Noteworthy

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HUGHES AMYS LLP
BARRISTERS & SOLICITORS

Ontario Court of Appeal Considers 'Pierringer' Agreements

by Michael Teitelbaum &
Frances Bertucci

In ***J. M. et al.* v. *Bradley et al.*, [2004] O.J. No. 2312**, a decision released on June 3, 2004, the Ontario Court of Appeal ruled that the Superior Court of Justice has jurisdiction under s. 1 of the *Negligence Act,* R.S.O. 1990, c. N.1 to apportion fault or neglect in a multi-party tort action to those defendants who have settled and will not be parties to the action at the time of trial. In so holding, the Court considered the effectiveness of "Pierringer" settlement agreements.

In January 1997, the plaintiffs commenced an action claiming damages for historical sexual abuse and assaults, allegedly perpetrated on them by the defendants, who were the organizations, supervisors and participants associated with the youth activities of the Salvation Army or Orange Lodge between 1960 and 1991. By September 2002, the plaintiffs entered into settlement agreements with some, but not all of the defendants. The settling defendants each entered into, what is described as, a "Pierringer" settlement agreement, (which originated in *Pierringer* v. *Hagaer*, 124 N.W.2d 106 (Wis. S.C. 1963)). Under a "Pierringer" settlement agreement, the settling defendants are permitted to exit the action by settling their claims with the plaintiff and an attempt is made to eliminate any joint liability the settling defendants might be found to have with the remaining defendants.

"Pierringer" settlement agreements (and "Mary Carter" agreements, where, *inter alia*, the settling defendant remains engaged at trial) have been characterized as a new generation of settlement agreements developed in response to increasingly complex, lengthy and expensive litigation. Instead of trying to resolve all issues, their aim is to proactively manage the risk associated with such litigation, with contracting litigants preferring the certainty of settlement to the uncertainty and cost of a trial and the possibility of an undesirable outcome. As the non-settling defendants are only responsible for their proportionate share of the loss, a "Pierringer" agreement has been

(Continued on page 2)

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The Court of Appeal Interprets Athey

Richard Horak

Firm News

(Continued from page 1)

called a "proportionate share settlement agreement."

The settlement agreements reached in this case contained both an indemnity clause provided by the plaintiffs in favour of the settling defendants (to address any portion of the damages a Court may determine is attributable to their fault, and for which the non-settling defendants would otherwise be liable due to the joint and several liability principle), as well as the plaintiffs' agreement to limit their claims against the non-settling defendants to only their several, rather than joint and several, shares of liability. In February 2003, a court approved the agreements and dismissed the action against the settling defendants. However, one of the non-settling defendants grew concerned that as a result of the agreements, the trial judge would be prevented from apportioning liability amongst all of the defendants. The non-settling defendant moved to set aside the dismissal, which led the parties to submit a special case for the court's opinion with respect to this issue.

The motion judge reviewed the Ontario Court of Appeal's decision in *Martin* v. *Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384 (C.A.), where the Court held in *obiter* that a court can only apportion degrees of fault under s. 1 of the *Negligence Act* to a defendant who is a party to the proceedings. On the basis of that case, the motion judge concluded that the Superior Court of Justice lacked jurisdiction to apportion fault or neglect to the settling defendants at trial. The plaintiffs appealed this decision.

On appeal, Cronk J.A., for the unanimous Court, reversed the motion judge's finding and concluded that neither the reasoning in the *Martin* case, nor the language of s. 1 of the *Negligence Act*, precludes the apportionment of fault or neglect at trial to one or more of the settling defendants. She distinguished the *Martin* decision on the basis that the settling defendants in this action were not strangers to the litigation. In *Martin*, the person against whom the finding of contributory fault or neglect was sought was not a person sued in the litigation. In contrast, the settling defendants in this case were sued by the plaintiffs and defended the action. They were given proper notice of the plaintiffs' allegations, were provided with a full opportunity to respond and voluntarily elected to enter into a pre-trial settlement.

Furthermore, there was no question of potential unfairness or prejudice to any of the parties from the implementation of the settlement agreements. The terms of the "Pierringer" settlement agreement employed by the plaintiffs and the settling defendants acknowledged that the non-settling defendants would be held accountable for their several liability only and the parties to the settlement agreed that the trial judge may apportion fault or neglect against them, even though they would not take part in the trial. Therefore, there was no risk that a gap in liability attribution will arise. Moreover, the settling defendants agreed to be discovered, should discovery of them be sought, so there was no suggestion of potential procedural unfairness to the non-settling defendants.

Cronk J.A's decision is consistent with the rulings of other provinces concerning the implementation of "Pierringer" settlement agreements. Those rulings emphasize that the administration of justice is not facilitated by requiring the involvement of a litigant at trial for purely procedural purposes. Furthermore, the Court's reasons emphasize the public interest in promoting pre-trial settlement, especially in complex, multi-party litigation. The implementation of agreements, such as "Pierringer" settlement agreements, serves to

(Continued on page 3)

(Continued from page 2)
shorten the duration of the trial, reduce the legal costs of the parties and encourage the efficient use of judicial resources. Cronk J.A. concluded that "Pierringer" settlement agreements should be supported in situations similar to the instant case where the fairness of the settlement is unchallenged and no prejudice arises from the full implementation of the settlement. Her Honour emphasized that "[c]ases of this kind cannot be rendered 'unsettleable' for all practical purposes, without just and substantive cause", which did not arise here.

The Court's recognition of innovative settlement arrangements will provide support and encouragement to litigants and their counsel to endeavour to reach such resolutions in appropriate cases.

The Court of Appeal Interprets *Athey*

by Richard Horak

In ***Cottrelle v. Gerard*** (2003), 67 O.R. (3d) 737 (O.C.A.), the Plaintiff had a pre-existing vascular condition. After contracting an infection she alleged that her doctor was negligent in diagnosing the problem. Ultimately her leg was amputated.

The Plaintiff argued that the negligence of the Defendant caused a "loss of a chance" to save the leg. While there was expert evidence to this effect, none of the experts were prepared to say that this opportunity was anything beyond a possibility.

Although the trial judge found in favour of the Plaintiff, the decision was overruled by the Court of Appeal. The court held that the Plaintiff must prove on a balance of probabilities that the Defendant's negligence caused the loss; a possibility was not enough. While the Court of Appeal acknowledged that the "but for" test of causation was in some cases unworkable and ought to be replaced by the "material contribution" test, as set out in ***Athey***, ***Cottrelle*** was not one of these cases. To the Court of Appeal the question was as follows:

> "Could the actions of the Defendant have prevented the outcome caused by the infection and the pre-existing vascular condition?"

As this could not be proven on a balance of probabilities, the action was dismissed.

Cottrelle has been followed in a number of trial decisions. One such decision, which found its way to the Court of Appeal, was the case of ***Ortega v. 1005640 Ontario Inc.,*** [2004] O.J. No. 2478 (O.C.A.). In ***Ortega,*** the Plaintiff was shot after leaving a nightclub. It was argued that had the Defendants had uniformed guards present at the nightclub the risk would have been reduced.

In applying ***Cottrelle,*** the Court of Appeal noted that even if the risk would have been diminished by the presence of uniformed guards, this did not prove causation. A court would have to find that the failure to provide the uniformed guards made the killing more likely than not.

The decisions in ***Cottrelle***, ***Ortega*** and other recent cases establish that the decision in ***Athey*** is not the panacea hoped for by Plaintiffs' counsel. Causation must still be proved on a balance of probabilities.

Firm News

Hughes Amys LLP are pleased to welcome Frances Bertucci and Ian Chai who have joined the Firm as Associates in our Toronto office.

We wish to congratulate Frances on her call to the Bar.

The Partners are also pleased to announce Marc Spector (formerly of Singleton Urquhart in Vancouver) has joined the Firm as an Associate in our Toronto office. Marc will continue his practice in insurance litigation.