CITATION: Gendron v. Thompson Fuels, 2017 ONSC 6856
LINDSAY COURT FILE NO.: 073/11
DATE: 20171116

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
WAYNE ALLAN GENDRON Plaintiff	Martin Forget, for the Plaintiff
– and –	
DOUG C. THOMPSON LTD. operating as THOMPSON FUELS, TECHNICAL STANDARDS AND SAFETY AUTHORITY, and LES RESERVOIRS D'ACIER DE GRANBY INC. Defendants	Albert Wallrap, for the Defendant, Doug C. Thompson Ltd. operating as Thompson Fuels Adam Grant for the Defendant, Technical Standards and Safety Authority
	HEARD: October 31, 2017

REASONS FOR DECISION RE: POST-TRIAL MOTIONS

CHARNEY J.:

Introduction

[1] This case concerned a home furnace fuel oil tank that developed a leak in December 2008, damaging the plaintiff's home and the adjacent environment, including Sturgeon Lake, which was across the road from the home.

[2] On July 17, 2017, I released my decision: *Gendron v. Thompson Fuels*, 2017 ONSC 4009 (the "Decision"), granting judgment in favour of the plaintiff, Wayne Gendron (Gendron), against the defendant Thompson Fuels. The Decision apportioned liability 60% to Gendron and 40% to Thompson Fuels. The parties have agreed that, based on my findings, Gendron's total damages are $2,161,570[1], and Thompson Fuels' proportionate

[1] Subject to the issue raised by Gendron in his rule 59.06(1) motion regarding a $313,005 payment order of the City of Kawartha Lakes.

share is $901,747[2]. As the reasons for judgment fully set out the facts relating to the claim, I will not repeat them here.

[3] The formal order has not yet been issued, but I am advised by counsel that the Decision has been appealed by both Gendron and Thompson Fuels.

[4] The parties have returned to court to deal with three issues:

(a) The first issue relates to a partial settlement agreement between the plaintiff and the defendant Les Reservoirs D'Acier de Granby Inc. (Granby), the manufacturer of the oil tank. The agreement is known as a "Pierringer agreement", and the issue is whether the non-settling defendant (Thompson Fuels) has a right of set-off so that its liability for damages will be reduced by the amount paid by Granby to Gendron.

(b) The second issue is raised by Gendron. He brings a motion under rule 59.06(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, to vary the judgment to add recovery of 40% of a $313,005 payment order of the City of Kawartha Lakes. While this claim was considered and dismissed as a claim for contribution and indemnity under s. 100.1(6) of the *Environmental Protection Act,* R.S.O. 1990, c. E. 19, (*EPA*)(see paras. 383 – 423 of the Decision), Gendron alleges that this court, through "accidental slip or omission", failed to consider his alternate claim that he should recover this sum as part of his common law negligence claim.

(c) The third issue is raised by Thompson Fuels. It also brings a motion under rule 59.06(1) to vary the judgment. Thompson Fuels alleges that the Decision "contains slips, omissions, and mistakes relating to evidence and legal issues at trial that require correction". These "slips, omissions, and mistakes" relate to my findings of fact and whether I considered specific evidence or considered specific arguments. Thompson Fuels also argues that the 60/40 "apportionment calculation of contributory negligence was incorrectly done given the findings of fact".

[5] I will address each of these issues in turn.

1. Pierringer Agreement

Facts

[6] Gendron originally alleged that Granby – one of the three defendants in this claim – manufactured an oil tank that it knew was prone to internal rust that could result in premature failure and leaks, and failed to provide warnings or an instruction manual to the consumer. Each of the other two defendants brought a crossclaim against Granby for

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[2] By my calculations that is 41.7%, but I will defer to the parties' agreement on this calculation since it does not affect my legal analysis.

contribution and indemnity. Soon after the trial began, however, Gendron and Granby reached a settlement agreement.

[7] The settlement agreement is a "Pierringer agreement" as that term has been defined by the Supreme Court of Canada in *Sable Offshore Energy v. Ameron International Corp.*, 2013 SCC 37 (CanLII). Pursuant to such agreements the "non-settling defendants can only be held liable for their share of damages and are severally, and not jointly, liable with the settling defendants": *Sable* at para. 26. In this way the settling defendant does not face the possibility of post-settlement claims made by the non-settling defendants. As the Supreme Court explained in *Sable* at para. 23:

> Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial.

[8] As in *Sable*, Gendron agreed that at the end of the trial, once liability was determined, the amount of the settlement will be disclosed to the court and, "should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff": *Sable* at para. 25.

[9] Since Thompson Fuels (the non-settling defendant) is held liable only for its proportion of the damages, it was still necessary to assess Granby's share of the liability notwithstanding its settlement with the plaintiff. In the result I concluded (at paras. 286 and 292 of the Decision) that Granby was not negligent in the manufacture of the tank and dismissed the claim against Granby. Accordingly, the combined liability of Gendron and Thompson Fuels still equalled 100% of the damages.

[10] At the end of the Decision (at para. 430) I noted that if the parties were unable to calculate the set-off resulting from the Pierringer agreement I could be spoken to. Indeed, the parties have reached such an impasse and now seek a resolution. There is no dispute concerning this court's jurisdiction to entertain this motion.

[11] The parties did not disclose the amount of the settlement to me[3], and agree that I can answer their legal question without this information. They request that the issue of set-off be determined "hypothetically" and the principles can then be applied to the findings. It is not really a hypothetical question at this stage. We know the quantum of damages and the percentage contribution of each of the parties to those damages. I agree that I do not need to know the amount of the settlement in order to provide the parties with the principles required to resolve this dispute. I was given a copy of the Pierringer agreement with the settlement amounts redacted.

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[3] Counsel for Thomspon Fuels requested the other parties keep the partial settlement amount confidential because Thompson Fuels has asked me to revisit my damages award in its motion under rule 59.06(1).

[12] The relevant portion of the Pierringer agreement is para. 4, which provides:

> The plaintiff hereby agrees to limit his claims...as against the Non-Settling Defendants to whatever the Non-Settling Defendants may be jointly and severally liable as between the Non-Settling Defendants only (more particularly, only the Non-Settling Defendants' relative degrees of fault or share of the liability to the Plaintiff) and, as such, the Non-Settling Defendants cannot be jointly liable with the Settling Defendant. This clause means that the Non-Settling Defendants have no basis to seek contribution, indemnity or relief over by way of equitable subrogation, declaratory relief or otherwise against the Settling Defendant.

Positions of the Parties

[13] The parties agree that this issue must be determined on the principle that double recovery by the plaintiff should be avoided. They disagree on the application of that principle.

[14] Thompson Fuels takes the position that since the plaintiff was found to be 60% at fault, the plaintiff is entitled to only 40% of the damages assessed and double recovery starts when the compensation exceeds that 40% (in this case the parties have agreed that this sum is $901,747). To avoid double recovery (more than 40%), the settlement with Granby (excluding costs) should be applied to reduce the amount to be paid by Thompson Fuels. If the settlement amount is credited to the plaintiff, the plaintiff will receive more than 40% ($901,747) recovery, and that is double recovery.

[15] Gendron agrees that the principle against double recovery applies, but argues that double recovery only occurs if the plaintiff receives more than 100% of its total loss. Gendron will recover only 40% of its total loss from Thompson Fuels. Unless the settlement agreement with Granby is for more than the remaining 60% ($1,259,823), Gendron will not recover more than 100% of his loss, and there will be no double recovery. Thompson Fuels is not entitled to a set-off unless the settlement agreement with Granby exceeds 60% of the total loss.

[16] In other words, the question for the court is this: does double recovery start at 40% of loss (the amount of loss apportioned to the defendant(s)), or at 100% of loss (the plaintiff's total loss)?

Analysis

[17] The application of the principle against double recovery is straightforward in cases in which no contributory negligence is attributed to the plaintiff, because, in such cases, the defendants' total liability equals the plaintiff's total loss. There is no dispute that in such cases the amount of the Pierringer settlement is credited to the non-settling defendants to the extent that the settlement amount would result in the plaintiff recovering more than 100% of its loss.

[18] The issue is not straightforward when there is a finding of contributory negligence on the part of the plaintiff. While a number of cases have affirmed the principle against double

recovery, the language used by the courts could support either side of this dispute if the language is divorced from the specific context of the case. None of the cases provided by counsel expressly considered the question at issue in this case. It is therefore important to consider the language in the specific factual context of each case.

[19] The first appellate level court to consider the issue of double recovery in the context of a partial settlement agreement was *Ashcroft v. Dhaliwal*, 2008 BCCA 352. The plaintiff was injured in two motor vehicle accidents nearly a year apart. There was no contributory negligence on the part of the plaintiff. The trial judge found that the injury was "indivisible" and did not apportion loss between the two tortfeasors. He awarded total damages of $400,000. The trial judge noted that if he were wrong in not apportioning loss between the tortfeasors, he would have attributed 70% of the loss to the first tortfeasor.

[20] Before trial, the plaintiff had settled with the second tortfeasor. The trial judge ordered that the net proceeds from the settlement of the second action be deducted to ensure that the plaintiff was not over compensated. The dispute arose because the settlement proceeds were $315,000, meaning that the plaintiff would collect only $85,000 (or 25% of the total damages) from the first tortfeasor.

[21] The Court of Appeal decided, at para. 21, that "the trial judge was correct to order that the settlement proceeds be deducted from the global award of $400,000". The Court concluded, at para. 30, that "the concern to prevent double recovery outweighs the public interest in encouraging settlements". As the Court explained at paras. 2 and 28:

> The fundamental principle of damage awards is that the plaintiff should be "compensated for the full amount of his loss, but not more". The proper focus of a damage award is on the plaintiff's loss. The Court should not encourage settlement with the promise that plaintiffs may have the opportunity for double recovery.
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> ...
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> Clearly there is a public interest in encouraging settlement... However, it would be wrong to promote settlement by encouraging parties to seek out double recovery in breach of the fundamental principle of damages. (Citations omitted)

[22] *Ashcroft* is of limited assistance in our case because there was no contributory negligence on the part of the plaintiff, and therefore the $400,000 represented both the plaintiff's total loss and the defendants' total liability. Accordingly, the Court's references to "plaintiff's loss", "full amount of loss" and "global award", which are relied on by the plaintiff in this case, must be approached with some caution.

[23] *Laudon v. Roberts*, 2009 ONCA 383 is important to our analysis because it appears to be the only case in which there was contributory negligence on the part of the plaintiff. The Ontario Court of Appeal affirmed, at para. 55, that "the law in this country is well-settled. Double recovery, save for a few narrow exceptions ..., is not permitted".

[24] The Court stated (at para. 27):

> It is the fundamental principle of tort law in this country that an injured plaintiff should be neither over nor under, but fully compensated by way of damages for injury sustained by the negligence of others. McLachlin J. writing for the majority in *Ratych v. Bloomer*, 1990 CanLII 97 (SCC), [1990] 1 S.C.R. 940 at paragraph 94 put it this way:
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> > The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle.

[25] In *Laudon* the Court of Appeal was dealing with a modified "Mary Carter" agreement (MCA) rather than a Pierringer agreement. There are significant differences between the an MCA and a Pierringer agreement, "including the fact that under a MCA, the settling defendant remains in the action whereas, in a 'Pierringer agreement', the settling defendant is removed from the proceeding": *Stamatopoulos v. Regional Municipality of Durham*, 2014 ONSC 6313 (Div. Ct.) at para. 17.[4]

[26] There is also an important similarity between the two: in both types of settlements "the plaintiff receives a certain recovery and maintains the chance to better that recovery in proceeding against the remaining defendants": (*Laudon* at para. 36).

[27] The settlement terms in *Laudon* did not require the plaintiff to repay any part of the settlement, regardless of the jury's verdict (para. 10). In that respect, the settlement resembled a Pierringer agreement rather than an MCA. In my view, any differences between the MCA in *Laudon* and the Pierringer agreement in our case are not relevant to the issue under consideration.

[28] In *Laudon* the plaintiff, who had been injured in a boating accident, settled against the settling defendant for $365,000 inclusive of damages and interest. The total damages awarded by the jury were $312,000. The plaintiff was found to be 11% liable, the settling defendant 50% and the non-settling defendant 39%. Accordingly, the plaintiff was awarded a net judgment of $277,698 (89% of $312,000) and the judgment against the non-settling defendant was $121,688 (39% of $312,000). The trial judge refused to

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[4] For a more detailed description of the differences between the two types of agreements see: *Elder v Rizzardo Bros. Holdings Inc.*, 2016 ONSC 7235 at footnotes (i) and (ii). See also: *Nadeau Poultry Farm Ltd. v Desjardins & Desjardins Consultants Inc.*, 2014 NBQB 81 at paras. 42 – 44.

deduct the amount paid to the plaintiff by the settling defendant, and ordered the non-settling defendant to pay the full $121,688.

[29] The Court of Appeal allowed the appeal, finding that the trial judge had permitted double recovery. While this result might initially appear to support Thompson Fuels in our case, the decision actually supports Gendron's position because the Court of Appeal deducted the settlement amount from the total damages award, not the net damages award. This is clear from paragraph 55 of the decision, which states:

> Clearly in this case the settlement monies received are on account of the same damage for which the plaintiff continued his proceeding against Sullivan, the non-contracting defendant. The plaintiff's total damages have been assessed by a jury at $312,000 which is less than the amount he received from Roberts the contracting defendant. To permit the plaintiff to recover any amount from Sullivan would result in double-recovery to the plaintiff. I am satisfied that the law in this country is well-settled. Double recovery, save in a few narrow exceptions which have no application to the facts here, is not permitted. [Emphasis added]

[30] Counsel for Gendron rightly notes that the Court of Appeal uses the total damages assessed by the jury ($312,000) as the point of double recovery, instead of the net judgment of $277,698 (89% of $312,000) as that point. He argues that the Court deliberately chose this method, and it is instructive with regard to the correct approach to this question.

[31] On the other hand, the settlement amount in *Laudon* was so high that the distinction between these two approaches did not matter to the result of that case. Whichever figure the Court used would result in the non-settling defendant paying nothing. Accordingly, the Court of Appeal did not directly address this question or provide any reason for using total loss rather than net loss.

[32] The final appellate authority on this issue is *Bedard v. Amin*, 2010 ABCA 3.

[33] *Bedard* was a medical malpractice case. It is important to consider the trial judge's reasons (*sub nom Bedard v. Martyn*, 2009 ABQB 392) because the Court of Appeal's brief summary of the facts can lead to a misinterpretation of the precise finding of the trial judge.

[34] In *Bedard,* the parties agreed that the plaintiff's damages totalled $2.8 million. The trial judge found that the doctors (the non-settling defendants) did not cause all of the plaintiff's injuries. The non-settling defendants were found to be liable in negligence and held to be 25% responsible for the injuries. There was no contributory negligence on the part of the plaintiff. As a result of the trial judge's finding, the non-settling defendants were liable for approximately $700,000. The trial judge assessed the liability of the settling defendant (the Calgary Health Region) and found the settling defendant was not negligent. Accordingly, $700,000 represented the total damages caused by negligence.

[35] The absence of contributory negligence on the part of the plaintiff is important to the court's analysis. While the non-settling defendants were responsible for only 25% of the total injuries, the trial judge found that they were "100% to blame for the damages that can be attributed to any negligence" (para. 12).

[36] The trial judge ordered that the amount of the settlement (not disclosed in the decision) be deducted from the damages that were otherwise to be paid by the non-settling defendants. The trial judge stated at para. 6:

> What must be kept in mind is that the Defendant doctors did not cause all of Logan's injuries. They caused only a portion of them. When the Plaintiffs receive 25% of the agreed damages, they will have received full compensation for all of Logan's injuries and resulting losses and as well as those caused to his parents. That is, he will have received full compensation for any of the damages caused by the Defendant doctors. The Plaintiffs cannot argue that the Court should consider that he has not been fully compensated for his injuries. He will be fully compensated for any damages caused by any of the Defendants' negligence. [Emphasis added]

[37] The issue on appeal in *Bedard* was whether the trial judge erred in concluding that the settlement funds received pursuant to a Pierringer agreement between the plaintiff and the settling defendants must be set off against the damages awarded against the non-settling defendants at trial.

[38] The Alberta Court of Appeal dismissed the appeal and upheld the decision of the trial judge. The Court concluded, at para. 2:

> The question calls for a balancing of competing policy objectives: the public interest in encouraging settlement of multi-party litigation versus the rule against double recovery in tort claims....The amount of the settlement monies paid under the Pierringer agreement, net of costs incurred in the claim against the settling defendants, should be deducted from the damages awarded at trial.

[39] The Court recognized at para. 11 that "both under-compensation and over-compensation of the plaintiff is to be avoided. The task of the court is to assess actual loss and to ensure, to the extent possible, that the injured person is compensated for the amount of that loss: no more and no less." The Court followed the appellate decisions in *Ashcroft* and *Laudon* stating (at para. 13):

> Those cases rest on the well accepted theory that the settlement made by the plaintiff and the monies received by the plaintiff from the settling defendant arise directly out of the action in which all parties are involved. In other words, the settlement monies received are directly related to the plaintiff's claim against both the settling and non-settling defendants for

> damages sustained. In such circumstances, the plaintiff is not entitled to receive more than the damages awarded by the court at trial.

[40] The Alberta Court of Appeal declined to "forge a new path for the use of Pierringer agreements in Alberta" (para. 14) stating, at paras. 16 – 17:

> We recognize, as did the trial judge, the element of unfairness that arises on the facts of this case, namely that the party who is at fault and who required the matter to go to trial has the benefit of monies paid by the settling defendants. In other cases, such as *Laudon*, a plaintiff may receive more under the terms of a settlement agreement than he is ultimately awarded at trial. There is no suggestion that the plaintiff in such a case should be required to pay back the excess. Although the policy adopted by the Canadian courts may lead to inconsistent or unsatisfactory results in some cases, the general principle is sound and in a broader sense is not unfair; no plaintiff will be left under-compensated through its application. Even if settlement proceeds are deducted from the plaintiff's ultimate award for damages, he will still receive full compensation for his injuries as assessed by the trial judge. The primary goal of tort damages, compensation of the plaintiff, is fulfilled.
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> The trial judge in this case carefully considered the competing policy objectives at issue. He correctly concluded that the current state of Canadian law is that the concern over double compensation outweighs the public interest in encouraging settlements. We agree with the trial judge's analysis of the law and his conclusion that the amount of monies received under the Pierringer agreement should be credited to the damages awarded against the non-settling defendant.

[41] Finally, the Alberta Court of Appeal stated: "The end result following the deduction of settlement proceeds should be that the appellants receive the full level of compensation for which the trial judge found the non-settling defendants liable."

[42] Divorced from its factual context, this last sentence supports Thompson Fuels' position on this motion. Thompson Fuels states that it was liable for only 40% of the damages incurred, and that if the settlement proceeds are credited to Thompson Fuels, Gendron will still receive the full level of compensation ($901,747) for which the defendants are severally liable.

[43] Gendron argues that this position confuses causation and liability. In *Bedard* the non-settling defendants *caused* only 25% of the total damages, and therefore any compensation above the 25% level amounted to double recovery. In other words, the plaintiff in *Bedard* was entitled to recover up to 100% of the damages *caused* by the defendants. As the trial judge stated: "he will have received full compensation for any of the damages caused by the Defendant doctors." There was no issue of contributory negligence on the plaintiff's part, so neither court in *Bedard* considered the effect that contributory negligence would have had on the decision.

[44] In our case, Gendron argues, the non-settling defendant *caused* 100% of the total damages, but its liability was reduced because of the plaintiff's contributory negligence. Gendron argues that the principle against double recovery applies to prevent a plaintiff from receiving more than 100% of the damages *caused* by the defendants, regardless of the plaintiff's own contribution to those damages. As Gendron states in his factum on this issue:

> The distinction between causation, which is a foundational aspect of the damages calculation, and liability or apportionment of fault, which is distinct from the damages calculation, is the crux of the argument here. *Bedard* involved a causation finding that served to reduce the damages where our case there is no controversy that Thompson's negligence caused the loss…In the case at bar Thompson can assert no entitlement to set off because Gendron has not fully recovered his loss.

Conclusion: Pierringer Agreement

[45] In the absence of express appellate direction on this point I consider myself bound by the methodology employed by the Court of Appeal in *Laudon*. That methodology infers that the principle of avoiding double recovery is based on the damages caused by the defendant(s) without reference to the plaintiff's contributory negligence (if any). As indicated, the Court clearly used the total assessed loss, without deducting the plaintiff's contribution to that loss, as the point for calculating double recovery. This method of calculating the point of double recovery is consistent with the Court's language, and I would not presume to suggest that the Court's use of the total assessed loss in para. 55 of its decision was unintended.

[46] Provided a plaintiff does not recover more than the total loss caused by the defendant(s) (without reference to the plaintiff's contributory negligence) there is no double recovery.

[47] Accordingly, provided the settlement proceeds are less than 60% of the assessed loss ($1,259,823 by the parties' calculations) they are not credited to the non-settling defendant. Any settlement proceeds above that amount are set off against the damages to be paid by the non-settling defendant.

2. Rule 59.06(1)

[48] Gendron and Thompson Fuels have each brought a motion under rule 59.06(1) to vary the judgment. Before considering their respective motions it will be helpful to consider the proper scope of rule 59.06(1).

[49] Rule 59.06 (1) allows for the amendment of an order containing an accidental error or oversight. The rule states:

> 59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendments in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

[50] In *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2013 ONSC 1502, at paras. 30 – 33, Perell J. provided a thorough analysis of the purpose and proper scope of this rule as follows:

> - Rule 59.06 (1) is designed to amend judgments containing a slip or error, errors which are clerical, mathematical or due to misadventure or oversight. The rule is designed to amend judgments containing a slip, not to set aside judgments resulting from a slip in judicial reasoning.
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> - Rule 59.06 (1) is not designed to be a disguised means to review errors in the making of the Reasons for Decision; rather, it is designed to correct errors in memorializing the Reasons into a formal order or judgment.
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> - Generally speaking the court's inherent and statutory jurisdiction to amend an order or judgment is limited to: (1) cases of fraud; (2) where there has been a slip in drawing up the order; and (3) where there has been an error in the order expressing the manifest intention of the court from its reasons for decision.
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> - The rule is only operative in exceptional circumstances given the public interest in the principle of finality to the litigation process.
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> - Under rule 59.06(1), the Court has the power to amend an order where there has been an error in expressing the manifest intention of the Court.
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> - The rule permits amendments where the order obviously or indubitably does not reflect what the court intended to do, either by error or oversight. [Citations omitted and bullet points added].

[51] In our case the final order or judgment has not been formally entered, so "the court has a broad discretion to vary or withdraw it, if it is in the interests of justice to do so": *Shaw Satellite G.P. v. Pieckenhagen*, 2011 ONSC 5968, at para. 21. Even so:

> [T]he circumstances in which a court may vary an order are limited. A court may only vary an order where: (a) there are new facts arising or discovered after the order was made that might probably have altered the judgment and could not with reasonable diligence have been discovered sooner; or (b) there has been an error in expressing the manifest intention of the court. (*Shaw Satellite* at para. 22).

[52] Also relevant is rule 59.06(2) (d), which provides:

> (2) A party who seeks to,
>
> (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

[53] A party relying on Rule 59.06 to re-open a case after the decision is rendered faces a high hurdle. In *Meridian Credit Union Limited v. Baig*, 2016 ONCA 942 the Court of Appeal stated, at paras. 6 – 7:

> Rule 59.06(1) addresses the jurisdiction of the court to amend an "order" where it contains "an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate". Rule 59.06(2) allows a party to move for the court to modify or set aside an order under particular conditions; to suspend the operation of an order; to carry an order into operation; or to obtain relief other than that originally awarded. All of these grounds for re-opening an appeal concern orders, whereas Baig alleges errors in this court's reasons; no order has yet been taken out.
>
> Nevertheless, generally speaking, there is no jurisdictional impediment to this court reconsidering its decision when no order has been taken out and entered... However, a party seeking to re-open an appeal after the appeal decision has been rendered faces "a high hurdle"...The court will re-open an appeal prior to the entering of the order "sparingly and only where it is clearly in the interests of justice"... Baig has not raised the kind of "rare circumstance" where "the interests of justice" would require us to withdraw our reasons and rehear the case on the merits. [Citations omitted]

[54] Rule 59.06 is not intended as an opportunity for counsel to ask the court for a "do-over" or to have a second kick at the can. I have no doubt that, following the release of a court's reasons for judgment, counsel frequently think of arguments that they did not make, but, with the benefit of hindsight and the court's reasons, wish they had. Nor is Rule 59.06 intended to authorize the trial judge to sit on appeal from his own decision. A court under Rule 59.06 is not entitled to consider issues properly dealt with by way of an appeal, such as alleged errors in law: *Zsoldos v. Ontario Assn. of Architects*, [2004] O.J. No. 309 (C.A.) at para. 3.

[55] In this regard, I adopt the caveat of Granger J. in *Rickett v. Rickett* (1990), 71 D.L.R. (4th) 734 (On S.C.); 1990 CanLII 8061, at paras. 2 and 4:

> As the formal judgment had not been issued and entered, counsel in their submissions requested that I consider amending or varying my judgment. There can be little doubt that prior to judgment being issued and entered, I have jurisdiction to amend or vary my judgment.
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> ...
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> In my opinion, I should avoid the temptation of tinkering with my judgment unless I have inadvertently failed to deal with a claim or made a mathematical error. If it is obvious that an error or omission has been

> made, counsel should always feel free to approach the trial judge and request that he or she reconsider his or her judgment in order to avoid the necessity of an appeal. On the other hand, counsel should not attempt to reargue their case prior to the formal judgment being issued and entered…

[56] See also *National Trust Co. v. Saks*, [1995] O.J. No. 853 per Borins J. at para. 6:

> My reasons for judgment reflected the result which I intended, based on my understanding of the submissions of counsel and the authorities which he provided, and other authorities which he did not provide. What…counsel did, in essence, was to reargue his client's position with respect to its damages and attempt to convince me that the approach taken in my reasons for judgment was wrong. In my view, I was asked to review my own reasoning. It may be that I was wrong. If I was, no doubt the Court of Appeal will correct the error.

3. Gendron's Rule 59.06(1) Motion

[57] The plaintiff, Gendron, moves under Rule 59.06(1) to vary the judgment to add recovery of 40% of the $313,005 costs of payment of the Order of the City of Kawartha Lakes in negligence. Gendron takes the position that I failed to adjudicate upon this issue in the Decision.

Facts

[58] Gendron's Statement of Claim in this action was issued in July 2009. Paragraph 1 of the Statement of Claim sought damages of $2 million and "ongoing damages" the particulars of which were to be provided before trial. The Statement of Claim listed some of the steps the plaintiff was required to take and expenses he was required to incur including remediation of the premises and adjoining premises.

[59] On June 15, 2010 the Corporation of the City of Kawartha Lakes (the "City") issued orders against Mr. Gendron, Thompson Fuels and the Technical Standards and Safety Authority ("TSSA"), pursuant to s. 100.1(1) of the *Environmental Protection Act* ("*EPA*"). The s. 100.1 orders required the orderees to pay $471,691.44 to the City for its costs and expenses incurred in cleaning up the spill.

[60] On July 29 and 30, 2010, Gendron, Thompson Fuels, and the TSSA each filed a notice of appeal with the Environmental Review Tribunal ("ERT"), regarding this order. The appeals by TSSA and Thompson Fuels were withdrawn following a settlement with the City; only the appeal by Gendron remained extant.

[61] Following a protracted hearing the ERT issued its decision on June 30, 2016 and allowed Gendron's appeal in part, reducing the s. 100.1 order to $313,005.08. This amount was calculated by the ERT on the basis of a detailed review of 19 invoices from Golder and Associates (Golder), the environmental remediation firm retained by the City. Some of the expenses were allowed by the ERT, others were not.

[62] In the proceeding before the ERT, Gendron sought to claim contribution and indemnity for its liability under the s. 100.1 order against the defendants to the civil action. In a decision dated March 10, 2016, the ERT decided that a claim for contribution and indemnity could not proceed before the ERT and had to be enforced in a civil action in court. The *EPA* provides that the right to contribution and indemnification for municipal orders to pay costs or expenses incurred by the municipality "may be enforced by action in a court of competent jurisdiction" (s. 99.1(7)).

[63] At para. 45 of its March 10, 2016 decision the ERT stated:

> ...s. 100.1 contemplates scenarios where there can be some perceived unfairness, in that a pollutant owner who is not at fault or is less at fault than others can be subject to a joint and several order to pay costs of a clean-up. However, subsequent recourse can be pursued by those subject to a s. 100.1 order via civil proceedings, which may involve the common law as well as s. 99.1(5) to (8) of the EPA because of s. 100.1(6). In that forum, degrees of fault or negligence can be taken into account in allocating final financial liability according to what is just and equitable in the circumstances (see s. 99.1(6)) [Emphasis added].

[64] At the outset of the trial on November 7, 2016, I allowed the plaintiff's motion to amend his Statement of Claim to add a claim for $313,005.08 for contribution and indemnity against the defendants in accordance with s. 100.1(1) and (6) of the *Environmental Protection Act* (see *Gendron v Doug G. Thompson Ltd. (Thompson Fuels),* 2016 ONSC 7056).

[65] The amendment to the plaintiff's Statement of Claim read as follows [amendments denoted by underlining]:

> (1) The plaintiff claims:
>
> (a) Damages in the amount of 3,000,000.00
>
> ...
>
> (e) Indemnity under s. 100.1(6) of the Environmental Protection Act;
>
> (f) Costs of proceeding before the Environmental Review Tribunal on a substantial indemnity scale.

[66] In my Decision I dealt with Gendron's claim for contribution and indemnity under s. 100.1(6) of the *EPA* at paras. 383 – 423 of my reasons. I concluded that Thompson Fuels did not have "the charge, management or control of a pollutant immediately before the first discharge" as required by s. 100.1(6), and therefore held that the plaintiff's claim for contribution and indemnity under s. 100.1(6) of the *EPA* was dismissed.

[67] In my Decision, I stated at para. 398:

> In the case before me the claim for contribution and indemnity with respect to the ERT's June 30, 2016 *EPA* Order is based on s. 100.1 of the *EPA*, and is not based on common law.

[68] Gendron argues that I misunderstood his position when I concluded that his claim for contribution and indemnity was based only on s. 100.1 of the *EPA*, and not on the common law. He therefore brings this motion to ask this court to adjudicate on the recovery of $313,005 in negligence, arguing that the Decision failed to adjudicate on this claim through "accidental slip or omission".

[69] Gendron does not seek to introduce any new evidence, and takes the position that the court can adjudicate on this claim on the basis of the existing record. In brief, his position is that Thompson Fuels was found 40% liable in negligence for the damages arising from the oil tank leak, and the $313,005 ERT order is one of the losses caused by that leak. Therefore 40% of that ERT order must be added to the damages assessed by the Court regardless of the result under s. 100.1(6) of the *EPA*.

Analysis

[70] Due to the length of this trial (approximately 24 days) I advised counsel that I would not impose a page limit on their factums. Gendron's factum was 107 pages long. His claim for contribution and indemnity with respect to the $313,005 ERT order is set out at pages 100 – 105. Nowhere in his factum did he advance the argument that if he were not entitled to contribution and indemnity under s. 100.1(6) of the *EPA*, he was still entitled to those same damages under the common law of negligence. That was why I concluded that the claim for contribution and indemnity was based exclusively on s. 100.1 of the *EPA*.

[71] Nor was this alternate common law claim advanced in Gendron's November 7, 2016 amendment to his Statement of Claim. There was no indication whatsoever that the amendment sought to claim the amount of the ERT order in negligence as well. Gendron acknowledges this, but argues that his original claim for negligence was broad enough to capture a claim for contribution and indemnity with respect to the subsequent ERT order.

[72] In any event, I am of the view that my Decision did address this issue, and it would be inappropriate to reconsider, revise, or try to improve those reasons in response to fresh arguments advanced by counsel on this motion.

[73] At paragraphs 398 and 414 of my Decision I stated the following:

> [398]…As indicated above, the ERT Order was based on 19 invoices from the remediation firm (Golder) retained by the City. No one from Golder testified before me and the 19 invoices were not made exhibits in this trial. Accordingly, if Thompson Fuels is responsible for any portion of those payments it is only by virtue of s. 100.1(6) of the *EPA*.
>
> [414] Plaintiffs may bring concurrent actions for contribution and indemnity under both s. 100.1 of the *EPA* and the common law. The

> advantage to proceeding under the *EPA* is that the plaintiff does not have to prove damages but can rely on the ERT's decision regarding the quantum or reasonableness of costs or expenses. The disadvantage is that the persons against whom contribution and indemnity may be claimed under the *EPA* are limited by the definitions of "owner" and "person having control" of the pollutant. If the action is brought under the common law, the plaintiff must prove the damages as it would in any common law action, but is not limited to "owners" and "persons having control of the pollutant".

Conclusion: Gendron's Rule 59.06(1) Motion

[74] In my view these two paragraphs addressed the common law negligence argument now advanced by Gendron's counsel. I was of the view that to proceed under the common law Gendron would have to prove damages by some means other than relying on the ERT decision. The paucity of analysis in my reasons was commensurate with the total absence of any submissions in the plaintiff's factum, but there was no failure to adjudicate on the claim. However tempting it may now be to expound on or reconsider my reasons, the issue under rule 59.06(1) is whether I did not adjudicate on an issue advanced by counsel. Since there was no such failure, Gendron's motion under rule 59.06 must be dismissed.

4. Thompson Fuels' Rule 59.06(1) Motion

[75] Thompson Fuels also moves under rule 59.06(1) to vary the judgment, arguing that the reasons "fail to address a number of legal issues argued at trial and key evidence that materially affect the outcome", and asks the court to "vary or amend" its reasons. This motion is based on a litany of complaints which essentially amount to disagreement with the reasoning and findings of fact in the Decision.

[76] Some of these complaints concern my alleged failure to deal with arguments that were not made in Thompson Fuels' 63 page factum. For example, Thompson Fuels states that I did not consider whether Gendron had breached s. 93 of the *EPA* as evidence of a failure to mitigate. Thompson Fuels also complains that I did not reference the payment of Gendron's line of credit and whether the line of credit was to be deducted from the replacement estimate for the home. Neither of these arguments appears in Thompson Fuels' factum. It is hardly surprising that I did not address arguments that were not made. In my view, this is not a basis for amending, varying or revisiting my reasons pursuant to either rule 59.06(1) or the court's inherent jurisdiction.

[77] Other complaints relate to my factual findings, and the allegation that I did not refer to portions of evidence that Thompson Fuels claims are inconsistent with those factual findings.

[78] The evidence in this trial comprised many hundreds of pages of transcripts and still many more hundreds of pages of exhibits. "There is no onus on a trial judge to refer to every piece of evidence adduced by the parties": *MacKinnon v. Sharkey*, 2009 ONCA 265 at para. 23. The trial judge "is required to consider the evidence as a whole in reaching

conclusions" *Tuchenhagen v. Mondoux*, 2011 ONSC 5398 (Div. Ct.) at para. 172. See also: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 46:

> The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others... Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion". [Citations omitted]

[79] I made no accidental slip or omission by not reciting all of the evidence referenced by counsel on this motion. My reasons for judgment reflected the result I intended, and "if I made an error, it is an error for the Court of Appeal to address and not for this court to fix" (*Shaw Satellite* at para. 26).

[80] As tempting as it is to respond to each of Thompson Fuels' allegations of factual error, I am reminded of Granger J.'s caveat in *Rickett* to "avoid the temptation of tinkering with my judgment unless I have inadvertently failed to deal with a claim or made a mathematical error."

[81] Thompson Fuels also argues that the 60/40 "apportionment calculation of contributory negligence was incorrectly done given the findings of fact". At the hearing of this motion counsel for Thompson Fuels agreed with my calculation that 60% plus 40% equals 100%. There was no mathematical error, and that is the end of the Rule 59.06(1) inquiry.

[82] In support of its motion Thompson Fuels relied on a lawyer's affidavit, and appends as an exhibit to that affidavit my Decision and excerpts of the trial transcript and exhibits. The lawyer's affidavit reviews my Decision and the transcript excerpts and attests that "there was no reference and consideration of material evidence and legal issues" and that certain of my findings are inconsistent with the evidence that he has reviewed. He also attests as to his belief that my assessment of contributory negligence is inconsistent with his review of the evidence.

[83] This affidavit is plainly inadmissible. It contains nothing but legal argument. Legal argument has no place in an affidavit.

Conclusion: Thompson Fuels' Rule 59.06(1) Motion

[84] Thompson Fuels' motion is an attempt to re-argue the merits of the case in an effort to obtain a better result under the guise of rule 59.06(1). None of the issues raised by Thompson Fuels falls within rule 59.06(1) or the inherent jurisdiction of the court. Therefore Thompson Fuels' motion under rule 59.06(1) is dismissed.

5. Summary of Conclusions

[85] Provided the settlement proceeds are less than 60% of the assessed loss ($1,259,823 by the parties' calculations) they are not credited to the non-settling defendant. Any settlement proceeds above that amount are set off against the damages to be paid by the non-settling defendant.

[86] Gendron's motion under rule 59.06(1) is dismissed.

[87] Thompson Fuels' motion under rule 59.06(1) is dismissed.

Costs

[88] The parties have deferred costs submission regarding the main trial pending the decision on this motion. Costs submissions of up to two additional pages with respect to this motion should be included with the costs submissions on the main trial.

R.E. Charney

Justice R.E. Charney

Released: November 16, 2017

CITATION: Gendron v. Thompson Fuels, 2017 ONSC 6856

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WAYNE ALLAN GENDRON

Plaintiff

– and –

DOUG C. THOMPSON LTD. operating as THOMPSON FUELS, TECHNICAL STANDARDS AND SAFETY AUTHORITY, and LES RESERVOIRS D'ACIER DE GRANBY INC.

Defendants

REASONS FOR DECISION RE: POST-TRIAL MOTIONS

Justice R.E. Charney

Released: November 16, 2017