-47:
>
> > Fraudulent concealment will suspend a limitation period until the plaintiff can reasonably discover his or her cause of action.
> >
> > The constituent elements of fraudulent concealment are threefold: (1) the defendant and plaintiff have a special relationship with one another; (2) given the special or confidential nature of the relationship, the defendant's conduct is unconscionable; and (3) the defendant conceals the plaintiff's right of action either actively or the right of action is concealed by the manner of the wrongdoing.
> >
> > Fraudulent concealment includes conduct that having regard to some special relationship between the parties) concerned is unconscionable. <u>For fraudulent concealment, the defendant must hide, secret, cloak, camouflage, disguise, cover-up the conduct or identity of the wrongdoing</u>. [Emphasis added.]

[31] The trial judge's findings of fact preclude any conclusion that the hospital was hiding, secreting, cloaking, camouflaging, disguising or covering up anything. The appellants point to the hospital's receipt of a notification in May, 1990 from the Emergency Care Research Institute ("ECRI") that indicated that the implant can contribute to progressive bone degeneration, should not be used anymore, existing stocks of the implant should be returned to the manufacturer, and persons who

had received the implant required monitoring and follow up. They also point to the hospital, in August of 1990, having received correspondence from the distributor recalling the implants and asking for the names of oral surgeons who had patients with the implants, so that safety information could be provided by the distributor to the oral surgeons.

[32] The facts found by the trial judge, which are referred to in the section below on the duty to recall, show that the hospital contacted the oral surgeons to ensure they knew about the issue with the implants. The hospital was advised that the oral surgeons were aware of the issue, and the hospital had the reasonable expectation that any follow up with patients would be done by the oral surgeons. The hospital was also in touch with the distributor and was advised that it already had the names of the oral surgeons for further communication. Those facts are not consistent with the hospital hiding, secreting, cloaking, camouflaging, disguising or covering up anything. In other words, they are not consistent with concealment in the sense required by the doctrine.

[33] Accordingly I would reject this ground of appeal.

<u>The Limitation Period Cross-Appeal regarding the Hearsey Action</u>

[34] By cross-appeal, the hospital argues that the trial judge erred in not dismissing the Hearsey Action as barred by the *PHA* limitation period. It argues that the diagnostic procedure that Ms. Hearsey had in 1994, the tomogram, was

not “treatment”. In the hospital’s view, the trial judge erred in using it to determine the start date of the limitation period for the Hearsey Action. The hospital concedes, per *Fiorelli*, that it is the most recent treatment that is the operative commencement of the limitation period, as long as it has a connection to the care or treatment in which the negligence is alleged to have occurred. The hospital also concedes that the tomogram was connected to the implant surgery. Its point is that a diagnostic procedure is not treatment.

[35] I would reject this argument. Nothing in the *PHA* limitation provision supports the distinction between a diagnostic procedure and treatment the hospital seeks to make, especially if one reads the provision so as to minimize the extent to which it interferes with rights of action, as cases such as *Fenton* require. Treatment is a term that encompasses investigation necessary to determine a future course of care and treatment, as well as investigation to monitor the effect of previous care and treatment. The tomogram in these circumstances was treatment.

[36] Accordingly, I would not give effect to this ground of the cross-appeal.

(2) The Duty to Recall

[37] The appellants argue that the trial judge failed to give effect to the correct duty of care. Although he criticized the oral surgeons for their delay in calling back patients after becoming aware of implant problems, the appellants say the trial judge should have recognized that when the hospital received the 1990 ECRI

warning and the August 1990 letter from the distributor, it owed a duty of care to "contain the risks". In oral argument, this was sometimes called a "duty to warn", but before the trial judge, in their factum in this court, and in the substance of their oral argument before this court, it was articulated as more than a simple duty to give the appellants some sort of warning or notification. Rather, it was framed as an obligation on the part of the hospital to notify the appellants of the need for follow up care and to provide that follow up care — independently of anything the oral surgeons were doing. The trial judge properly described the contended for duty as a duty to recall the patients.

[38] In my view, on the facts he found, the trial judge did not err in rejecting this theory of liability.

[39] The trial judge found that upon receiving the 1990 ECRI warning and the distributor's letter, the hospital contacted the oral surgeons to ensure both that they did not book any further implant surgeries and to confirm that they knew about the warning. He found that the oral surgeons advised the hospital that they were aware of the warning, and he found that the oral surgeons were aware of the problems with the implant by 1990. He also found that the hospital had contacted the distributor and confirmed in 1991 that the distributor was aware of and had been directly in touch with the oral surgeons — one of the requests in the distributor's letter.

[40] The appellants were the patients of the oral surgeons. The trial judge accepted the evidence of the CEO of the hospital that a recall of patients was something to be initiated only by the oral surgeons, given their medical training, ability to order tests, and ability to treat patients. The trial judge also accepted expert evidence that there was no precedent for any hospital in Canada self-initiating a recall of patients. He accepted evidence that the hospital could not order an oral surgeon to do any procedure on a patient or call people in for treatment; nor could it write orders for tests or book patients for treatment absent a physician's approval. He held that it was reasonable for the hospital to assume that the distributor and the oral surgeons, who had knowledge superior to that of the hospital about the implant and about what to do for patients if the implant failed, would deal appropriately with the issue. He concluded that there was no basis to elevate the hospital to an oversight role over the oral surgeons. These findings are entitled to deference. In light of them, the appellants' proposition that a duty to recall existed and was breached by the hospital must be rejected.

[41] In my view, the trial judge also did not err in determining that the decision in *Pittman Estate v. Bain* (1994), 112 D.L.R. (4th) 257 (Gen. Div.) did not assist the appellants. *Pittman* held that a hospital that undertakes a program to notify patients of a problem must do so without negligence. That proposition is not applicable here, given that the hospital did not undertake any notification program. On the

trial judge's findings of fact, nothing in *Pittman* requires a different conclusion to the one he reached.

[42] Accordingly I would reject this ground of appeal.

(3) Apportionment

[43] The appellants argue that the trial judge erred by apportioning 75% of the liability to two non-parties. This limited the recovery of the appellants whose claims were not barred by a limitation period - that is, the Hearsey appellants - to 5% of their assessed damages. The manufacturer, who the trial judge found to be 50% at fault, and the distributor, held to be 25% at fault, were never parties to the action, were never the subject of third party proceedings by the hospital, and were both bankrupt. As such, the appellants say that apportionment of fault to them in a way that reduced the appellants' recovery from the hospital was improper.

[44] The hospital supports the trial judge's approach.

[45] There were two planks to the hospital's argument, (a) the Pierringer Order and the resulting amended statement of claim; and (b) this court's decision in *Taylor v. Canada (Health)*, 2009 ONCA 487, 95 O.R. (3d) 561. In my view, neither supports the trial judge's approach.

[46] In order to understand why I reject the hospital's argument, it is important to review some principles which set the background for consideration of both the

Pierringer Order and the consequential amendment to the statement of claim, and the decision in *Taylor*.

Concurrent Liability and Pierringer Orders

[47] At law, where more than one wrongdoer has caused or contributed to the plaintiff's injury, they are each liable to compensate the plaintiff in full, subject only to the rule that the plaintiff cannot recover more than 100% of their damages: see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 25. In practical terms, this means the plaintiff can recover 100% of their losses from any defendant who caused or contributed to the particular injury regardless of the degree of fault of that defendant, and regardless of whether others, parties or non-parties, were also at fault.

[48] Pursuant to s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, wrongdoers have a right of contribution from each other. In other words, although each remains jointly and severally liable to pay the plaintiff 100% of the plaintiff's damages, each can exercise the statutory right to have fault apportioned among the wrongdoers so that each wrongdoer will indemnify the others in accordance with the share of fault apportioned to them. Thus, if a defendant found 50% at fault pays the plaintiff 100% of their damages, that defendant can recover the 50% overpayment from the other wrongdoer(s) to whom the other 50% of fault was apportioned: see *Martin*

v. Listowel Memorial Hospital (2000), 192 D.L.R. (4th) 250, 138 O.A.C. 77 (C.A.), at paras. 34-35.

[49] It is important, however, to note that the right of indemnity is not something which affects the plaintiff. The entire risk that a wrongdoer, liable to pay 100% of the plaintiff's damages while not 100% at fault, will be able to actually recover indemnity from another wrongdoer, is on that first wrongdoer — not the plaintiff. If the second wrongdoer is not pursued by cross-claim, third party action or separate action, or if the second wrongdoer pursued is not creditworthy or insured, the first wrongdoer will still have to pay 100% of the plaintiff's damages and recover no indemnity: see *Taylor*, at paras. 18-20.

[50] Before the Pierringer Order in the Hearsey Action, the hospital and oral surgeons were defendants and had cross-claimed against each other. The hospital and the oral surgeons were each at risk to the Hearsey appellants, if found at fault to any degree, of having to pay 100% of any damages. But, each had the right to recover from the other for the latter's proportionate share of any fault. So if, for example, the hospital paid the plaintiff more than its proportionate share, the hospital's out of pocket expense, assuming the oral surgeons were creditworthy, would be reduced by obtaining indemnity from the oral surgeons for their proportionate share of fault, and vice versa.

[51] In addition, before the Pierringer Order in the Hearsey Action the hospital and the oral surgeons had no proceeding pending to claim indemnity from the manufacturer or distributor for their proportionate share of any fault, and they had no practical means of collecting any indemnity even if they had claimed it, as each of the manufacturer and distributor was bankrupt. So if, for example, the hospital paid 100% of the damages of the Hearsey appellants, as it would be liable to do no matter the degree of fault attributed to it, it could recover nothing from either the manufacturer or the distributor.

[52] This brings us to the Pierringer Order in the Hearsey Action. Named after *Pierringer v. Hoger*, 124 N.W. 2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C. 1963), the purpose of a Pierringer Order is to facilitate a settlement between a plaintiff and a defendant who wishes to settle (a settling defendant), while maintaining a level playing field for the remaining (non-settling) defendant against whom the plaintiff wishes to proceed to trial: see *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at paras. 6, 23-26. It does this by certain essential provisions:

> (1) The settling defendant settles with the plaintiff;
>
> (2) The plaintiff discontinues its claim [against] the settling defendant;
>
> (3) The plaintiff continues its action against the non-settling [defendant] but limits its claim to the non-settling defendant's several liability (a 'bar order');

> (4) The settling defendant agrees to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendant;
>
> (5) The settling defendant agrees not to seek contribution and indemnity from the non-settling defendant; and
>
> (6) The plaintiff agrees to indemnify the settling defendant against any claims over by the non-settling defendants.
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> *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, at para. 39, citing Paul M. Perell & John W. Morden, The Law of Civil Procedure in Ontario, 3d ed. (Toronto: LexisNexis Canada, 2017), at p. 762.

[53] These essential provisions of a Pierringer Order are informed by the discussion of liability above. The non-settling defendant will have cross-claimed against a settling defendant because it wants to recover the settling defendant's share of fault from it as indemnity, should the non-settling defendant have to pay more than its proportionate share of the plaintiff's damages. The non-settling defendant's need to do so disappears under a Pierringer Order, because it requires the plaintiff to effectively put 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. It does this by requiring the plaintiff to reduce its recovery from the non-settling defendant by the percentage of fault to be attributed to the settling defendant, and thus by the amount the non-settling defendant would have been able to recover from the settling defendant as indemnity: see *M.(J.) v. Bradley* (2004), 71 O.R. (3d) 171, 187 O.A.C. 201 (C.A.), at paras. 30-31.

[54] To use an example, suppose defendants A and B were each creditworthy and cross-claimed against each other for indemnity. Suppose each is found liable at trial and fault was apportioned 50% to each. The plaintiff makes A pay 100% of the damages. But A recovers from B, on a cross-claim, for B's 50% proportionate liability as indemnity. At the end of the day, A's net payment is only 50%, commensurate with A's liability.

[55] Now suppose the plaintiff settled with B before trial. In the Pierringer Order situation, the plaintiff reduces their recovery from A (who did not settle) by the amount it is determined that B is at fault. At trial, A and B are each found to be 50% at fault. The plaintiff reduces their claim against A by the amount of fault attributed to B. A's net payment is the same 50%.

The Pierringer Order in the Hearsey Action Did Not Authorize Reduction of Recovery Due to Fault of Persons Other Than the Oral Surgeons

[56] The Pierringer Order in the Hearsey Action is similar to the example above in so far as the hospital and the oral surgeons were concerned. For ease of reference, that Pierringer Order is attached as 'Schedule A' to these reasons. The hospital's cross-claim against the oral surgeons in the Hearsey Action had been made so that the hospital could obtain indemnity from the oral surgeons if it was obliged to pay the plaintiff's full damages. To the extent fault was attributed to the oral surgeons, the hospital could recover indemnity from them and thus reduce its

net out of pocket expenditure. The Pierringer Order dismissed the cross-claim of the hospital against the oral surgeons. It did not prejudice the hospital by doing so, as it required the Hearsey appellants to reduce their claim against the hospital by the amount of fault that would be apportioned at trial to the oral surgeons, and it provided procedures whereby that determination could be made at trial. If that was all the Pierringer Order in the Hearsey Action did, it would meet the objectives generally ascribed to a Pierringer Order discussed above.

[57] However, the effect the hospital argues for goes much further. According to the hospital, the effect of the Pierringer Order was to also reduce the Hearsey appellants' recovery from the hospital by the amount of fault the trial judge might attribute to the manufacturer and the distributor. These were entities against whom the hospital had not claimed indemnity under the *Negligence Act*, and from whom the hospital had no practical ability to recover indemnity even if claimed. The Pierringer Order, if so interpreted, would do more than maintain a level playing field for the hospital compared to its pre-Order position. The effect of the interpretation the hospital seeks is to put the hospital in a <u>better</u> position than it was in before the Pierringer Order. Before the Pierringer Order, the hospital was at risk, if found at fault to any degree, to pay all of the Hearsey appellants' damages without the ability to obtain indemnity from the manufacturer and distributor. This risk was on the hospital, regardless of the degrees of fault of the concurrent tortfeasors. As interpreted by the hospital, the Pierringer Order would free the hospital of that risk.

The hospital would be placed in as good a position as it would have been had it claimed indemnity from the manufacturer and distributor and had the manufacturer and distributor been creditworthy and able to pay indemnity, rather than being bankrupt. No reason why this should be the case was suggested.

[58] The Pierringer Order's language, including that incorporated into the amended statement of claim, does not, taken as a whole, support this broader interpretation. Paragraph 5 of the Pierringer Order provides that the "Plaintiffs will only claim from the Defendant Hospital those damages, if any, arising from the actions or omissions of the Defendant Hospital", and refers to the "Defendant Hospital's several liability, or proportionate share of joint liability, as may be proven against it at trial". But that must be read in light of the context and the other provisions of the Pierringer Order, which demonstrate that this was only intended to ensure the Hearsey appellants' claim and recovery from the hospital did not include anything for the fault that may be attributed to the oral surgeons.

[59] The Pierringer Order was made in the context of an action that included the oral surgeons and the hospital as defendants — no one else. It was made in the context of a settlement by the appellants with the oral surgeons against whom the hospital had cross-claimed. It dismissed the hospital's cross-claim against the oral surgeons. It expressly provided that the court at trial may apportion fault among "all Defendants named in the Statement of Claim" (emphasis added), which meant only the hospital and the oral surgeons. It did not refer to apportionment of fault to

anyone else. And it provided procedures, including for the obtaining and use of evidence from and about the oral surgeons, clearly aimed at assisting the parties to present their cases on what fault should be apportioned to the oral surgeons. It provided no similar procedures regarding the fault of any other entities.

[60] We were not referred to evidence that any of the appellants had made an agreement, as a result of settlements with the manufacturer or distributor, that claims the appellants might pursue against the hospital, would be reduced by the percentage fault that would be attributed to the manufacturer or distributor.

[61] In his reasons, the trial judge referred to the manufacturer having gone bankrupt shortly after it ceased to make the implant in 1988. No reference is made to any settlement with the manufacturer or recovery from it, let alone to the terms on which that may have occurred.

[62] The trial judge also referred to a settlement between the distributor on the one hand, and the appellants and many others who received the implant on the other. The record included a settlement agreement of class actions against the distributor. Accepting that the appellants were members of the class and may have benefitted from that settlement, my review of that agreement does not reveal any term whereby the appellants would reduce their claims against persons who were not parties to the class actions, such as the hospital, by the distributor's percentage fault. Rather, the settlement agreement provides:

> Except as otherwise provided herein, nothing in this Settlement Agreement shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against persons and/or entities other than the Defendant and Released Parties. Nevertheless, Settlement Class Members further agree that in the event the Settlement Class Member commences or continues litigation or pursues a claim or-makes a claim against any person or entity arising from, arising out of, or connected directly or indirectly with the distribution and insertion of a Vitek Proplast TMJ implant, including all claims for non-pecuniary, punitive, aggravated, and consequential damages, then the Settlement Class Member expressly agrees not to include in respect of any such claim any right to recover from such person or entity any such amounts as have been paid under the terms of this Settlement Agreement to the Settlement Class Member or Settlement Class Members.

[63] This provision requires the appellants to reduce their claims against the hospital to take into account the amount they recovered from the distributor under the class action settlement. If applicable, this credit would occur in the damages phase of the trial. It does not require or justify, on the question of apportionment, reducing the appellants' recovery by the distributor's percentage fault, as the trial judge did.

[64] In my view, taken as a whole against the evidentiary background, the Pierringer Order and the amended statement of claim in the Hearsey Action do not require the appellants to reduce their claims against the hospital by the percentage fault of the manufacturer and the distributor, and thus improve the position of the hospital.

The Trial Judge Erred in Relying on *Taylor*

[65] The trial judge relied on this court's decision in *Taylor* as authority to apportion fault to non-parties. He stated that *Taylor* "…expressly determined that a court can apportion fault to a person who is not a party to an action." But the issue is not whether a court may do so, but under what circumstances a court should do so. The circumstances in *Taylor* were substantially different than those in the case at bar.

[66] *Taylor* concerned an attempt, by a defendant to a class action, to add third parties from whom the defendant wished to claim contribution and indemnity on the basis that their fault had contributed to each class member's injury. In other words, due to the risk it could be made to pay 100 percent of the damages it wished to seek indemnity from the third parties for their proportion of fault. The plaintiff, however, made it clear by an amendment to the claim that the exposure of the defendant was limited to damages for which it could have no right of contribution, because all that was claimed were the damages that would be apportioned to the defendant given its relative degree of fault: see paras. 4 and 11. This was done specifically "to preclude the defendant's attempt to assert a third party claim" and with the intention that "[t]he possibility of third party claims will be obviated": paras 9 and 10. Thus in *Taylor* the plaintiff amended her statement of claim to specifically

state that she was not suing the defendant for anything other than the defendant's proportionate share of fault, in circumstances that made it clear she was prepared to reduce the claim by the proportion of fault that would be attributed to the proposed third parties.

[67] It was in that context that the court in *Taylor* held that fault could be apportioned at trial to the proposed third parties even though they were non-parties. This was essential to the court's holding that the third party claim was unnecessary. To protect the defendant, the reductions in the plaintiff's claim due to the fault of the proposed third parties would have to be calculated by determining their degree of fault. As the court in *Taylor* noted, considerations of encouraging settlements with non-parties or of simply allowing a plaintiff to streamline litigation by obviating third party claims, favoured an interpretation of the court's powers to apportion fault that is broad enough to permit apportionment to non-parties: see paras. 26 to 28.

[68] The circumstances in *Taylor* were not present in the case at bar in so far as the manufacturer and distributor are concerned. As discussed in the section above, the settlement with the oral surgeons which gave rise to the Pierringer Order contemplated an apportionment of fault to, and a corresponding reduction of the claim for the fault of, the oral surgeons, not the manufacturer and distributor. The class action settlement with the distributor also does not contemplate such an apportionment and reduction. Nor did the appellants evince an intention to

streamline the litigation by indicating they would reduce their claim for the fault of the distributor and manufacturer, as the plaintiff did in *Taylor*.

[69] *Taylor* does not stand for a proposition that is so broad that it would entitle the court in any case to apportion fault to non-parties, and reduce the plaintiff's recovery by that apportioned share of fault. That would be inconsistent with what the Supreme Court of Canada said in *Athey* and with s. 1 of the *Negligence Act*: namely, the general rule is that a wrongdoer is liable for 100 percent of a plaintiff's injuries and wrongdoers are liable to contribute between themselves in accordance with their relative shares of fault. The approach in *Taylor* was context specific. And that context is not present here.

[70] Accordingly, it was an error of law for the trial judge to apply *Taylor* as he did.

Conclusion on Apportionment

[71] The appellants argued that if we agreed there was an error in the apportionment of fault to the manufacturer and distributor and the reduction of the appellants' recovery as a result, we should remit that matter back to the trial judge. The hospital argued that if we found such an error, fault should be reapportioned 20% to the hospital and 80% to the oral surgeons. In other words, the relative assessment of fault as between the hospital and oral surgeons found by the trial

judge should be maintained. The trial judge found the oral surgeons four times more at fault than the hospital.

[72] I agree with the result proposed by the hospital. As discussed above, the underlying theory of contribution and indemnity is that a wrongdoer should be able to recover indemnity from another when the first has paid the plaintiff more than its proportionate share, assessed by their relative degrees of fault. Both the hospital and the oral surgeons were at risk before the Pierringer Order that one or the other would have to pay all of the appellants' damages. They each had cross-claimed for indemnity from the other. And they were both in the same situation vis-à-vis the manufacturer and distributor — they had no claim or ability to recover indemnity from them regardless of their degree of fault.

[73] The Pierringer Order was designed to protect the hospital from paying more than its proportionate share to the same degree as its prior cross-claim for indemnity against the oral surgeons. Given the findings of the trial judge, the hospital would be paying more than its proportionate share if it paid more of the total damages than its relative share of fault compared to the fault of the oral surgeons: namely, more than one fifth of the total fault attributed to the hospital and the oral surgeons combined. The judgment in the Hearsey Action should therefore be varied to reflect this.

(4) The Costs Cross-Appeal

[74] I would not give effect to the hospital's cross-appeal on costs. The hospital argues that an amount for HST is not included in the costs awards which the trial judge made after dismissing the Endean, Karam, and Lind Actions. In my view, the trial judge did not limit himself to a mechanical calculation of costs dependent on the inclusion or lack of inclusion of any specific item. In his reasons on costs, he "stepped back" to determine whether the amounts he calculated were reasonable given the magnitude of the matter and other relevant considerations: see para. 72. He was satisfied the amounts he awarded were reasonable. There is no error in principle justifying appellate intervention.

Conclusion

[75] Accordingly, I would dismiss the appeals in the Endean, Lind and Karam Actions. I would allow the appeal in the Hearsey Action and vary para. 1 of the judgment in that action by replacing 5% with 20%. I would dismiss the hospital's cross-appeal.

[76] The Hearsey appellants should have their costs of the appeal and cross-appeal fixed at $20,000 inclusive of HST and disbursements.

[77] Success was divided between the hospital and the Endean, Karam and Lind appellants. I would not award any costs in the appeals or the cross-appeals in those actions.

Released: March 8, 2019 (“P.R.”)

“B. Zarnett J.A.”
“I agree. Paul Rouleau J.A.”
“I agree. K. van Rensburg J.A.”

SCHEDULE A

Court File No. 96-0342A

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	FRI DAY, THE 21st DAY
	)	
JUSTICE JOHN WILKINS	)	OF JUNE, 2013

B E T W E E N:

JANET HEARSEY and LESLIE HEARSEY

Plaintiffs

- and -

DR. W.W. DOWHOS, ST. JOSEPH'S GENERAL HOSPITAL and THE ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO

Defendants

- and -

ATTORNEY GENERAL OF CANADA

Third Party

ORDER

THIS MOTION made by the Defendant Dr. W. W. Dowhos (the "Moving Defendant") for an Order dismissing the Main Action against him, as well as the Crossclaims and Third Party Claims, was heard this day at the 361 University Avenue, Toronto, Ontario.

ON READING the Affidavits of Tim Farrell, a solicitor for the Moving Defendant, and of David Steeves, a solicitor for the Plaintiffs, and on being advised of the Consent of the Plaintiffs, Defendants and Third Party to the requested Order, and on being

advised that the action was discontinued as against the Defendant the Royal College of Dental Surgeons of Ontario on or about October 16, 1996, and on being advised that Dr. W.W. Dowhos passed away on or about February 24, 2011, and that Carole Dowhos is the Estate Trustee for the Estate of Dr. W.W. Dowhos, and on hearing submissions of counsel for the Moving Defendant:

1. **THIS COURT ORDERS** that this proceeding continue with the Estate of Dr. W.W. Dowhos, deceased, by its Estate Trustee Carole Dowhos as a Defendant, and that the Title of Proceeding be amended accordingly in all documents issued, served or filed after the date of this Order.

2. **THIS COURT ORDERS** that the Main Action be dismissed as against the Moving Defendant, without costs.

3. **THIS COURT ORDERS** that the Moving Defendant's Crossclaim against St. Joseph's General Hospital (the "Defendant Hospital") and the Defendant Hospital's Crossclaim against the Moving Defendant are hereby dismissed without costs.

4. **THIS COURT ORDERS** that all claims for contribution and/or indemnity or any other relief over by the Defendant Hospital or by any other person, whether as yet asserted or still unasserted, as against the Moving Defendant, and/or Daniel Tomlak, and/or Eric Orpana in relation to the claims made in the Main Action, are hereby barred, prohibited and enjoined forever.

5. **THIS COURT ORDERS** that the Plaintiffs' claims are restricted such that the Plaintiffs will only claim from the Defendant Hospital those damages, if any, arising from the actions or omissions of the Defendant Hospital, and that, to effect this, the Statement of Claim shall be amended to include the following paragraphs:

> 1. The Plaintiffs limit their claims against the Defendant Hospital to the damages, costs and interest attributable only to the Defendant Hospital's several liability or proportionate share of joint liability to the Plaintiffs, such that the Plaintiffs' recovery shall be limited to the damages, costs and interest attributable to the Defendant Hospital's several liability, or proportionate share of joint liability, as may be proven against it at trial.

2. That the Plaintiffs acknowledge that the court at any trial of this action shall have the full authority to adjudicate upon the apportionment of fault, if any, among all Defendants named in this Statement of Claim.

6. **THIS COURTS ORDERS** that the following procedures will be observed upon the continuation of the Action as between the Plaintiffs and the Defendant Hospital:

(a) For the purpose of a trial of this Action, despite the dismissal of the Crossclaims, the Defendant Hospital will be deemed to be adverse in interest to the Moving Defendant, Daniel Tomlak and/or Eric Orpana, and may cross-examine any of these three at trial despite calling them as witnesses;

(b) The Defendant Hospital shall be entitled to serve a Request to Admit upon the Moving Defendant prior to the trial of this Action and shall be entitled to file the Response (including any deemed admissions) at the Trial of this Action;

(c) The Moving Defendant, Daniel Tomlak and/or Eric Orpana, shall provide an undertaking to attend at the trial of this Action as a fact-witness if the Defendant Hospital summonses them or one of them or serves a Notice of Intention to Call them or one of them and the Defendant Hospital will compensate the witness in accordance with the applicable tariffs; and

(d) All Discovery evidence provided by the Moving Defendant including all Transcripts of the examinations of discovery conducted of the Moving Defendant in any file, action or proceeding which relates to the Vitek TMJ Implant litigation shall be available for use at the Trial in this Action.

(e) For the purposes of service of the Requests to Admit or Summonses on the Moving Defendant, Daniel Tomlak and/or Eric Orpana, service will be directed to their lawyers, Blaney McMurtry LLP, Toronto, ON, unless otherwise advised.

7. **THIS COURT FURTHER ORDERS** that all Third Party Claims be dismissed without costs.

ENTRE / INSUIT — BOOK / REGISTRAR
DATE — Jun 26/13
No. 984 — PER / POUR
No.