

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

J.K.

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF ONTARIO

Defendant

- and -

BANYAN COMMUNITY SERVICES
INC., CRAIGWOOD YOUTH SERVICES,
PWI-DI-GOO-ZING-NE-YAA-ZHING
ADVISORY SERVICES, CAS OF
NIPISSING AND PARRY SOUND,
WILLIAM W. CREIGHTON YOUTH
SERVICES, RAY OF HOPE INC.,
NORTHERN YOUTH SERVICES INC.,
YOUTH SERVICES BUREAU OF
OTTAWA, ANAGO (NON)
RESIDENTIAL RESOURCES INC.,
KENNEDY HOUSE YOUTH SERVICE
INC., NORTH EASTERN ONTARIO
FAMILY AND CHILDREN'S SERVICES /
SERVICES A LA FAMILLE ETA
L'ENFANCE DU NORD-EST DE
L'ONTARIO, ST. LAWRENCE YOUTH
ASSOCIATION, KINARK CHILD AND
FAMILY SRVC. CORP. (MARKHAM),
CASATTA LTD., YORK DETENTION
CENTRE LTD.

Third Parties

Proceeding under the *Class Proceedings Act, 1992*

) *Kirk Baert and James Sayce, for the Plaintiff*

) *Christopher A. Wayland, Jonathan Sydor*
) *and Richard Miller for the Defendant*

) *C. Kirk Boggs for the Third Parties, Banyan*
) *Community Services Inc., Craigwood Youth*
) *Services, Pwi-Di-Goo-Zing-Ne-Yaa-Zhing*
) *Advisory Services, CAS of Nipissing and*
) *Parry Sound, William W. Creighton Youth*
) *Services, Ray of Hope Inc., Northern Youth*
) *Services Inc., Youth Services Bureau of*
) *Ottawa, Anago (Non) Residential Resources*
) *Inc., Kennedy House Youth Service Inc.,*
) *North Eastern Ontario Family and Children's*
) *Services/Services A La Famille et a*
) *L'Enfance du Nord-Est de L'Ontario, St.*
) *Lawrence Youth Association, Kinark Child*
) *and Family Srvc. Corp. (Markham), and*
) *York Detention Centre Ltd.*

) **HEARD:** December 13, 2016

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Pursuant to the Ontario *Child and Family Services Act*, R.S.O. 1990, c. C.11, and the federal *Youth Criminal Justice Act*, S.C. 2002, c. 1, Her Majesty the Queen in Right of the Province of Ontario (“the Crown”), through the Ministry of Children and Youth Services (“MCYS”), operates or oversees the operation of youth detention centres. There are 23 detention centres, and some are operated by the MCYS and some are operated by NGOs (non-government non-profit, organizations) that have signed service contracts with the Crown.

[2] J.K., the Plaintiff in this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, sues the Crown on behalf of all persons who were detained and/or incarcerated at one of the youth detention centres from January 1, 2007 to the present and were placed in secure isolation while under the age of 18.

[3] J.K. alleges that in the operation, oversight, or management of the youth detention centres, the Crown was negligent, in breach of fiduciary duties, and has breached the Class Members’ rights under sections 7, 9, and 12 of the *Canadian Charter of Rights and Freedoms*.

[4] Relying in part on indemnity provisions in the service contracts, the Crown has brought third party claims against the NGOs, and the Crown claims contribution and indemnity from them.

[5] J.K. and the NGOs respectively bring a motion to have the Crown’s third party claims struck out or stayed.

[6] For the reasons that follow, J.K.’s and the NGOs’ motions are granted.

B. Factual Background, Discussion and Analysis

[7] Through the MCYS, the Crown operates or oversees the operation of 23 youth detention centres; namely: (a) Bluewater Youth Centre; (b) Portage Youth Centre; (c) Craigwood Youth Services (Woodview Unit); (d) JJ Kelso Centre; (e) Near North Youth Centre; (f) Pinegar Youth Centre; (g) Sundance; (h) Donald Doucet Youth Centre; (i) Kennedy House Youth Services; (j) Genest Detention Centre for Youth; (k) Ge-Da-Gi Binez Youth Centre; (l) Peninsula Youth Centre; (m) Arrell Youth Centre; (n) Justice Ronald Lester Youth Centre; (o) Ray of Hope (Hope Manor); (p) Brookside Youth Centre; (q) Cecil Fader Youth Centre; (r) William E. Hay Youth Centre; (s) Sprucedale Youth Centre; (t) Syl Apps Youth Centre; (u) Roy McMurtry Youth Centre; (v) Sterling B. Campbell House; and, (w) York Detention Centre.

[8] The NGOs have service contracts with the Crown. The service contracts include the following indemnity provision:

Indemnification

12. (a) The Service Provider will, both during and following the term of this contract, indemnify and save harmless Ontario from all costs, losses, damages, judgements, claims, demands, suits, actions, complaints or other proceedings in any manner based upon, occasioned by or attributable to anything done or omitted to be done by the Service Provider, its directors, officers, employees, agents or volunteers in connection with services provided, purported to be provided or required to be provided by the Service Provider pursuant to this contract.

....

[9] In his Fresh as Amended Statement of Claim, J.K. claims damages of \$100 million and punitive damages of \$25 million for the Crown's alleged systemic negligence and breach of fiduciary duty in establishing, operating, controlling, or supervising the youth detention centres and for its violations of the Class Members' rights under sections 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*.

[10] Although J.K. pleads that the Crown is liable for the misconduct that occurred at both the youth detention centres that the MCYS directly operates and at the centres operated by the NGOs, in his Fresh as Amended Statement of Claim, J.K. limits his and the Class Members' claim for damages to the Crown's several liability; i.e., its discrete and independent liability separate and apart from the liability of the NGOs. Thus, J.K. pleads in paragraph 45:

45. The Plaintiffs claim, and the claim of each Class Member, is limited to the amount of the Plaintiffs or other Class Member's damages that would be apportioned to the Defendant in accordance with the relative degree of fault that is attributable to the Defendant's negligence. The Plaintiffs claim is against the Defendant for those damages that are attributable to its proportionate degree of fault, and he does not seek, on his own behalf or on behalf of the Class, any damages that are found to be attributable to the fault or negligence of any other person, or for which the Defendant could claim contribution or indemnity.

[11] In response to the Fresh as Amended Statement of Claim, the Crown delivered a Statement of Defence, and it issued Third Party Claims against the NGOs with which it had service contracts.

[12] J.K. purposefully chose not to sue the NGOs, and J.K. does not wish them joined to his proposed class proceeding. J.K. submits that it is neither necessary nor desirable to have the NGOs part of the class action because he has confined his claim for damages to the several or independent liability of the Crown. J.K. attempted to make his position about his claim against the Crown clear in his Reply to the Crown's Statement of Defence, where in paragraph 7 he pleaded:

7. The plaintiff denies that any fault and/or liability lies with any party other than the defendant for its systemic negligence. In any event, the plaintiff has pled only several liability for the defendant's systemic negligence. The plaintiff's claims for breaches of fiduciary duties of the defendant and for breaches of his and the Class's *Charter* rights lie only with the defendant. The plaintiff's claims and the claims of each Class member are limited to the damages that would be apportioned to the defendant in accordance with the relative degree of fault that is attributable to the defendant's negligence.

[13] J.K. also attempted to make his position about his claim against the Crown clear in a response to a Demand for Particulars from the NGOs, which stated:

RESPONSE TO DEMAND FOR PARTICULARS

The Plaintiff responds to the Third Parties' Demand for Particulars dated October 2, 2016 (the "Demand"), as set out below.

1. Paragraph 1 of the Demand requests: Please provide particulars of the term "agent" as used throughout the Fresh as Amended Statement of Claim. Specifically how does the term "agent" relate to the Third Party Defendants?

Response to Paragraph 1:

With respect to the Facilities operated by the Third Parties, the Plaintiff seeks damages arising as a result of the actions of the Crown in failing to draft and employ adequate policies and failing to properly supervise, inspect and/or oversee the actions of the Third Parties. In respect of these claims, the Plaintiff seeks damages from only the Crown for the actions of the Third Parties, and

their agents and employees, when acting within the course of the authority granted to them by the Crown. The Plaintiff does not in any way seek to hold the Crown liable for any independent negligent or intentional acts of the Third Parties, and their agents and employees, when they acted outside of the authority granted of them by the Crown.

2. Paragraph 2 of the Demand requests: Please provide particulars of the vicarious liability as pled at paragraph 50 of the Fresh as Amended Statement of Claim and how it relates to the Third Party Defendants.

Response to Paragraph 2:

With respect to paragraph 50 the reference to "vicariously liable for the harms perpetrated upon residents by its employees, representatives and agents" relates to:

- (a) Harms perpetrated on residents in the Facilities the Crown directly operated, as a result of the actions of its employees, servants and agents.
- (b) Harms perpetrated on residents in the Facilities that are operated by the Third Parties:
 - i. by the Crown's employees, servants and agents; and,
 - ii. by the Third Parties and their agents and employees, but only when acting within the authority granted to them by the Crown.

[14] Notwithstanding how J.K. has attempted to make his position clear about the nature of his and the Class Members' claims against the Crown, the Crown seeks to pursue its third party claims against the NGOs, but is now met by motions by J.K. and by the NGOs to have the third party claims struck out for not showing a reasonable cause of action or stayed pursuant to Rule 21 of the *Rules of Civil Procedure*.

[15] J.K. and the NGOs make three arguments to have the third party claims struck or stayed.

[16] The first argument is that since J.K. has limited his claim against the Crown to losses directly attributable to the Crown's own negligence, breaches of fiduciary duty, and breaches of the *Charter* and since the Court of Appeal held in *Taylor v. Canada (Health Canada)*, 2009 ONCA 487 that, in these circumstances, a right of contribution and indemnity does not arise, therefore, a third party claim for contribution and indemnity cannot be advanced and it should be struck. The first argument is that J.K. has "*Taylorized*" his claim and, therefore, there is no viable third party claims.

[17] In *Taylor v. Canada (Health Canada)*, in her class action, Mrs. Taylor sued Health Canada for negligent regulation of a medical device, a jaw implant. She did not sue the surgeon who had implanted the device or the hospital where the surgery had taken place, and she limited her claim to Health Canada's proportionate degree of fault. Health Canada, nonetheless, brought a third party proceeding against the surgeon and the hospital. The third parties brought a motion under rule 21.01(1)(b) to strike the third party claim as against them. In a decision, upheld by the Court of Appeal, the third party claims were struck. The Court of Appeal held that because the court can apportion liability between named parties and non-parties, a third party claim was not necessary or appropriate. Where only several liability is claimed, a defendant can never be required to pay more than their proportionate share of damages and, therefore, there was no right to claim contribution and indemnity.

[18] In my opinion, J.K.'s and the NGOs first argument succeeds. As I shall explain, the **letter** of *Taylor v. Canada (Health Canada)* applies to preclude third party claims with respect to J.K.'s claims for breach of fiduciary duty and for breaches of the Class Members' *Charter* rights. The **letter** of *Taylor v. Canada (Health Canada)* also works with respect to J.K.'s claims in

negligence. The **spirit** of *Taylor v. Canada (Health Canada)* applies to preclude third party claims with respect to J.K.'s claim that the Crown is vicariously liable for the acts of the NGOs.

[19] The principle from *Taylor v. Canada (Health Canada)* works with respect to J.K.'s claims for breach of fiduciary duty and for breaches of the Class Members' *Charter* rights. The *Taylor* Principle works because those claims are claims for which the Crown exclusively would be liable and thus these claims would not support any third party claim against the NGOs which cannot be liable for matters for which the Crown exclusively would be liable.

[20] The principle from *Taylor v. Canada (Health Canada)* also works with respect to J.K.'s claims in negligence against the Crown. The principle works because where there is more than one party or person who caused harm to the plaintiff, then the liability amongst the tortfeasors can be apportioned regardless of whether or not they are all parties. Thus, if the plaintiff limits his or her claim to each tortfeasors' allocated share of the damages, then third party claims between the tortfeasors are not tenable.

[21] However, *Taylor v. Canada (Health Canada)* did not consider a claim for vicarious liability (apart from Canada's vicarious liability for Health Canada); visualize, while Mrs. Taylor alleged that Canada was vicariously liable for Health Canada, she did not allege (nor could she allege) that Canada was vicariously liable for the malpractice of her surgeon or for the negligence of the hospital.

[22] It would follow that in the immediate case, the Crown's submission that *Taylor v. Canada (Health Canada)* does not make its third party claims against the NGOs' legally untenable has traction because *Taylor* did not deal with a claim based on vicarious liability. The strength of the Crown's submission rests in the legal nature of vicarious liability, which unlike the joint, several, or joint and several liability of wrongdoers, is based on the imposition of liability on a defendant for the acts and omissions of another person because of their relationship, one to another; the liability is not based exclusively on the defendant's own misconduct; it is an associated and not a direct liability.

[23] For example, in the leading cases of *Bazley v. Curry*, [1999] 2 S.C.R. 534 and *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, the Supreme Court of Canada considered the question of when an employer, who was without direct fault, would be held responsible for the civil wrongs of an employee. In *Bazley v. Curry*, the Supreme Court of Canada held that an NGO that offered care for emotionally troubled children was liable for its employee's sexual assaults on the plaintiff. In *Jacobi v. Griffiths*, the same panel of the Supreme Court divided four-to-three, and the majority concluded that the Vernon Boys' and Girls' Club, an NGO that promoted health, educational, vocational, and character development of boys and girls, was not liable for the sexual assaults perpetrated by its program director on the plaintiff. In both cases, the Supreme Court was not asked to address the question of whether the NGO might be liable based on its own direct fault, for instance, for negligence or for breach of fiduciary duty in hiring a pedophile. Rather, the court was asked to focus on the problems of an employer's vicarious liability for its employee's wrongdoings even if the employer itself was without fault.

[24] The nature of vicarious liability is that it is not attributable to the proportionate degree of fault between the defendant and the co-defendant or non-party for whom the defendant is vicariously liable; rather the tortfeasor's liability is wholly (not-proportionately) attributable. I, thus, conclude that the jurisprudential letter of *Taylor v. Canada (Health Canada)* does not assist J.K. or the NGOs in having the third party claims struck out. That said, the spirit of the *Taylor v.*

Canada (Health Canada) case does assist J.K. and the NGOs, and the jurisprudential spirit of the *Taylor* decision has persuaded me that the third party claims should be struck out.

[25] Put differently, J.K.'s pleadings and his reply to the Demand for Particulars make it clear that once the dust of the litigation battlefield settles, the Class Members seek to only make the Crown liable for its own misconduct for breach of fiduciary duty or for *Charter* violations or to the limits of its several liability in negligence.

[26] Put differently still, J.K. has pleaded his action in a way that the court will be required to determine what proportion of the liability for the Class Members' injuries rests exclusively with the Crown and to grant judgment exclusively for that sum, if any. The judgment award will, therefore, by definition, not include any award for injuries for which there would be a claim for relief over in third party proceedings. Thus, pleading as J.K. has in the main action, it is plain and obvious in the third party proceedings that the Crown does not have third party claims and the third party claims should be struck out.

[27] J.K.'s and the NGOs' second argument is that the service contracts between the Crown and the NGOs upon which the Crown relies for its third party claim do not provide indemnification to the Crown with respect to its own negligence and misconduct and the law is that if a party to a contract is to be protected against and indemnified for its own misconduct, the indemnity clause must be set out in the clearest terms, which is not the case in the immediate case.

[28] Having regard to my conclusions about J.K.'s and the NGOs' first argument, it is not necessary for me to address their second argument.

[29] J.K.'s and the NGOs' third argument is that if the Crown's Fresh Amended Third Party Claim does disclose a reasonable cause of action, that action should be stayed at least until after the certification motion. In this regard, they rely on s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, rules 6.01(1)(e), 21.01(1)(b), 29.01, 29.08(2), 29.09 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and sections 12 and 13 of the *Class Proceedings Act, 1992*.

[30] Having regard to my conclusions about J.K.'s and the NGOs' first argument, it is not necessary for me to address their third argument.

C. Conclusion

[31] For the above reasons, J.K.'s and the NGOs' motions are granted.

[32] If the parties cannot agree about the matter of costs, then they may make submissions in writing beginning with J.K.'s and the NGOs' submissions within 20 days from the release of these Reasons for Decision followed by the Crown's submissions within a further 20 days.


Perell, J.

CITATION: J.K. v. Ontario, 2016 ONSC 8047
COURT FILE NO.: CV-16-543895CP
DATE: 20161222

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Plaintiff

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Third Parties

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