Contribution and Causation: The IPEX Case

June 16, 2016

As succinctly summarized by Justice Belobaba, the case addressed the intersection of two lines of authority, namely that which permits a defendant who settles a class action to seek recovery from other non-settling parties, and the axiom that causation must be proven in order to establish liability.

On April 19, 2016 the decision in *IPEX Inc. v. AT Plastics et al.* ("*IPEX*") was released.[1] As succinctly summarized by Justice Belobaba, the case addressed the intersection of two lines of authority, namely that which permits a defendant who settles a class action to seek recovery from other non-settling parties, and the axiom that causation must be proven in order to establish liability. While neither proposition was truly controverted by the parties, it was held to be premature to decide causation on the basis of summary judgment rather than at trial.

IPEX manufactured a composite pipe called Kitec that was used in plumbing and heating in thousands of residential and commercial premises across North America. Kitec itself was composed of five layers of various plastics and adhesives; AT Plastics and Lubrizol Advanced Materials supplied roughly 80% of the resin for an inner layer.

End-users of Kitec ultimately complained of widespread premature failures of the pipe. IPEX, faced with 29 class actions in both the US and Canada, entered into a universal settlement in 2012 in the amount of $125 million (the "Settlement"). Under the Settlement, *inter alia*, IPEX paid into a settlement fund to cover compensation claims for a period of 8 years. The claims process requires class members to fill out a detailed proof of claim and provide a sample of the impugned product; accepted claims were to be paid out regardless of cause (i.e. whether or not the failure resulted from the resin or other adhesives, fittings, negligent manufacture etc.). Neither AT Plastics nor Lubrizol were parties to the Settlement.

Following the Settlement, IPEX in turn sued AT Plastics and Lubrizol (collectively, the "Defendants") in Ontario seeking contribution and indemnity under the *Negligence Act* and under contract (*Sale of Goods Act*) for the amount of the Settlement. The Defendants brought motions for summary judgment, on the basis of the assertion that IPEX could not prove that the Defendants caused any part of the loss underlying the Settlement. In particular, it was argued that no connection could be made between the Kitec resin and the damage sustained without individual claims data, which was not available in the action (due to its confidential treatment pursuant to the Settlement).

Justice Belobaba dismissed the Defendants' motions. The applicable law was not in dispute. A party that settles may seek contribution against a non-settling party as long as the settlement is assessed to be within a range of reasonableness by the Court, and the Court may apportion liability between the defendants on the basis of a determination of causation of the loss.[2]

However, the argument that IPEX could not show that the Defendants' resin was a cause of the pipe failures without reliance on the unavailable claims information (described as "each piece of leaky Kitec pipe"), was rejected. The Court determined that IPEX could plausibly establish causation and recovery under the Settlement by showing that the resin was at least *a cause* of the failures. It was also noted that IPEX's case did not depend on individual proof of causation, but rather expert evidence based on a limited subset of claims and investigation data. Evidence was proffered that the Defendants supplied defective resin, which was one of several likely causes of Kitec failures on the basis of expert investigation. Importantly, evidence going to the actual causes of Kitec failure was not before the Court.

Accordingly, the claim was held to raise a genuine issue requiring a trial. It was not feasible to summarily decide the issue of recovery under the Settlement without a full evidentiary basis for a determination of causation. This conclusion was premised on liability under the *Sale of Goods Act*'s implied warranty of fitness for purpose; yet it was held that it would not be sensible or proportionate to essentially bifurcate the action and dispose of the parallel claim for contribution and indemnity on a summary basis. Both were ordered to proceed to trial, to avoid "litigation by slices."

In addition, Justice Belobaba dismissed the request for summary judgment of whether the Settlement was unreasonable in the circumstances. The question of whether the quantum paid by IPEX was justified or reasonable required a full evidentiary foundation at trial.

Ultimately, and notwithstanding the direction of the Supreme Court in *Hryniak v. Mauldin*, *IPEX* illustrates that summary disposition cannot be achieved simply by pointing to the "individual issues" which “might have been” in the context of a settled class action.

In the same way that plaintiffs are permitted to try their cases at the common issue trial stage with reference to expert opinion establishing a common causal link where there is some basis in fact to do so, it appears that defendants who seek contribution and indemnity from third parties will be entitled to the same procedural courtesy without recourse to individual proof. The result with the benefit of a full evidentiary record remains to be seen.

[1] 2016 ONSC 1859 (S.C.J.)

[2] As put in the reasons, "Causation is also the first ‘stage' or step in the ‘recoverability of a reasonable settlement' claim. Before A can claim against C the settlement that it made with B, A must show that C caused all or part of the loss that led to the settlement and is therefore liable in damages to A."

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