Third Party Claim Immunity

A Commentary by John D. Strung
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It is common for defendants in negligence actions to third party anyone who might be contributorily negligent. Somewhat surprisingly there are at least three categories of parties who are immune to third party procedures. Counsel defending such third parties should bring an early motion to strike the third party claim as failing to disclose a cause of action, or to dismiss the claim by way of summary judgement.

1. Parties for whom the plaintiff is vicariously liable.

This issue was discussed in *478649 Ontario Limited v. Corcoran et al.; Pearson, Third Party,* [1994] O.J. No. 2103, 20 O.R. (3d) 28 (C.A.) which was a case arising from the purchase and sale of a piece of land. The plaintiff purchaser sued, among others, its real estate agent, alleging that it had been induced to enter into the transaction as a result of negligent misrepresentations of the agent. The agent then third partied the solicitor who acted on behalf of the plaintiff in the real estate transaction alleging the solicitor's negligence in failing to do his due diligence contributed to the loss.

The plaintiff brought a motion to strike the third party claim. There is an interesting discussion in the case as to whether the plaintiff had standing to bring such a motion which would normally have been brought by the third party itself. The Court of Appeal found the plaintiff did have standing. For the purposes of this commentary, though, our interest lies in the substantive issues of the motion.

The Court of Appeal cited with approval the decision of the British Columbia Court of Appeal in Adams v. Thompson, Berwick, Pratt & Partners (1987), 39 D.L.R. (4th) 314, 15 B.C.L.R. (2d) 51, as follows:

> "The British Columbia Court of Appeal discussed this issue in Adams v. Thompson, Berwick, Pratt & Partners (1987), 39 D.L.R. (4th) 314, 15 B.C.L.R. (2d) 51. In that case, the plaintiffs retained a firm of engineers and a contractor to design and develop a subdivision on property which the plaintiffs owned. The plaintiffs were delayed in their marketing of the lots in the subdivision and sued the engineers and the contractor for negligent design and delay. The engineers in turn issued a third party notice against the plaintiffs' solicitors alleging that they should have advised the plaintiffs to take certain steps which would have reduced the losses claimed. The British Columbia Court of Appeal upheld an order striking out the third party claim. McLachlin J.A., who wrote the reasons for the court, said at pp. 318-19:

> ‘It thus may be stated with confidence, in my view, that a third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence. Where the only negligence alleged against the third party is attributable to the plaintiff, there is no need for third party proceedings since the defendant has his full remedy against the plaintiff. On the other hand, where the pleadings and the alleged facts raise the possibility of a claim against the third party for which the plaintiff may not be responsible, the third party claim should be allowed to stand.
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> ‘The same result arises if one views the matter on the basis of the Negligence Act and the Supreme Court Rules. Where the third party claim can be raised by way of defence, the substance of the matter is that the plaintiff is at fault. . . . .
>
> It remains to consider those circumstances in which a claim against a proposed third party is, in fact, a claim with respect to an obligation of the plaintiff.
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> Generally speaking, all acts falling within the scope of an agency between the proposed third party and the plaintiff fall into the category of acts for which the plaintiff is responsible and hence are not the proper subject to third party claims. …
>
> ‘Another situation where a third party claim cannot be raised because the obligation is essentially that of the plaintiff is where the claim is one that the proposed third party should have advised or assisted the plaintiff to mitigate his damages. In that situation, like the situation of agency, third party proceedings are redundant because the defendant can obtain any relief to which he may be entitled by reduction of the plaintiff's claim if he makes out the defence of failure to mitigate.’”

In *478649 Ontario Limited,* the third party claim was allowed to stand on the ground that it fell within the second category cited by McLachlin, J.A., that is there was the possibility that the claim against the third party was one for which the plaintiff might not have been responsible, however, the principle stands in Ontario that “[w]here the only negligence alleged against the third party is attributable to the plaintiff, there is no need for third party proceedings since the defendant has his full remedy against the plaintiff” and the third party action should be struck.

Other Ontario cases which may be cited for this proposition are:

> *Brampton Hydro-Electric Commission v. B.C. Polygrinders Ltd.,* [1993] O.J. No. 628, 12 O.R. (3d) 625, 62 O.A.C. 42 (Div. Ct.)

Canada (Attorney General) v. ATCO Frontec Logistics Corp., [2007] O.J. No. 1355 (Sup.Ct.)

Cardar Investments Ltd. v. Thorne Riddell, (1979) 71 O.R. (2d) 29, [1989] O.J. No. 1930 (Div. Ct.)

Macchi s.p.a. v. New Solution Extrusion Inc. [2007] O.J. No. 4392 (Sup.Ct.), [2008] O.J. No. 3130, 2008 ONCA 586 (C.A)

Davy Estate v. CIBC World Markets Inc., 2009 ONCA 763.

The issue has also been more recently revisited by the British Columbia Court of Appeal in *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc*., 2012 BCCA 22.

2. Parties Who Are Not Liable to the Plaintiff

The Supreme Court of Canada, in *Giffels Associates Ltd. v. Eastern Construction Co*., [1978] 2 S.C.R. 1346 established another category of persons immune to third party procedure.

In *Giffels*, the plaintiff Dominion Chain Company Limited brought an action against Giffels and Eastern to recover damages for a defective roof on a new plant constructed for the plaintiff by Eastern, the general contactor for the building. Giffels was the engineer for the project under a contract with the plaintiff to prepare the specifications and to supervise the construction. A separate contract was entered into between the plaintiff and Easter as the general contractor for the building.

The claim against Eastern failed because of a contractual provision which read, in part, "The issuance of the final certificate shall constitute a waiver of all claims by the Owner…"

The Court held that since, Eastern had no liability to the plaintiff, Giffels had no right of contribution from Eastern, stating,

> "I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff…
>
> "…whether Giffels bases its claim for contribution on s. 2(1) or outside of that provision, the same result adverse to Giffels must follow. I am prepared to assume, for the purposes of this case, that where there are two contractors, each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss, even where the plaintiff chooses to sue only that one and not both as in this case. It is, however, open to any contractor (unless precluded by law) to protect itself from liability under its contract by a term thereof, and it does not then lie in the mouth of the other to claim contribution in such a case. The contractor which has so protected

> itself cannot be said to have contributed to any actionable loss by the plaintiff. This result must follow whether the claim for contribution is based on a liability to the plaintiff in tort for negligence or on contractual liability. In either case there is a contractual shield which forecloses the plaintiff against the protected contractor, and the other contractor cannot assert a right to go behind it to compel the former to share the burden of compensating the plaintiff for its loss.
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> "What we have here is a case where the immunity of Eastern from liability did not arise from some independent transaction or settlement made after an actionable breach of contract or duty, but rather it arose under the very instrument by which Eastern's relationship with the plaintiff was established. Giffels had no cross-contractual relationship with Eastern upon which to base a claim for contribution; and once it was clear, as it was here, that Eastern could not be held accountable to the plaintiff for the latter's loss, any ground upon which Giffels could seek to burden Eastern with a share of that loss disappeared."

While this was a case for contribution and indemnity by way of crossclaim, the same reasoning would apply with respect to a claim for contribution and indemnity by way of the third party procedure. If the proposed third party has a defence to the claim which did not arise from an independent transaction or settlement made after an actionable breach of contract or duty, such party is immune to third party procedure.

The Supreme Court has re-iterated this position in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45.

3. Where the Plaintiff's Claim is Limited to the Defendant's Several Liability.

If the plaintiff in his statement of claim expressly limits his claim to the damages arising from the defendant's proportional degree of fault, the defendant has no cause of action for contribution and indemnity against any other tortfeasor. See for instance *Nasir v. Kochmanski*, 2012 ONCA 758 and *Taylor v. Canada (Health)*, 2009 ONCA 487. A pleading of this nature forms the basis of Pierringer Agreements. The plaintiff, by limiting its claim against a non-settling defendant to that defendant's several liability is able to release the settling the defendant without recourse by the non-settling defendant and thus implement the Pierringer Agreement.

4. Summary and Conclusions

There are three circumstances in which defendant has no recourse to third party proceedings:

1. Against parties for whom the plaintiff is vicariously liable.
2. Against parties who have a defence to the plaintiff's claim which did not arise from an independent transaction or settlement made after an actionable breach of contract or duty.

3. In cases where the plaintiff has limited its claim to damages attributable to the defendant's degree of fault.

In any of those cases, counsel representing such third party should bring an early motion, either to strike the third party claim as failing to disclose a cause of action, or to dismiss the claim by way of summary judgement.

Counsel must be alert to the possibility of such defences. One common situation giving rise to such defences are cases of third party claims against officers and directors. Providing the officers or directors were acting within the scope of their authority, they can probably bring themselves within the first category. Moreover, officers and directors often have hold harmless clauses in their favour which would bring them within the second category. For instance, officers and directors of condominium corporations are routinely protected by hold harmless clauses in the condominium corporation bylaws.

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