J. R. PAINE & ASSOCIATES LTD. v. STRONG, LAMB & NELSON LTD.

In *J. R. Paine & Associates Ltd.* v. *Strong, Lamb & Nelson Ltd.*,[1] Mr. Justice Laycraft of the Alberta Court of Appeal dealt with an old problem in a new way.

The facts of the case were as follows. The plaintiff, Alberta Housing Corporation, commenced an action for damages arising from the settlement and cracking of concrete slab foundations for a senior citizens' lodge. Named as defendants in the original statement of claim were the contractor and its surety company, the architect, and J. R. Paine & Associates, a company which had been engaged by the architect to perform soil tests and to prepare an appropriate report on the suitability of the soil. The architect had retained Strong, Lamb & Nelson, a firm of structural engineers, to design and supervise the construction of the structural portions of the building.

Paine filed its statement of defence more than a year after the statement of claim was issued. It obtained a fiat which permitted it to issue a third-party notice claiming contribution and indemnity from Strong, Lamb & Nelson, in respect of any judgment that might be obtained by Alberta Housing against Paine. The third-party notice alleged several acts of negligence on the part of Strong, Lamb & Nelson. Up to this point, Alberta Housing itself had not made any claim against Strong, Lamb & Nelson. Shortly thereafter, however, Alberta Housing moved in Chambers for leave to add Strong, Lamb & Nelson as defendants in the action, alleging the same acts of negligence which had been set out in the third-party notice. By this time, however, the limitation period of two years for actions in tort, prescribed by section 51 of the Limitation of Actions Act[2] had expired, and consequently Alberta Housing's application to add Strong, Lamb & Nelson as defendants in the principal action was dismissed.

Strong, Lamb & Nelson subsequently moved to have the third-party notice issued against it by Paine struck out. The ground of this motion was that since it was found not liable to the plaintiff Alberta Housing, on the basis of the expiration of the limitation period, it was accordingly not a party against whom a claim for contribution, pursuant to section 4(1)(c) of the Tort-Feasors Act,[3] could be brought. The Chambers Judge refused to set aside the third-party proceedings, and this appeal was brought by Strong, Lamb & Nelson to the Court of Appeal.

The Court of Appeal was faced with a problem which has presented itself on many previous occasions. What is the correct interpretation of section 4(1)(c) of the Tort-Feasors Act,[4] and its counterpart in other common law jurisdictions? Under what circumstances is one tortfeasor obliged to contribute to the damages which have been assessed against a co-tortfeasor? If a tortfeasor has been sued by the plaintiff and found not liable to him as a result of a procedural defect in the plaintiff's action, in circumstances in which there has been fault and there ought to have been

1. [1979] 6 W.W.R. 353 (Alta. C.A.).
2. R.S.A. 1970, c. 209, as am.
3. R.S.A. 1970, c. 365.
4. *Id.*

liability, save for the defect, is the tortfeasor relieved of his obligation to contribute?

There have been differing views on this matter. The more authoritative line of decisions maintains that if a defendant has been sued by the plaintiff and the plaintiff's action has not succeeded, *for whatever reason*, either substantive or procedural, the successful defendant is relieved of any obligation to contribute to the damages assessed against co-defendants. This is not a defendant who is liable to the plaintiff. He therefore does not qualify under section 4(1)(c). The high water mark of this approach was the Supreme Court of Canada's decision in *County of Parkland* v. *Stetar*.[5] This was an Alberta based action, where one of the defendants was relieved of liability to the plaintiff in the principal action due to the plaintiff's failure to give it adequate notice. On the basis of this, the Supreme Court of Canada relieved the successful defendant of its obligation to contribute to damages assessed against co-defendants.[6] The contrary authorities maintain that what is important in a claim for contribution is not whether the defendant against whom the claim is made was actually found liable to the plaintiff, or even could be found liable at the time that the claim for contribution is brought, but whether he was factually at fault in contributing to the damages, and could have been found liable *at some time*, if the proper process was commenced at the proper time. The trial court decision in the Ontario case of *Dominion Chain* v. *Eastern Construction Company*[7] represented this point of view. The issue has been quite fully discussed in other places and will not be reviewed here.[8]

What is unique about the present decision, from the Alberta perspective, and why it warrants further examination, is the manner in which the court approached the problem. Mr. Justice Laycraft accepted the *County of Parkland* v. *Stetar*[9] approach, which of course he was bound to do, yet avoided its necessary and harsh result by resorting to what is essentially procedural legislation—the Limitation of Actions Act.[10] This is the first time that the legislation has been interpreted in this way in Alberta, and one must concede that the Alberta Court of Appeal quite smartly avoided the ambiguous provision of the Tort-Feasors Act.[11] The argument that the Limitation of Actions Act[12] could have this result has escaped this writer's attention in previous research and writing on this subject. As well, although it was not strictly relevant to *County of Parkland* v. *Stetar*,[13] it is interesting to note that no reference to this possible resolution of the issue was raised by the Supreme Court of Canada. Was the Alberta court's interpretation of the legislation a legitimate resolution of the problem?

Mr. Justice Laycraft relied on section 60 of the Limitation of Actions Act[14] which provides:

5. [1975] 1 W.W.R. 441, 50 D.L.R. (3d) 376 (S.C.C.).
6. For discussion of this case, *see* Klar, "Contribution Between Tort-Feasors" (1975) 13 *Alta. L. Rev.* 359.
7. (1974) 46 D.L.R. (3d) 28, rev'd. (1976) 68 D.L.R. (3d) 386, (1978) 84 D.L.R. (3d) 344.
8. *See especially*, Cheifetz, (1977) 25 *Chitty's L.J.* 145, (1978) 26 *Chitty's L.J.* 109, 1979) 27 *Chitty's L.J.* 50.
9. *Supra* n. 5.
10. *Supra* n. 2.
11. *Supra* n. 3.
12. *Supra* n. 2.
13. *Supra* n. 5.
14. *Supra* n. 2.

60(1) Where an action to which this Part applies has been commenced, the lapse of time limited by this Part for bringing an action is no bar to

(a) proceedings by counterclaim, including the adding of a new party as defendant by counterclaim, or

(b) third party proceedings,

with respect to any claims relating to or connected with the subject matter of the action.

(2) Subsection (1) does not operate so as to enable one person to make a claim against another person when a claim by that other person

(a) against the first mentioned person, and

(b) relating to or connected with the subject matter of the action,

is or will be defeated by the pleading of any provision of this Part as a defence by the first mentioned person.

What was the intention of the legislature when it enacted this provision? Did it intend to resolve the problem created by s. 4(1)(c) of the Tort-Feasors Act[15] with this provision?

It is this writer's respectful opinion that section 60 of the Limitation of Actions Act[16] deals with an entirely different matter than that raised by section 4(1)(c) of the Tort-Feasors Act.[17] In short, the Alberta Court of Appeal's attempt to resolve the ambiguity of the Tort-Feasors Act[18] by reference to the Limitation of Actions Act,[19] although ingenious, is unsupportable.

As with any cause of action, there are two distinct and separable issues in a claim by one tortfeasor for contribution from a second tortfeasor. First, as a matter of substantive law, and on the merits of the case, does the claimant (plaintiff) have a cause of action? Second, and if the answer to the first question is affirmative, what, as a matter of procedural law, is the proper process and the proper time for bringing such a claim? Section 4(1)(c) of the Tort-Feasors Act[20] relates to the first question; section 60 of the Limitation of Actions Act[21] to the second.

Section 4(1)(c) of the Tort-Feasors Act deals with the substance of a claim for contribution. It requires that the person making the claim be a party who was found liable to the principal plaintiff, or, in the case of a settlement, who would have been found liable. It further requires that the person against whom the claim for contribution is brought be a person who was found liable to the principal plaintiff, or if not having been sued by the latter, would have been found liable if sued. Although there is great ambiguity over the last phrase, it is clear that in the case of a person who has actually been sued, a dismissal of the action in his favour, relieves him of his obligation to contribute. This was decided by *County of Parkland* v. *Stetar*[22] and this was accepted by the Alberta Court of Appeal as representing the existing law. It accurately described the situation of defendant Strong, Lamb & Nelson, who was sued and found not liable due to the expiration of the limitation period.

As discussed elsewhere,[23] the *County of Parkland* interpretation of section 4(1)(c) of the Tort-Feasors Act[24] is unfair to the defendant seeking

15. *Supra* n. 3.
16. *Supra* n. 2.
17. *Supra* n. 3.
18. *Id.*
19. *Supra* n. 2.
20. *Supra* n. 3
21. *Supra* n. 2.
22. *Supra* n. 5.
23. Klar, "Contribution Between Tort-Feasors", *supra* n. 6.
24. *Supra* n. 3.

contribution from his co-defendant. It produces the situation in which a claimant's action for contribution may be bound to fail from the outset due to an irregularity in the principal plaintiff's action. It is submitted, however, that this result can only be changed by reform of the substantive law dealing with claims for contribution. One possibility would be to enact legislation which would make it clear that a person who would have been held liable to the principal plaintiff if a proper action were commenced in the proper time is a person against whom a claim for contribution can be brought. This would remain so even if that person had actually been sued and found not liable, if the action had been dismissed due to the expiration of a limitation period, or other procedural irregularity. The only issue then remaining would be the determination of an appropriate limitation period for bringing this claim for contribution. At present, however, this is not the substantive law.

Section 60 of the Limitation of Actions Act[25] is a procedural provision which deals with the issue of limitations as it relates to third party proceedings and counterclaims. As discussed in the English Law Reform Committee's *Twenty-First Report* which is the *Final Report on Limitations of Actions,* September 1977, "the essential features of these (i.e. third party proceedings) are that a party who is being sued is trying to 'off-load' the whole or part of his liability on to someone else against whom he himself has (or claims to have) a cause of action and that rules of court permit him to do so without requiring him to institute separate proceedings".[26] As is further stated in the Report, "the objects of these rules are to prevent multiplicity of actions; to enable the court to settle in one action all the disputes between the various parties; and to prevent the same issue being litigated more than once with, perhaps, different results. It is, however, clear that the form of the proceedings *does not affect the substantive rights of the parties*".[27] The Report goes on to succinctly state the limitations problems which may arise in relation to these proceedings, and provides the problem which the legislature intended to resolve by enacting section 60. The Report states:[28]

> The difficulty to which limitation gives rise in this context is simply stated: if the plaintiff (P) issues his writ against the defendant (D) at a time when D's cause of action against the third party (TP) is already, or is on the point of being, statute-barred, D may have no opportunity of obtaining from TP the relief to which he is, *on the merits,* entitled.

The Report stated that this was not a problem in relation to claims for contribution between tortfeasors in England, because of section 4(2) of the Limitation Act 1963 which prescribes a two year period for the bringing of a claim for contribution by one tortfeasor against another, which period only begins to run from the judgment against the first tortfeasor, or if the claim has been compromised, from the date on which he admitted liability.[29] This of course did not deal with the English substantive law concerning the entitlement to seek contribution and the obligation to pay it. In reference to this question, the Law Commission's *Working Paper on Contribution*[30] stated that the English authorities favour the view that if

25. *Supra* n. 2.
26. Law Reform Committee, *Final Report on Limitations of Action,* Cmd. 6923 at 63.
27. Report, *supra* n. 26 at 63-64 [emphasis added].
28. *Id.*
29. *Id.*
30. The Law Commission, *Working Paper No. 59, Contribution.*

a defendant has not been sued by the principal plaintiff, the person seeking contribution from this defendant need only show that the latter would have been liable to the plaintiff if sued *at any time*.[31] In relation to the defendant who has been sued and found not liable to the principal plaintiff due to the expiration of the limitation period, the Commission favoured the approach that this defendant should be treated no better than the one who had not actually been sued. Therefore, in this case as well, the defendant would be obligated to contribute, even if he had actually been relieved of liability to the principal plaintiff on a limitations issue, as long as he would have been liable on the merits of the action.

In order to prevent the problem discussed above, section 60 of the Limitation of Actions Act[32] was enacted. It allows a defendant to obtain relief from a third party, even where the limitation period for obtaining such relief has expired, in third party proceedings, brought in an action which has been commenced against the defendant, with respect to claims relating to the subject matter of the action. It does not alter the substance of the third party claim and cannot cure a substantive defect. The present substantive law in Canada in relation to claims for contribution brought against a defendant who has been found not liable to the principal plaintiff, even as a result of a procedural defect in the plaintiff's action, is that he is not obligated to contribute to the plaintiff's damages. If this is an undesirable situation it can only be changed by reforming the substantive law. Extending the limitation period for bringing a claim for contribution has not had this effect.

The Alberta Court of Appeal's interpretation of section 60 has added another anomaly to legislation which has been the subject of much criticism for its ambiguities. It has divided into two classes those defendants who have been sued by the principal plaintiff and who have been found not liable to him. First, there are those defendants who have been sued by the principal plaintiff and who have been successful due to the expiration of a limitation period provided for in Part 9 of the Limitation of Actions Act.[33] According to the *Paine* decision, section 60 applies to them and they are accordingly not relieved of their obligation to contribute to the plaintiff's damages. Second, there are those defendants who have been sued by the plaintiff and who have been successful due to the expiration of a limitation period provided for in a section other than Part 9, or who have succeeded due to some other procedural irregularity in the plaintiff's action, e.g., a failure to give notice. According to *Paine*, section 60 does not apply to them. Rather, section 4(1)(c) of the Tort-Feasors Act,[34] as interpreted by *County of Parkland* v. *Stetar*[35] does. They are accordingly not obligated to contribute to the plaintiff's damages. This is not logical.

What will be hoped for now, in order to obviate this and other problems with our legislation dealing with contribution between tortfeasors, is the enactment of new legislation. This is the only way to bring back order to this area.

—LEWIS N. KLAR*

31. *Id.* at 19.
32. *Supra* n. 2.
33. *Id.*
34. *Supra* n. 3.
35. *Supra* n. 5.

* Of the Faculty of Law, University of Alberta.