Strong v. Kisbee, Estate Trustee for the Estate of Micheline M. Paquet*

[Indexed as: Strong v. Paquet Estate]

50 O.R. (3d) 70
[2000] O.J. No. 2792
Docket No. C28057

Court of Appeal for Ontario
Borins, MacPherson and Sharpe JJ.A.
August 1, 2000

*Application for leave to appeal to the Supreme Court of Canada was dismissed with costs April 5, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28170. S.C.C. Bulletin, 2001, p. 631.

Limitations -- Pleadings -- Plaintiff suing defendant for damages for defamation -- Defendant counterclaiming for damages for sexual assault -- Plaintiff not pleading that counterclaim barred by s. 45(1)(j) of Limitations Act -- Trial judge raising question of limitation period during closing arguments and giving parties opportunity to make submissions on that issue -- Trial judge ruling that counterclaim statute-barred -- Trial judge erring in doing so as plaintiff's failure to plead s. 45(1)(j) of Limitations Act fatal to plaintiff's and trial judge's reliance on it -- Fact that trial judge gave parties opportunity to make submissions on issue not removing potential prejudice to defendant -- Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(j).

The plaintiff was dismissed by the defendant GM in 1992 because of his alleged sexual assault on a co-worker, the defendant P. He brought an action against GM for damages for wrongful dismissal. He also brought an action against P for

damages for defamation. P counterclaimed for damages for sexual assault. The trial judge found the plaintiff not to be credible. He found that the alleged sexual assault did in fact occur in 1985 and dismissed the defamation action. He dismissed the wrongful dismissal action on the ground that sexual assault constituted cause for termination of employment without notice. He also dismissed P's counterclaim on the ground that it was statute-barred pursuant to s. 45(1)(j) of the Limitations Act, which requires that a civil action for assault be brought within four years after the cause of action arose. The plaintiff had not pleaded s. 45(1)(j) of the Act. The trial judge raised the question of the applicability of the limitation period during closing arguments and gave the parties an opportunity to make submissions on the issue. He indicated that, if P's counterclaim were not statute-barred, he would have found in her favour on the merits and assessed damages for the sexual assault at $100,000. He ordered the plaintiff to pay the costs of P and GM on a solicitor and client basis.

The plaintiff and P both appealed.

Held, the plaintiff's appeal should be dismissed; P's appeal should be allowed.

The plaintiff did not come close to demonstrating that the trial judge committed a palpable and overriding error in his assessment of the evidence or in his factual findings. The trial judge was at pains to substantiate his findings by referring in considerable detail to the testimony of many of the witnesses and to the other evidence. In particular, the trial judge provided a full explanation for his conclusion that the plaintiff's denials were "hollow and unconvincing". The plaintiff was essentially inviting the appellate court to retry the case. In light of the high hurdle of the "palpable and overriding error" test and in light of the trial judge's clear and fully documented findings concerning the credibility of witnesses, that invitation had to be declined.

Both defendants were represented by the same counsel. The trial judge was assured that P had obligated herself to be

responsible for her own costs. There was no basis in the record to call that assurance into question. Accordingly, the plaintiff's argument that the trial judge erred in awarding solicitor and client costs to P because all of her costs would have been indemnified by GM could not succeed.

The trial judge should not have considered the limitation issue because the plaintiff had not pleaded it. The parties to a lawsuit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. Rule 25.07(4) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 provides that in a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading. Rule 25.07(4) applies to pleadings relating to limitations that might bar an action. The fact that the trial judge gave counsel time to prepare submissions on the issue after he raised it during closing argument did not remove the potential prejudice to P. Moreover, the plaintiff's defamation claim and P's claim against him were essentially mirror images of each other. In the circumstances, the result that the plaintiff's claim against P was not statute-barred but P's claim against the plaintiff was statute-barred was anomalous and unsatisfactory.

Cases referred to

B. (P.) v. B. (W.) (1992), 11 O.R. (3d) 161 (Gen. Div.); Bates v. Bates (2000), 49 O.R. (3d) 1, [2000] O.J. No. 2269 (C.A.); D.S. Park Waldheim Inc. v. Epping (1995), 24 O.R. (3d) 83 (Gen. Div.); Kalkinis v. Allstate Insurance Co. of Canada (1998), 41 O.R. (3d) 528 (C.A.); Ontario (Attorney General) v. Palmer (1979), 28 O.R. (2d) 35, 108 D.L.R. (3d) 349, [1980] I.L.R. 1-1196, 15 C.P.C. 125 (C.A.); Pringle v. London (City) Police Force, [1997] O.J. No. 1834 (C.A.); R. v. White (1996), 29 O.R. (3d) 577, 108 C.C.C. (3d) 1, 49 C.R. (4th) 97 (C.A.) [affd [1998] 2 S.C.R. 72, 39 O.R. (3d) 223n, 161 D.L.R. (4th) 590, 227 N.R. 326, 125 C.C.C. (3d) 385, 16 C.R. (5th) 199]; Stein v. "Kathy K" (Ship), [1976] 2 S.C.R.

802, 62 D.L.R. (3d) 1, 6 N.R. 359

Statutes referred to

Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(i), (j)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 25.07(4)

Authorities referred to

Mew, The Law of Limitations (Toronto: Butterworths, 1991), p. 54

APPEALS by the plaintiff from a dismissal of actions for defamation and wrongful dismissal and by the defendant from a dismissal of an action for damages for sexual assault.

Kenneth S. Marley, for appellant.
Terrence J. O'Sullivan and Tracy L. Wynne, for respondents.

The judgment of the court was delivered by

MACPHERSON J.A.: --

INTRODUCTION

[1] In 1992 Wayne Strong was the plant manager of General Motors of Canada Ltd.'s Trim Plant in Windsor, Ontario. On November 17, 1992, General Motors ("GM") dismissed him because of his alleged sexual assault on Micheline Paquet. In 1992 Paquet was an employee at GM's head office in Oshawa. She made a complaint related to an incident seven years earlier, when she had been a GM employee in Montreal and attended a training session at the Guild Inn in Scarborough. Strong was an instructor at the session. She alleged that Strong raped her in his bedroom.

[2] GM investigated Paquet's complaint and decided to dismiss Strong. After his dismissal, Strong initiated two lawsuits: one against Paquet for defamation; the other against GM for wrongful dismissal. Paquet counterclaimed for damages for sexual assault.

[3] The two actions were heard together by Granger J. He dismissed both of Strong's actions. He also dismissed Paquet's counterclaim on the basis that it was statute-barred by the Limitations Act, R.S.O. 1990, c. L.15.

[4] Strong and Paquet both appeal from Granger J.'s decision. Strong's principal ground of appeal is that the trial judge's decision was unreasonable because he made factual findings unsupported by the evidence, misconstrued the evidence, and made palpable and overriding errors of law. Paquet asserts in her cross-appeal that the Limitations Act is not a bar to her counterclaim.

[5] Strong's appeal raises the issue whether the trial judge made a palpable and overriding error in his assessment of the evidence or in his factual findings. Paquet's cross-appeal raises the issue whether a trial judge can apply a statutory limitation period that is not pleaded by the party who will benefit from it.

A. FACTUAL BACKGROUND

1. The Parties and the Events

[6] On August 25, 1992, Paquet reported that she had been sexually assaulted by Strong on August 27, 1985. Paquet's complaint related to a GM training seminar organized by Strong that she attended in August 1985. Paquet testified at trial that, at Strong's request, she went to Strong's room. After consuming a drink offered by Strong, she became dizzy and unable to move. Strong removed Paquet's clothing and then had intercourse with her. When Paquet woke up, she returned to her room and then went to bed.

[7] Paquet testified that the next morning she informed Catherine Ramsay (another GM employee attending the seminar) what had happened to her. This was confirmed by Ramsay's testimony. Paquet further testified that, upon her return from the seminar, she informed Carol Beaudry (a co-worker) that she had been drugged and raped by Strong. Beaudry testified that, although Paquet did not tell her that she had been raped, Paquet did tell her that she believed that Strong "put something in [her] drink".

[8] After receiving the complaint from Paquet, William Tate and Douglas Burke (both senior executives at GM) met with Strong on October 14, 1992. At that meeting, Strong was advised that GM had received an allegation of sexual misconduct on his part -- specifically, that a complainant (Paquet was not identified at this meeting) alleged that he drugged and raped her on August 27, 1985. Strong was advised that GM intended to investigate the complaint, and also to determine if there had been other instances of sexual misconduct or harassment on his part.

[9] The investigation revealed other instances of alleged sexual harassment. These other complainants testified at trial. Geraldine Lesperance complained of two occasions of sexual harassment. Lesperance testified that in 1991, while she was attending a retirement party, Strong stood behind her and rubbed her buttocks for five minutes. Strong denied this. Lesperance also testified that during a blood donor clinic held at the GM plant, Strong, in the presence of other employees, asked how she answered questions concerning her sexual history. Strong indicated that there was some joking between himself, Lesperance and other employees, but denied posing the question to Lesperance. Lynda Gallop accompanied Strong on a series of recruitment trips in 1980. Gallop testified that Strong acted in a flirtatious manner with hotel staff and flight attendants. Gallop further testified that, on a flight in early 1980, Strong asked her what kind of men she liked. Strong denied making such a statement to Gallop. Cynthia Ulrich testified that on one occasion Strong stated that he and another employee had been with at least one hundred women at the plant. Strong denied making this statement.

[10] After completing their investigation, Tate and Burke arranged to meet with Strong on November 16, 1992. At this meeting, Tate informed Strong that the complainant was Paquet. Tate then read Paquet's statement. Strong denied knowing Paquet and denied any sexual misconduct. Strong took the position that Paquet was never in his hotel room. Strong also denied any sexual harassment or misconduct towards Lesperance, Gallop or Ulrich. Strong acknowledged that GM policy required him to refrain from sexual relations with subordinate workers. He was shown a list of female employees who had been subordinate to him, and he denied having sexual relations with any of them. (Strong later testified that he had, in fact, had sexual relations with some of these women.) At the end of the meeting, Tate advised Strong that GM would be recommending to its U.S. parent termination of Strong's employment. That afternoon, the recommendation was accepted and Strong's employment was terminated.

[11] On November 17, 1992, Strong was advised in writing that his employment had been terminated for cause. He was offered 11 months' salary. Strong accepted GM's offer and, on November 19, 1992, executed a full and final release with respect to GM.

[12] On November 2, 1994, Strong commenced an action against Paquet for damages for defamation. Paquet counterclaimed for damages for sexual assault. On November 28, 1994, Strong commenced an action against GM for damages for wrongful dismissal. By judgment dated June 17, 1997, Granger J. dismissed all claims and counterclaims. After hearing further submissions, the trial judge ordered that Strong pay the costs of Paquet and GM on a solicitor and client basis. He fixed those costs at $228,780.19 plus GST.

2. The Trial Judgment

[13] The trial judge found that Strong was not a credible witness. This finding was based on, inter alia, the fact that Strong lied to Tate and Burke during the meeting of November 16, 1992, and Strong's willingness to embarrass employees or former employees. In contrast, the trial judge found that

Ulrich, Gallop and Lesperance were reliable witnesses and accepted their evidence. The trial judge also found Paquet to be a reliable witness and accepted her evidence. In assessing Paquet's credibility, the trial judge noted that the cross-examination did little to test the relevant parts of her evidence. Moreover, it was directed to showing that Paquet had consented to sexual intercourse with Strong, although Strong had taken the position that the incident did not occur. The trial judge further found that Paquet's statements to Ramsay and Beaudry were consistent with her evidence as to what happened in Strong's hotel room, and helped to determine her credibility. Finally, the trial judge concluded that the fact that Paquet did not immediately report the incident did not detract from the veracity of her complaint. He attributed Paquet's decision to report the assault to changed attitudes on the part of GM.

[14] After reviewing the evidence, the trial judge found as a fact that it was the effect of alcohol, and not any drug, that caused Paquet to feel dizzy. He then concluded that he was "satisfied on a balance of probabilities . . . that Ms. Paquet attended at Mr. Strong's hotel room on the evening of August 27, 1985, and was sexually assaulted by Mr. Strong." He was "also satisfied that Mr. Strong sexually harassed Ms. Ulrich, Ms. Gallop and Ms. Lesperance." In general, he found "Mr. Strong's denials to be hollow and unconvincing." On the basis of these findings, he dismissed Strong's action against Paquet on the ground that "the statements which Mr. Strong claims defamed him were true and as such are a complete defence to his action against Ms. Paquet."

[15] The trial judge then considered Strong's action against GM. He had some criticism for the manner in which GM carried out its investigation, finding that GM had accepted the allegations as true prior to the meeting on November 16, 1992. However, notwithstanding such criticism, he dismissed Strong's action for damages for wrongful dismissal on the grounds that sexual assault constituted cause for termination of employment without notice. Having reached this conclusion, he found that it was not necessary to determine whether the instances of sexual harassment, or the failure to be truthful at the

November 16 meeting, also constituted cause for termination without notice.

[16] The trial judge also reviewed the release executed by Strong. He found that, on its face, the release would preclude Strong from bringing any action against GM. He further found that there was no evidence of unconscionability, fraud or misrepresentation on the part of GM, or lack of capacity on the part of Strong. Accordingly, he found that Strong was bound by the release.

[17] Finally, the trial judge found that Paquet's counterclaim against Strong was statute-barred pursuant to s. 45(1)(j) of the Limitations Act, which requires that a civil action for assault be brought within four years after the cause of action arose. Paquet made her claim against Strong only after he had sued her for defamation in 1994. This was nine years after the alleged sexual assault in the Scarborough hotel room. In reaching this decision, the trial judge held that a counterclaim was an action and was, therefore, covered by s. 45(1)(j) of the Limitations Act. He applied the decision of this court in Ontario (Attorney General) v. Palmer (1979), 28 O.R. (2d) 35, 108 D.L.R. (3d) 349 (C.A.), stating that it "remains the law in Ontario and as such is binding upon me".

[18] However, the trial judge also indicated that, if Paquet's counterclaim were not statute-barred, he would have found in her favour on the merits and assessed damages for the sexual assault at $100,000.

B. ISSUES

[19] The appeal and cross-appeal raise the following issues:

Appeal issues

1. Did the trial judge make a palpable and overriding error in his assessment of the evidence and in his factual findings?

2. Did the trial judge err by awarding both respondents their costs of the action?

Cross-appeal issues

1. Did the trial judge err in applying s. 45(1)(j) of the Limitations Act when it had not been pleaded by Strong in his defence to the counterclaim?

2. Did the trial judge err in concluding that a counterclaim is an action and is, therefore, covered by s. 45(1)(j) of the Limitations Act?

C. ANALYSIS

The Appeal

1. "Palpable and overriding error"

[20] The appellant asserts that the trial judge made several major errors in his assessment of the evidence and in his factual findings. These alleged errors can be divided into three categories.

[21] First, the appellant submits that the trial judge made several findings of fact that were unsupported by the evidence. In particular, the appellant submits that the trial judge should not have accepted Paquet's testimony, given his conclusion that her dizziness was probably caused by alcohol, rather than a drug slipped into her drink. The appellant argues that in the absence of a reasonable explanation for what Paquet experienced in the hotel room, it is impossible to accept that Paquet was in fact in the hotel room. Further, the appellant submits that there is no basis for the trial judge's conclusion that GM did little to encourage employees to report sexual harassment until 1992. The appellant argues that, if this finding is set aside, Paquet's reliability is called into question as there is no reasonable explanation for her failure to report the incident.

[22] Second, the appellant contends that the trial judge made several findings of fact which resulted from a misapprehension of evidence. In particular, the appellant submits that the

trial judge misapprehended the following: the timing of comments made by Strong at a meeting of the Women's Advisory Council at the Windsor Trim Plant; Paquet's statements to Ramsay and Beaudry soon after the hotel room incident; the thrust and effectiveness of the cross-examination of Paquet; and the testimony of the other female employees who described incidents they had experienced with Strong.

[23] Third, the appellant submits that the trial judge's finding that the release Strong signed was a bar to his action against GM was unreasonable in so far as it was premised entirely upon his rejection of Strong's evidence and did not attach appropriate weight to the supporting opinion evidence of Dr. Howard Book.

[24] An appellant faces a high hurdle when he challenges on appeal a trial judge's assessment of the evidence, including the credibility of witnesses, and factual findings. The appellant must establish that the trial judge committed a palpable and overriding error in these domains. As expressed by Ritchie J. in the leading case, Stein v. "Kathy K" (Ship), [1976] 2 S.C.R. 802 at p. 808, 62 D.L.R. (3d) 1:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at trial.

[25] In my view, the appellant does not come close to demonstrating that the trial judge in this case committed a palpable and overriding error in his assessment of the evidence or in his factual findings. The fundamental fact is that the trial judge believed Paquet and disbelieved Strong. Moreover, he did not state these conclusions in a bald, unsupported fashion. Rather, he was at pains to substantiate his findings

by referring in considerable detail to the testimony of many of the witnesses and to the other evidence.

[26] In particular, the trial judge provided a full explanation for his conclusion that Strong's denials were "hollow and unconvincing". He pointed out that Strong had lied during GM's investigation and that his lies (which he maintained until his examination for discovery) cast aspersions on the integrity of several female GM employees. Moreover, he also lied in a letter he wrote to the president of GM protesting his innocence. The trial judge was also unimpressed by the manner in which Strong conducted himself at the trial:

> During the course of this trial, Mr. Strong never apologized or indicated any remorse for branding employees at General Motors as liars when he knew in fact they had told the truth. On the contrary, Mr. Strong demonstrated a willingness to embarrass employees or former employees of General Motors who appeared at this trial by revealing or suggesting mistakes which they may have made in their private lives and which had very little, if any, relevance to the issues before this Court. Much of the cross-examination of Cyndy Ulrich, Lynda Gallop, Geraldine Lesperance and Micheline Paquet was designed to embarrass and humiliate each of them on matters which did not go to the core of their evidence or to the issues in this trial.

[27] In my view, the appellant's first ground of appeal is essentially an invitation to this court to re-try the case. In light of the high hurdle of the "palpable and overriding error" test, and in light of the trial judge's clear and fully documented findings concerning the credibility of witnesses, especially Paquet and Strong, the invitation must be declined. The trial judge's ultimate conclusion was: "I am satisfied on a balance of probabilities and I must state that I am also satisfied beyond any reasonable doubt that Ms. Paquet attended at Mr. Strong's hotel room on the evening of August 27, 1985 and was sexually assaulted by Mr. Strong." I see no reason to interfere with this conclusion.

2. The costs issue

[28] The trial judge awarded solicitor and client costs to both Paquet and GM. The appellant appeals the award to Paquet on the basis that all of her costs would have been indemnified by GM.

[29] Strong initiated two separate actions, one against Paquet for defamation, the other against GM for wrongful dismissal. Both defendants retained Mr. O'Sullivan and Ms. Wynne. The actions were joined and Mr. O'Sullivan and Ms. Wynne represented the defendants throughout the nine-day trial. In his supplementary reasons for judgment dealing with costs, the trial judge stated:

> I was assured by Ms. Wynne that Ms. Paquet had retained Mr. O'Sullivan, and that his firm was at liberty to send Ms. Paquet an account for legal services rendered. If Ms. Paquet was not obligated to pay any monies to the solicitors that acted on her behalf, she would not be entitled to make a claim for costs. As she retained Mr. O'Sullivan and obligated herself to be responsible for his legal services, she is entitled to seek costs against Mr. Strong.

There is nothing in the record before this court to call into question either Ms. Wynne's assurance or the trial judge's conclusion. I would not, therefore, give effect to this ground of appeal.

The Cross-Appeal

[30] The trial judge dismissed Paquet's counterclaim for damages for sexual assault on the basis that it was barred by s. 45(1)(j) of the Limitations Act:

> 45(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> . . . . .
>
> (j) an action for assault . . . within four years after the cause of action arose;

The trial judge held that a counterclaim was an action. In so holding, he relied expressly on this court's decision in Ontario (Attorney General) v. Palmer, supra.

[31] Paquet contends that the trial judge erred in two respects -- first, he should not have considered the limitation issue because Strong had not pleaded it; and, second, he should not have applied Palmer because it cannot stand in light of more recent decisions of the Supreme Court of Canada dealing with the interpretation of limitations statutes.

1. The pleadings issue

[32] The issue of the Limitations Act was a live one at the trial. Paquet pleaded in her statement of defence that Strong's action against her was barred by s. 45(1)(i) of the Limitations Act. The trial judge dealt fully with this issue in his judgment. It appears that during closing arguments the trial judge raised the question whether Paquet's counterclaim might be barred by s. 45(1)(j) of the Limitations Act. Counsel were given time to prepare submissions on this issue and, in the result, the trial judge decided that Paquet's counterclaim was barred. In his reasons on this issue, the trial judge dealt only with whether a counterclaim was covered by the word "action" in s. 45(1)(j).

[33] In her notice of cross-appeal, Paquet challenged the trial judge's decision on the counterclaim/action issue. However, her first ground of appeal was that Strong had not pleaded s. 45(1)(j) of the Limitations Act and that this failure was fatal to his, and the trial judge's, reliance on it. Unfortunately, although this argument was advanced before the trial judge, he did not address it in an otherwise comprehensive judgment.

[34] In my view, Paquet is entitled to succeed on this ground of appeal. There is nothing in Strong's pleadings about the Limitations Act. In Kalkinis (Litigation guardian of) v. Allstate Insurance Co. of Canada (1998), 41 O.R. (3d) 528 at (C.A.) p. 533, Finlayson J.A. said:

It has long been established that the parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings: see rule 25.06.

[35] The Rules of Civil Procedure, R.R.O. 1990, Reg. 194, are particularly specific about the pleading of affirmative defences. Rule 25.07(4) provides:

> 25.07(4) In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.

[36] The Ontario courts have consistently held that rule 25.07(4) applies to pleadings relating to limitations that might bar an action: see Pringle v. London (City) Police Force, [1997] O.J. No. 1834 (C.A.); D.S. Park Waldheim v. Epping (1995), 24 O.R. (3d) 83 (Gen. Div.); and B. (P.) v. B. (W.) (1992), 11 O.R. (3d) 161 (Gen. Div.). See also Mew, The Law of Limitations (Toronto: Butterworths, 1991), at p. 54.

[37] I see no reason for departing from these authorities in the present appeal. The fact that the trial judge gave counsel time to prepare submissions on the issue after he raised it during closing argument does not remove the potential prejudice to Paquet. If Strong had raised the issue in his pleadings, Paquet might have tried to settle, or even have abandoned, her counterclaim. Either decision might have had costs consequences. Another potential source of prejudice arises from the fact that counsel for Paquet might have adopted different tactics at trial. In particular, counsel might have called different or additional evidence to support an argument that the discoverability principle applied.

[38] Moreover, I note that Strong's claim against Paquet (defamation) and Paquet's claim against Strong (sexual assault) were essentially mirror images of each other. In such circumstances, the result reached by the trial judge, namely Strong's claim against Paquet was not statute-barred but

Paquet's claim against Strong was statute-barred, is an anomalous and unsatisfactory result.

[39] Finally, I note that at no time during the trial, including during the closing arguments when the trial judge raised the limitation issue, did Strong seek to amend his pleadings. Nor, indeed, did he seek such an amendment during the appeal hearing.

[40] For these reasons, I would allow the cross-appeal on the pleadings issue. Fortunately, the trial judge considered the question of Paquet's damages in the event he was wrong in dismissing the cross-appeal. He assessed those damages at $100,000. I see no basis for interfering with that assessment.

2. The issue relating to the nature of a counterclaim

[41] In light of my conclusion on the pleadings issue, it is not necessary to consider whether this court's decision in Ontario (Attorney General) v. Palmer, supra, should be overruled. Since anything I would say on this important issue would be obiter, I am inclined to forego discussion of it. However, since Paquet argued vigorously that Palmer should be overruled, I note that this court has a general practice of constituting a five-judge panel if a party submits that the court should overrule one of its previous decisions: see, for example, R. v. White (1996), 29 O.R. (3d) 577, 108 C.C.C. (3d) 1 (C.A.), and Bates v. Bates (2000), 49 O.R. (3d) 1, [2000] O.J. No. 2269 (C.A.).

DISPOSITION

[42] I would dismiss the appeal. I would allow the cross-appeal and order that Strong pay Paquet $100,000 in damages.

[43] I would award Paquet her costs of the appeal and the cross-appeal. There is no need to alter the trial judge's costs order because he awarded costs to Paquet even though success at the trial was, in a formal sense, divided.

Plaintiff's appeal dismissed; defendant's appeal allowed.