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LIMITATIONS AND JOINT AND SEVERAL LIABILITY

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Limitations and Joint and Several Liability

Introduction

The intent of this paper is to provide an overview of the provisions of the new *Limitations Act, 2002* and outline the history and significance of the joint and several liability rule as it applies to tort litigation in Ontario. Neither of these topics is particularly exciting but both must be understood thoroughly by claims examiners and their counsel.

Changes in the *Limitations Act, 2002* oblige claims examiners and defence counsel to take positive steps to preserve rights of contribution against co-defendants and potential third parties. Prior to the enactment of the new *Limitations Act* rarely did claims examiners or defence counsel need to concern themselves with limitation periods for contribution claims. As will be discussed below, both insurers and defence counsel will now need to maintain tickler systems to avoid missing these limitation periods.

It is also important to have a firm grasp on the rules for joint and several liability. The concepts are not new but the appearance of *Mary Carter* and *Pierringer* Agreements has made a thorough understanding of these rules essential for both claims examiners and counsel defending claims on behalf of deep pocket defendants such as municipalities. This paper should provide you with a basic working knowledge of these two topics. Hopefully, it will allow you to avoid the pitfalls of the new limitations legislation and provide you with the ability to utilize *Mary Carter* and *Pierringer* Agreements to the advantage of your insureds.

The Limitations Act, 2002

Introduction

Prior to January 1, 2004 there were a myriad of limitations periods that applied to a variety of tort actions. For example, the *Highway Traffic Act* imposed a two year limitation period on damages “occasioned by a motor vehicle”, a one year limitation period applied to actions against doctors for medical malpractice while a two year limitation period applied to claims against hospitals. There was a 3 month limitation period against municipalities and the provincial government for failure to keep a highway or sidewalk in good repair and a six year

limitation period that applied to most occupiers' liability claims. Some of the limitation periods that applied in this province were almost impossible to find. For example, under the provisions of the *Railroads Act*, which had not been consolidated since the revised statutes of Ontario in 1950, a one year limitation period was imposed on actions arising out of injuries occurring on subways.

For years, limitation periods were assumed to run from the date of the accident or error giving rise to the claim. Therefore, the limitation period for motor vehicle accidents ran from the date of the accident and expired two years after the accident had occurred. In the mid to late 1980s the Supreme Court of Canada and Ontario Court of Appeal decided a series of cases that effectively stripped many limitation periods of their vitality. The Supreme Court held that, in many cases, the limitation period did not begin to run until the plaintiff discovered that it had suffered damage. The seminal case was the Ontario Court of Appeal's decision in the *Consumers Glass* case which allowed that company to sue those responsible for the design and construction of a building that collapsed many years after it was constructed. This case essentially meant that for architects, engineers and construction companies there was no real limitation period that they could rely upon. The principle of discoverability was thus born.

Another decision held that, in most cases, limitations did not run against minors until they reached their majority. An even later decision was prepared to treat claims under Bill 59 as governed by two limitation periods, one for economic loss and one for non-pecuniary general damages. It was possible for a plaintiff to discover that he or she had an economic loss claim before discovering that his or her injuries were permanent and serious.

By the late 1990s not only was the public faced with a bewildering assortment of limitation periods but those limitation periods were subject to so many exceptions that it was impossible for most companies to know how long they should even retain their files. After a number of judicial requests for legislative intervention, the Ontario government enacted new regime for limitations and this regime came into force on January 1st, 2004. This paper will focus only on the *Limitations Act, 2002* which deals with most of the limitation periods that the average tort claims examiner and defence counsel will encounter. I should warn you that

this legislation is complex and confusing and, in my opinion, not particularly well drafted. I anticipate years of litigation over the meaning of a number of its sections.

The Basic Limitation Period

Instead of myriad of limitation periods, the new act creates one basic limitation period of two years. No claim may be commenced after the second anniversary after it was discovered. In the simplest of cases a person who fell in a parking lot on January 15, 2006 and was injured would be obliged to commence his or her action on or before January 15, 2006 (unless the second anniversary fell on a holiday). There are significant exceptions to this basic limitation period which will be discussed below. However, many of the old special limitation periods are now gone. These include all of the limitation periods referred to previously (however, the notice requirements for non-repair of a highway still apply but the action can be commenced up to two years after the accident).

That brings us to what is meant by “discovered”. This is defined in the act. A claim is discovered on the earlier of the day when the claimant actually knew or a person with the claimant’s abilities and in the circumstances of the claimant ought to have known all of the following:

- (a) that injury, loss or damage has occurred;
- (b) that the injury loss or damage was contributed to by an act or omission;
- (c) that the act or omission was that against whom the claim is made; and
- (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

It will be presumed that the claimant knew all of the above on the day that the act or omission took place unless the contrary is proved.

The concept of discovery can make this new limitation period very difficult to apply to real world situations. It now appears that one has to take into account the plaintiff’s actual circumstances in determining when the limitation period begins to run for that plaintiff. For example, if the plaintiff was depressed after an accident it may well be that such a plaintiff

will be excused from making appropriate enquires for a period of time after an accident and thus the two year limitation period could be significantly lengthened.

It is item (d) which causes me the most concern. I can envision this provision being used to justify starting a claim after other avenues of resolution have been exhausted. For example, one could argue that a plaintiff did not realize that a proceeding was an appropriate remedy until negotiations had been attempted. This again could lengthen the limitation period. I note that (d) does not say that a proceeding is the only appropriate method for seeking to remedy the wrong. I would argue that this means that a plaintiff is not entitled to wait until they have exhausted every non-litigious method for seeking redress before the limitation period begins to run. However, there is no case law which interprets this provision so its actual meaning will not become clear for some time.

Incidentally, it should be noted that section 11 suspends the limitation period when the parties have agreed to third party resolution of the dispute. This could involve mediation or arbitration. The suspension runs from the date the agreement to third party resolution is entered into until the claim is resolved, the date the attempted resolution process is terminated or the date one party withdraws from or terminates the agreement. If the limitation period is close to expiring, then you may wish to consider whether it makes sense to agree to third party resolution until after the limitation period has actually expired. However, given the rules for discoverability it is often difficult to know when the limitation period will expire. You should also ensure that there is a clear mechanism in any agreement for third party resolution to be terminated. You do not want an agreement that cannot be withdrawn from as this may extend the limitation period indefinitely.

Additionally, the two year limitation period does not run against a minor or a person incapable of commencing a proceeding because of his or her physical, mental or psychological condition provided that the person is not represented by a litigation guardian. In one Supreme Court of Canada decision the court excused a plaintiff from commencing an action late, even though the claim was “discovered”, because she felt that it was more important to get well than to commence litigation. This provision insofar as it refers to “psychological condition” probably incorporates the views of the Supreme Court of Canada

in that case. It is presumed that a person is capable of commencing a proceeding unless the contrary is proved.

If one is represented by a litigation guardian, then the criteria referred to above from section 5 of the Act apply as if the litigation guardian was the person with the claim. The act contains a provision which allows defendants to apply to the court to appoint litigation guardians for minors and persons incapable of commencing proceedings. The intent of the section is to start the limitation period running against such persons by means of the appointment of a litigation guardian. I will not go into the details of this very cumbersome and complex process as I have serious doubts that it will ever be successfully utilized by defendants.

If the claim is one based on assault or sexual assault the limitation period does not run during any period of time when the claimant was incapable of commencing a claim because of his or her physical, mental or psychological condition. All claimants are entitled to such a suspension of the running of the limitation period if they can prove that they are suffering from such a condition. However for assault claims, it will be assumed, subject to proof to the contrary, that the claimant was incapable of commencing a proceeding sooner than it was if one of the parties to the assault was in an intimate relationship with the claimant or if the claimant was dependant on one of the parties to the assault financially or otherwise. If it is a sexual assault, it will be presumed, subject to proof to the contrary, that the claimant was incapable of commencing the proceeding sooner than it was. This provision can significantly extend the two year basic limitation period that applies for assault and sexual assault cases.

A potential defendant may also send a notice to a potential claimant, other than a minor or person who is incapable of commencing a claim, which advises the potential claimant that the person may have a claim against the potential defendant. Such a notice may be considered by a court in deciding whether the limitation period has begun to run. It would be a very unusual case where a potential defendant would give such a notice.

The Ultimate Limitation Period

The act provides for what it calls an “ultimate limitation period”. Since the concept of discoverability has the potential to extend the limitation indefinitely, the legislature has capped that extension. Regardless of the actual date of discovery of the claim, the ultimate limitation period prevents a claimant from commencing a claim after the 15th anniversary following the act or omission.

Accordingly, if we had a building that was built in 2004 and the roof collapsed in 2022, the owner of the building could not sue for the collapse as the act or omission occurred more than 15 years before the collapse. Incidentally, this is essentially the fact situation in the seminal Court of Appeal decision in *Consumers’ Glass*. Under the new act, the claim of Consumers’ Glass would be statute barred.

Of course there are exceptions, even for the ultimate limitation period. It does not run against a minor or person incapable of commencing a proceeding because of a physical, mental or psychological condition. The onus is on the person with the claim to establish that such a condition exists. It does not run during the time that the defendant willfully conceals the claim or misleads the plaintiff about the claim. There is a list of claims that no limitation period runs against. The most important of these is undiscovered environmental claims.

Contribution Claims

Prior to January 1, 2004, claims based on the *Negligence Act* for contribution and indemnity were rarely dismissed because of a missed limitation period. For all intents and purposes, section 8 of the *Negligence Act* permitted a claim for contribution or indemnity to be brought at any time prior to judgment or settlement and for up to one year after such judgment or settlement. Additionally, the case law indicated that the commencement date for the running of a contribution claim was from the date the plaintiff obtained a judgment against the defendant. Accordingly, defendants rarely had any limitation issues to be concerned with and were usually only concerned with limitation periods in respect of subrogated claims.

That has all changed under this new legislation. Now there is a two year limitation period and the legislation deems the act or omission for both the basic and ultimate limitation periods to have commenced on the day the claim is served on the defendant. In most cases this results in a two year limitation period that runs from date the claim is served upon the

defendant. All crossclaims and third party proceedings should be commenced within this timeframe. However, this time limit can be extended to the earlier of 15 years after service of the claim or the discovery of the claim against the party indemnity is sought from.

The legislation has effectively made two changes to the prior law. It has created a limitation period that defendants must be concerned with when there was no effective limitation period before the legislation took effect. It has also changed the commencement date for the running of the limitation period for contribution claims from the date of judgment against the defendant to the date the statement of claim is served on the defendant.

This new limitation period requires changes to claims handling by both claims personnel and defence counsel. Both claims examiners and defence counsel must now create a tickler system to ensure that they do not miss this limitation period. Blaney McMurtry LLP created such tickler system which went into operation on January 1, 2004. Whenever a new claim comes into the office, the lawyer in charge must indicate on the file opening sheet what the contribution limitation period is. To be conservative our tickler assumes that the limitation period will expire 2 years after the statement of claim is issued (as we often do not know when it was served upon the insured). We receive electronic warnings of the impending limitation period beginning 3 months prior to its expiry. A tickler clerk monitors the limitation periods and ensures that the lawyer in charge either commences a proceeding within the 2 year time limit or advises that no such proceeding needs to be commenced. When we receive these reminders we review the file again with a view to determining whether we should be commencing additional crossclaim or third party proceedings. You will receive a call from us if there is any entity that we have not claimed contribution and indemnity from that we either should commence such a claim against or, at least, we should consider commencing a claim against.

Insurers need to create their own tickler systems to keep track of the limitation periods for contribution claims. The most dangerous situations for claims personnel involve waivers of defence. If your insured is served with a statement of claim, then the time for commencing a crossclaim against a co-defendant or a third party claim against a non-party has probably commenced to run. If you obtain a waiver of defence and sit on the file for two years (which can easily happen with claims brought by infants), then it will be too late to

commence any contribution claims. Such files must be sent to defence counsel well in advance of the expiry of the two year time limitation period to provide them with time to commence all appropriate contribution proceedings.

It is easier for lawyers to tickle these limitation dates as we almost always receive a copy of the statement of claim when the file is assigned. Insurers need to establish a protocol that will ensure that when any statement of claim comes in the claims examiner is obliged to create a tickler. If you already have a system for noting when a potential claim turns into a litigated claim, then the system should be modified to oblige the claims examiner to note the contribution limitation period. We would urge you to have an electronic reminder system that notifies claims personnel of these tickler dates. We would also urge you to have a person or persons placed in charge of this electronic system to ensure that the ticklers are not ignored or missed because people are away or the files have been reassigned. Frankly, this last section contains the most important and the most practical advice in this entire paper.

I should also point out that both claims examiners and defence counsel will need to watch for missed limitation periods by co-defendants and those who third party your insureds.

Transition

There are transition provisions in the legislation that are designed to determine whether a claim is governed by the old legislation or the new legislation. They are confusing, poorly drafted and almost assuredly will be the subject of considerable litigation. I will briefly describe these rules but you really need to consult counsel in any case where you have any concerns regarding the applicability of the old or new legislation.

The transition rules apply to acts or omissions that occurred before January 1st, 2004 and for which no proceeding has been commenced prior to January 1st, 2004. There has already been litigation regarding the meaning of “no proceeding has been commenced”. For the moment, it would appear that the proceeding must be against the proposed defendant. For example, a crossclaim commenced against some other party prior to January 1st 2004, could not be counted as a proceeding and thus take the claim outside of the transition provisions.

If the transition rule applies, then if the old limitation period has expired no proceeding shall be commenced. In other words, if the claim was already statute barred it will remain statute barred. If the old limitation period has not expired and there is no limitation period under the new legislation (for undiscovered environmental claims for example), then there is no limitation period that applies to the claim.

If the old limitation period has not expired and there is a limitation period under the new legislation if the act or omission had occurred after January 1, 2004, then if the claim was undiscovered the new legislation applies as if the act or omission occurred on January 1, 2004 and if it was not discovered, then the old limitation period applies. This provision has already caused some problems. In one case, the act took place more than 15 years before it was discovered in 2004. The plaintiff argued that since it was discovered in 2004, the act or omission was deemed to have occurred on January 1, 2004 and the claim was still in time. The court refused to apply this reasoning and concluded that the claim, being more than 15 years old, was out of time because of the provision regarding ultimate limitation periods.

If there was no limitation period under the old legislation but there would be if the act or omission occurred after January 1st, 2004, then if it was discovered after January 1st, 2004 the new act applies as if the act or omission occurred on January 1st, 2004. If it was discovered before January 1st, 2004, then there is no limitation period.

It is this transition rule that causes difficulty with pre-2004 actions with potential contribution claims. Given that the limitation period commencement date has changed for contribution claims and that for *Negligence Act* claims it is arguable that section 8 effectively eliminated limitation periods for contribution claims, one might argue that no limitation period applies to contribution claims which were discovered prior to January 1st, 2004. If the claim is discovered after January 1st, 2004, then the defendant has 2 years from the date of discovery to commence the contribution claim. In light of the earlier case I referred to it is unclear if the 15 year ultimate limitation period runs from January 1st, 2004 or from the actual date of the act or omission. Alternatively, if there was a previous limitation period for contribution claims, then it applies to claims discovered prior to January 1st, 2004. However, it is unclear whether that limitation period continues to be “suspended” by the pre-2004 rules which governed the commencement date for the running of the contribution claim or

by section 8 of the *Negligence Act*. These questions are even more complex and confusing than this paragraph makes them appear.

We were concerned that some older claims might have their contribution claims expire on December 31st, 2005. Accordingly, we reviewed all of our old files in the fall of last year to consider whether a contribution claim should be brought before the end of 2005.

There are also special transition rules for assault and sexual assault. Frankly, these provisions are also difficult to reconcile and I will not attempt to do so in this paper.

Tolling Agreements

So-called tolling agreements appear to be prohibited by the legislation. Clearly any agreement made to reduce the length of a limitation period after January 1st, 2004 is prohibited. Tolling agreements generally extend limitation periods to allow parties to negotiate settlements without actually commencing litigation. These also appear to be prohibited by the legislation. There was a bill introduced before Christmas which would have permitted tolling agreements and other agreements between commercial entities to vary limitation periods prescribed by the legislation, but it has not yet become law.

Record Retention

One question that often comes up is how long a party should retain a file. That question was impossible to answer prior to January 1st, 2004 because there was no cap on discoverability. In some respects that question is somewhat less difficult to answer now. For the vast majority of torts, the ultimate limitation period will expire 15 years after the act or omission occurred. The cases indicate that this ultimate limitation period will apply to any claim discovered after January 1st, 2004. Therefore, if an act or omission occurred on or before January 1st, 1989, it will be defeated by the ultimate limitation period. Under the old law the vast majority of tort claims were governed by a limitation period that was six years or less. Therefore, if the claim was discovered before January 1st, 2004, the limitation period for the claim will expire on or before January 1, 2010 and the claim must be served on or before July 1, 2010. This suggests that after July 1, 2010 it will be safe to dispose of records or files that are more than 15 ½ years of age.

Of course, this approach will not work in all cases. The limitation periods under the new legislation for claims involving minors and incapable persons are suspended during their minority or incapacity. Claims involving assault and sexual assault are also suspended in many circumstances. Finally, there is a list of claims that have no ultimate limitation period whatsoever and these include undiscovered environmental claims.

Nevertheless, a good working rule is to retain files for 15 ½ years after July 1, 2010. Judgment will need to be exercised to determine whether some records should be retained for longer periods.

Joint and Several Liability

Introduction

Joint and several liability or, as it is sometimes referred to, the 1% rule is the bane of minimally liable deep pocket defendants such as municipalities. The 1% rule obliges a defendant, which is only 1% at fault, to pay the plaintiff's entire judgment. If that defendant is unable to collect on its contribution claim (often because the co-defendant is impecunious), then it is the defendant that bears the loss not the plaintiff. Before outlining how the rule works a brief discussion of the history of the rule would be in order.

Prior to the enactment of the *Negligence Act* in 1930 in Ontario, the rules governing the apportionment of fault in tort were significantly different than they are today. At common law there was a distinction between joint tortfeasors and several tortfeasors. Joint tortfeasors were person who jointly engaged in a common enterprise that caused harm to the plaintiff. For example, a landlord and a lodger jointly search for a gas leak using an open flame and the lodger's flame causes and explosion. Both are considered to have engaged in a joint tort. Several tortfeasors are persons who engage in independent acts of negligence that cause the same damage. A good example would be two cars colliding and causing injury to a pedestrian or a passenger.

At common law, joint tortfeasors were jointly and severally liable to the plaintiffs for the damage they caused. The injured person could sue them jointly or separately for the entire loss and could execute the full judgment against any one of the joint tortfeasors. The

plaintiff was not permitted, however, to recover more than his or her entire loss. Several tortfeasors were severally liable for all of the damage they caused. They could not be sued in the same action but could all be sued in separate actions. Again, the plaintiff could not recover an amount on all of the judgments that exceeded his or her entire damages.

Concurrent and several tortfeasors had no right of contribution as between themselves at common law. Accordingly, if the first tortfeasor was 10% at fault for the accident and paid all of the plaintiff's damages, then it could not recover the remaining 90% of that amount from its co-tortfeasor. The so-called 1% rule applied at common law but was even more draconian than it is now because the tortfeasor who paid the judgment had no right of contribution from its co-tortfeasor. It didn't matter if the co-tortfeasor had assets there simply was no mechanism that allowed such recovery.

The final rule that was different at common law concerned contributory negligence. At common law if the plaintiff was even 1% at fault for his or her own injuries, then the plaintiff was barred from recovering anything from the defendants.

The *Negligence Act* has changed these rules considerably. First, contributory negligence no longer bars a plaintiff's claim. The damages of the plaintiff are simply reduced to the extent that the defendant was negligent.

Second, the *Act* states that both joint tortfeasors and several tortfeasors (often referred to as concurrent tortfeasors) are jointly severally liable to the plaintiff and that "...each of them is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent." This section permitted concurrent tortfeasors, for the first time, to obtain contribution from other concurrent tortfeasors.

As the law now stands, concurrent tortfeasors are each liable to pay the plaintiff's entire judgment. However, if they do so, they are entitled to seek contribution from other concurrent tortfeasors. In some cases, that right will be a hollow one. For example, if a person is catastrophically injured in a single vehicle collision accident which is 90% the fault of the driver of the vehicle and 10% the fault of the municipality for failing to maintain the road, both the driver and the municipality are liable for 100% of the plaintiff's damages. However, if those damages, for example, are assessed at \$6 million, and the driver only has

\$1 million of insurance, then the municipality will be obliged to pay the plaintiff \$5 million notwithstanding that it was only 10% at fault. Although the municipality should only have paid \$600,000 and has the right to recover the \$4.4 million overpayment from the driver, that judgment is worthless if the driver has no assets other than the \$1 million insurance policy.

It should be noted that under certain pieces of legislation the joint and several liability rule has been abrogated. For example, under Ontario's workers' compensation legislation, a worker is generally not entitled to recover anything in a tort action from another worker, his or her employer or the employer of any other worker. The legislation has been interpreted as mandating that the liability of any other defendants is reduced by the negligence of the worker's employer and that of other workers and their employers.

A similar approach was taken to the liability of unprotected defendants under the OMPP. Under that regime unprotected defendants, such as municipalities, were only severally liable for the damage they caused if the protected defendants were immune to suit. Therefore, if a case did not pierce the threshold under the OMPP a municipality would only pay the amount of the plaintiff's damages reduced by the negligence of all of the protected defendants. A similar approach was taken under Bill 164 for a plaintiff's pecuniary losses. A more complicated approach has been taken under Bills 59 and 198, which takes an entire paper to explain. A full explanation of this regime can be found under "Articles" "insurance" at www.blaney.com.

Reform

There have been complaints over the years from deep pocket defendants which seem to routinely get burned by the 1% rule. The provincial government and municipalities have been the most vocal group seeking reform of the rule.

Generally, the reform requested is that each defendant would be severally liable only for the damage it caused. Therefore, if a municipality was 10% at fault it would only pay 10% of the damages. Any inability to find defendants or to obtain money from them would be the plaintiff's problem.

While this approach to apportionment would certainly assist some deep pocket defendants in some situations, it is not a panacea. If Ontario adopted this reform, then plaintiffs would be left with no choice but to sue every single person who might be partly at fault for the plaintiff's injuries. As the law now stands, a plaintiff who knows that his or her damages will assess at a value less than the insurance carried by a substantially at-fault tortfeasors will often elect to only sue that tortfeasor. If the proposed reform was enacted all potentially liable tortfeasors would need to be sued.

Let us return to the earlier example involving a municipality that was found to be 10% at fault for an accident. If the at-fault driver had \$10 million of liability coverage, then the plaintiff would probably choose not to sue the municipality and recover all of his or her damages from the driver. If the law was reformed, the plaintiff would be obliged to sue the municipality or risk a less than a full recovery of his or her damages. On large losses, the reform would assist municipalities but this savings might be lost due to the fact that municipalities will be obliged to respond to many more claims that they do currently.

Mary Carter and Pierringer Agreements¹

The Legal Underpinnings of Mary Carter Agreements

Mary Carter and *Pierringer* Agreements are designed to change the exposure of a settling defendant from joint and several liability to several only. I will begin by discussing *Mary Carter* Agreements.

Mary Carter Agreements take their name from the American case, *Booth v. Mary Carter Paint Co.*². The utility of using a *Mary Carter* Agreement arises when a plaintiff has sued more than one jointly and severally liable defendant and one or more of those defendants wish to settle with the plaintiff but one or more of the others do not. Since the defendants who wish to settle are often subject to a claim for contribution from the remaining tortfeasors, they cannot simply remove themselves from the action by settling with the plaintiff. The

¹ Much of this part of the paper is taken from a paper that Miriam Tepperman of our office and I wrote several years ago.

² 202 So. 2d 8 (Fla. App. 1967) [hereinafter *Booth*].

contribution claim allows the remaining defendants to continue to pursue the settling defendants at trial for any portion of the judgment which is ultimately paid by the remaining defendants but which the court attributes to the liability of the settling defendants. Thus, while a defendant may settle with a plaintiff, a simple payment by the settling defendant to the plaintiff does nothing to protect the settling defendant from the expense of litigating the contribution claims. Additionally, it does not necessarily cap the settling defendants' contribution to the ultimate judgment that the plaintiff will receive at trial. A *Mary Carter* Agreement attempts to provide this protection by addressing the potential contribution claim of the remaining defendants within the context of the settlement arrangement between the plaintiff and the settling defendants.³

The essential ingredients of an American *Mary Carter* Agreement are as follows:

- 1) the settling defendants guarantee a minimum recovery to the plaintiff;
- 2) the exposure of the settling defendants is capped;
- 3) the settling defendants remain in the lawsuit;
- 4) the settling defendants liability for damages reduces in direct proportion to any increase in the liability of the non-contracting defendant's liability;
- 5) the agreement remains a secret.⁴

The *Mary Carter* Agreement in Canada differs from the original *Mary Carter* Agreement, since Canadian law requires immediate disclosure of the agreement.⁵ While the classic form of the *Mary Carter* Agreement might contain all the remaining features, there is no rule that all of these features are required. The most common form of the agreement contains only the first

³ Barbara Billingsley, "Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" *Alberta Law Review*, (1998) 36 *Alta. L. Rev.* (No. 4) 1017

⁴ Roger G. Oatley, "*The Mary Carter Agreement: A Powerful Strategy for Settlement*" presented at the Advocates Society (Ontario) conference Practical Strategies for Advocates VII January 23-24, 1998.

⁵ Roger G. Oatley, "*The Mary Carter Agreement: A Powerful Strategy for Settlement*" presented at the Advocates Society (Ontario) conference Practical Strategies for Advocates VII January 23-24, 1998.

three features: a minimum recovery for the plaintiff, a cap for the settling defendant, and a provision enabling the settling defendant to remain in the lawsuit in the hope of recovering some of the damages or costs from the non-settling defendants. Indeed no two *Mary Carter* Agreements are the same. The only limitation on the features of these agreements is the needs of the contracting parties and the imagination of their counsel.⁶

It appears to be commonly accepted that *Mary Carter* Agreements may take a variety of forms.

The terms of the agreements in *Margetts v. Timmer Estate*⁷ were:

- (1) without any admission of liability, the settling defendant would pay the plaintiffs a set some of money as compensation for their damages;
- (2) the settling defendant would be at liberty to pursue the plaintiffs' actions arising from the accident as against the non-settling defendant;
- (3) the settling defendant would be at liberty to pursue its own claim for contribution and indemnity as against the non-settling defendant;
- (4) the plaintiffs would hold harmless the settling defendant as against any claims for contribution by the non-settling defendant, meaning that the non-settling defendant would only be pursued by or on behalf of the plaintiff on the basis of several, rather than joint and several liability;
- (5) henceforth any legal costs incurred by the plaintiffs in prosecuting their claims against the non-settling defendant would be paid by the settling defendant;
- (6) the settling defendant would hold harmless the plaintiffs against any costs awarded against the plaintiffs in favour of the non-settling defendant;

⁶ Roger G. Oatley, "*The Mary Carter Agreement: A Powerful Strategy for Settlement*" presented at the Advocates Society (Ontario) conference Practical Strategies for Advocates VII January 23-24, 1998.

⁷ (1996), 192 A.R. 42, [1996] A.J. No. 842 (Q.B.), affirmed by [1999] A.J. No. 1087 (Alta. C.A.) [hereinafter *Margetts*]

(7) any finding of liability at trial against the non-settling defendant or any award of costs against the non-settling defendant would be applied for the sole and exclusive benefit of the settling defendant.

While the settlement agreements in the *Margetts* case did not contain all of the elements of the original *Mary Carter* Agreement, the agreements were similar to the original *Mary Carter* Agreement in that they allowed one defendant to achieve a settlement with the plaintiff by structuring the settlement arrangements in a manner designed to cap the settling defendant's liability exposure and to protect the settling defendant from a contribution claim by the non-settling defendant.⁸

The actual intent of the agreement in *Margetts* is not entirely clear from the report of its contents or the comments of the courts. On its face it appears to provide for a final recovery for the plaintiffs from the settling defendants. It then permits the settling defendants to pursue both their contribution claims and the plaintiffs' claims against the non-settling defendants. This differs from the usual contribution claim pursued after settlement under the provisions of the *Negligence Act*⁹ in one very important detail. In a claim under the *Negligence Act*, the settling defendant can only recover contribution from the non-settling defendant based on the amount of the settlement. Under the agreement in the *Margetts* case the settling defendant's recovery is based on the damages proved at trial rather than the settlement amount. Therefore, if the settling defendant pays less to the plaintiff than is assessed for damages at trial, the settling defendant can actually recover more from the non-settling defendant than it could under the *Negligence Act*.¹⁰

Mary Carter Agreements have been the subject of judicial comment in Canada at least as early as 1975.¹¹ While it is permitted in some American jurisdictions to make and keep these

⁸ *Margetts* at 46.

⁹ R.S.O. 1990, c. N.3 as amended

¹⁰ Of course, if the damages are assessed at a lower amount than the settlement, then the settling defendant will recover less than it would under the *Negligence Act*. The settlement agreement is quoted in the trial decision but summarized somewhat differently by the Court of Appeal. My reading of the decisions suggests that after settlement all amounts recovered were to accrue to the benefit of the settling defendant.

¹¹ *Nash v. Glickman and Gibson* (1975), 7 O.R. (2d) 711 (C.A.) [hereinafter *Nash*]

agreements secret, it is clear in Canada that such an agreement cannot be held secret once it is concluded. This is clear from the jurisprudence and also from the *Rules of Professional Conduct*. The Commentary under Rule 4.01 states:

In civil proceedings, the lawyer has a duty not to mislead the tribunal about the position of the client in the adversary process. Thus a lawyer representing a party to the litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgement of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

In *J. & M. Chartrand Realty Inc. v. Martin*,¹² while the court did not specifically approve *Mary Carter* Agreements, it was made clear that at a bare minimum secrecy would not be permitted. In *Petty v. Avis Car Inc.*¹³ Ferrier J. upheld a *Mary Carter* Agreement in circumstances where there was immediate disclosure of the details of the agreement and sufficient procedural safeguards could be imposed so as to prevent an abuse of process.¹⁴ Both Justice Ferrier, in *Avis*,¹⁵ and Justice Dea, in *Margetts*,¹⁶ dismissed the argument that the *Mary Carter* agreement constituted champerty or maintenance by granting a *de facto* interest in the plaintiff's claim against the defendant.

The *Avis* judgement is considered as providing the groundwork for the adoption of *Mary Carter* Agreements in Canada.¹⁷ Most post - *Avis* jurisprudence has been concerned with procedural details, such as whether certain procedural safeguards were appropriate;¹⁸ whether certain factors amounted to an abuse of process;¹⁹ whether an agreement would

¹² [1981] O.J. No. 739 (H.C.J)

¹³ (1993). 103 D.L.R. (4th) 298 (Ont. Gen Div.) [hereinafter *Avis*]

¹⁴ *Avis* at 312. It should be noted that the agreement was concluded after the trial commenced.

¹⁵ *Avis* at 313-314.

¹⁶ *Margetts* at 54.

¹⁷ *Normerica Inc. v. 1406716 Ontario Inc.* (2002), 58 O.R. (3d) 464, [2002] O.J. No. 654 (S.C.J.); *Edmonton (City) v. Lovat Tunnel Equipment Inc.* (2000), 76 Alta. L.r. (3d) 389, [2000] A.J. No. 238 (Q.B.)

¹⁸ *Waterworth (Litigation Guardian of) v. Freeman* (2001), 10 M.V.R. (4th) 241, [2001] O.J. NO. 624 (C.A.)

affect any award of costs;²⁰ and whether the details of the agreement necessitate striking the jury.²¹

To understand fully the genius of a *Mary Carter* Agreement it is necessary to analyze the impact on the parties in the courtroom after the agreement is reached and announced to the court and non-contracting parties. The plaintiff and the settling defendant both benefit from the Agreement. The plaintiff is guaranteed a substantial recovery and the settling defendant caps its exposure. If the settling defendant is insured, then the insurer can ensure that the case is settled within the insured's policy limits. It is then free to make an effort to recover some of its losses without any risk of exposure to a bad faith claim from its insured. The agreement may also result in the most exposed defendant, who has taken the lead on defending the damages claim, no longer taking a position on damages. As a result, the other defendants suddenly find themselves without the champion they were counting on to minimize damages at trial. Since the plaintiff is now guaranteed a minimum recovery, the remaining defendants must accept that they face a plaintiff who has nothing to fear from trying the case to conclusion. Also, the plaintiff now has a dedicated ally at the counsel table whose focus at trial is to assist the plaintiff in succeeding against the remaining defendants.²²

The overall effect of these terms is that the settling defendant pays the plaintiff a certain sum in exchange for the plaintiff agreeing not to pursue the settling defendant and providing the settling defendant with the full benefit of any claim the plaintiff or the settling defendant may have against the non-settling defendant. The plaintiff is therefore spared any risk involved in litigating the matter further. The settling defendant, in turn, is provided with a guarantee that it will never have to pay damages greater than the amount agreed to in the settlement documents regardless of the degree of liability which a court ultimately might

¹⁹ *Edgar Estat v. Queensway General Hospital* (1996), 2 O.T.C. 5, [1996] O.J. No. 1531 (Gen. Div.)

²⁰ *Walker Estate v. York Finch General Hospital*, [1998] O.J. No. 2271 (Gen. Div.), varied on other grounds (1998), 169 D.L.R. (4th) 689 (Ont. C.A.)

²¹ *Bartosek (Litigation Guardian of) v. Turret Realities Inc.*(2000), 7 C.P.C. (5th) 372, [2000] O.J. No. 5253 (S.C.J.); *John v. Flynn*, [2000] O.J. NO. 4034 (S.C.J.); and *Tellier v. Stevenson Transport*, [2000] O.J. NO. 3663 (S.C.J.)

²² Roger G. Oatley, “*The Mary Carter Agreement: A Powerful Strategy for Settlement*” presented at the Advocates Society (Ontario) conference Practical Strategies for Advocates VII January 23-24, 1998.

attribute to the settling defendant. Critical to this guarantee is the plaintiff's promise to hold harmless the settling defendant against any contribution claim by the non-settling defendant. By ensuring that the plaintiff will never try to recover damages from the non-settling defendant in excess of the degree of liability which a court attributes to the non-settling defendant, this promise negates any contribution claim which the non-settling defendant might otherwise have against the settling defendant. Accordingly, the settling defendant does not need to worry about ever having to respond to a contribution claim made by the non-settling defendant. On the other hand, the non-settling defendant remains responsible for paying the portion of damages commensurate with any liability finding made against it at trial.²³

By allowing the settling defendant to pursue the non-settling defendant for both the plaintiff's claim and the settling defendant's own contribution claim, this agreement also guarantees that the settling defendant will recover some or all of the money it paid to settle the action as long as some portion of liability is assessed against the non-settling defendant at trial. If however, the court assesses damages less than the settlement amount; the settling defendant will be out of pocket even if the court also finds the non-settling defendant 100 percent liable.²⁴

In order to recover as much money as possible however, the interest of the settling defendant lies in maximizing the total damage assessment at trial and in maximizing the degree of liability apportioned against the non-settling defendant by the trial court.²⁵

While these agreements do not necessarily remove the settling defendant from the action, it does remove the settling defendant's liability risks at trial. This is due to the fact that the settling defendant will never be liable to the plaintiff for more than the agreed upon cap. The

²³ Barbara Billingsley, "Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" *Alberta Law Review*, (1998) 36 *Alta. L. Rev.* (No. 4) 1017

²⁴ Barbara Billingsley, "Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" *Alberta Law Review*, (1998) 36 *Alta. L. Rev.* (No. 4) 1017.

²⁵ Barbara Billingsley, "Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" *Alberta Law Review*, (1998) 36 *Alta. L. Rev.* (No. 4) 1017

plaintiff on the other hand is guaranteed recovery of this predetermined amount regardless of the liability findings at trial.²⁶

The agreement in *Margetts* should be contrasted with the more usual type of agreement described in the *Avis* case. In *Avis* the settling defendants agreed to pay the plaintiffs \$3,000,000.00 during the trial. It was agreed that the trial would proceed and that the settling defendants would recover whatever percentage negligence was found against the non-settling defendant assuming that the damages assessed at or less than \$3,000,000.00. If the plaintiffs recovered more than \$3,000,000.00, then the excess recovery belonged to the plaintiffs. In the case Justice Ferrier discussed an example where damages were assessed at \$6,000,000.00 and the non-settling defendants were found to be 50% at fault. In those circumstances the non-settling defendants would pay \$3,000,000.00 (50% of the assessed damages), the settling defendants would recover \$1,500,000.00 (50% of the amount paid to the plaintiffs under the agreement) and the plaintiffs would recover a total of \$4,500,000.00 (\$3,000,000.00 under the agreement plus an additional \$1,500,000.00 from the non-settling defendants) In this case, the settling defendants would not reap any benefit from a damages assessment in excess \$3,000,000.00.

Mary Carter Agreements by their definition change the goals and strategies of the parties at trial. To maximize his overall recovery the plaintiff's focus shifts from maximizing liability of all defendants to maximizing the liability of the non-settling defendant. Similarly the focus of the settling defendant shifts from limiting its own liability to and the plaintiff's damages to limiting its own liability and maximizing the plaintiff's damages. This will also involve the corollary of the first goal, namely, maximizing the liability of the non-settling defendants. These changes in tactics are required to maximize its recovery from the non-settling defendants.

Public policy implications hold that parties to litigation in our system enjoy the fundamental right to settle issues as they see fit and that our courts encourage settlements, even if settlement is limited to some of the issues in dispute.²⁷

²⁶ Barbara Billingsley, "Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" *Alberta Law Review*, (1998) 36 *Alta. L. Rev.* (No. 4) 1017

Callaghan A.C.J.H.C. stated:

...there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.²⁸

Rule 2.02 of the *Rules of Professional Conduct* provides as follows: “A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis...”.

Accordingly, there is significant emphasis in modern litigation upon achieving early settlement of disputes. While this process can be relatively straight forward when there are a small number of parties, this can become more complicated as the number of parties increases.

When there are multiple parties involved, there are generally differing opinions regarding liability and damages. These differing opinions will impair the ability of the parties to settle. Partial settlement agreements allow some of the participants of the multi-party litigation to settle their claims, while maintaining the claims against the rest of the participants. *Mary Carter* Agreements are an example of a partial settlement agreement.²⁹

The American jurisprudence indicates that a “true” *Mary Carter* Agreement is secretive in nature and cannot be disclosed to either the court, or the non-settling defendants. This position has been expressly rejected in Canadian jurisprudence.³⁰

The plaintiff proceeds with the litigation with reduced risk, as he or she is guaranteed to receive the settled amount regardless of the outcome of the trial. In addition, the upside is that the amount to be awarded can only be increased³¹.

²⁷ Roger G. Oatley, “*The Mary Carter Agreement: A Powerful Strategy for Settlement*” presented at the Advocates Society (Ontario) conference Practical Strategies for Advocates VII January 23-24, 1998.

²⁸ *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230.

²⁹ Peter Cronyn and James Brown, “Multi-Party Settlements: Breaking the Logjam”, presented in Montebello,, Quebec, November 1, 2002.

³⁰ *J. & M. Chartrand Realty Ltd. v. Martin* (1981) 22 C.P.C. 186, [1981] O.J. No. 739 (H.C.J) at para 13.

A settling defendant is also in a position to carry on the litigation without further risk, as the amount that he or she will have to pay the plaintiff is capped by the agreement. Where an insurer is involved, the damages can be capped within the limits of the insurance policy and the insurer would avoid any potential claim of bad faith by the insured³². The settling defendant is then given the opportunity to recapture some of what they have paid, as the settlement amount stands to be decreased in proportion to the liability of the non-settling defendant³³.

Accordingly, the plaintiff and the settling defendant can co-operate in a joint effort to ensure that the non-settling defendants are found liable to the highest degree possible and for the highest possible damages, as it is in the interest of both parties.³⁴

The non-settling defendant is placed in the position where it either settles with the plaintiff (although this is what it tried to avoid) or continues the litigation while being targeted by both the plaintiff and the settling defendants.³⁵

Disclosure

In *Margetts*, Justice Dea provides one of the most comprehensive Canadian decisions directly addressing some of the most common procedural and substantive challenges raised against *Mary Carter* Agreements.

Mary Carter Agreements raise the issue of disclosure. These agreements were originally intended to be secretive arrangements between the plaintiff and the settling defendant.

³¹ Peter Cronyn and James Brown, “Multi-Party Settlements: Breaking the Logjam”, presented in Montebello,, Quebec, November 1, 2002.

³² Peter Cronyn and James Brown, “Multi-Party Settlements: Breaking the Logjam”, presented in Montebello,, Quebec, November 1, 2002.

³³ Peter Cronyn and James Brown, “Multi-Party Settlements: Breaking the Logjam”, presented in Montebello,, Quebec, November 1, 2002.

³⁴ Peter Cronyn and James Brown, “Multi-Party Settlements: Breaking the Logjam”, presented in Montebello,, Quebec, November 1, 2002.

³⁵ Peter Cronyn and James Brown, “Multi-Party Settlements: Breaking the Logjam”, presented in Montebello,, Quebec, November 1, 2002.

Canadian courts, however, have clearly rejected this secrecy element, establishing, that *Mary Carter* Agreements must be disclosed to all parties to the litigation as soon as the agreement is made³⁶. This has now been adopted into the ethical codes of Canadian lawyers. The requirement of prompt disclosure of a *Mary Carter* Agreement is designed to protect the integrity of the court process by ensuring that the court and all parties to an action are fully aware of the interests being pursued by each litigant.³⁷ In *Margetts*, Justice Dea held that as long as proper disclosure of a *Mary Carter* Agreement is made, the effect the Agreement may have on the relationship between the litigants does not itself threaten the integrity of the court process. He stated³⁸:

Notwithstanding the eloquent recitation of the changes in the relationships between the settling parties both among themselves and with respect to the non-settling parties to this litigation I am of the view that the risk to the court process and its integrity lies not in these changed relationships but in the risk of the non-settling parties trying to conduct litigation without a full and complete knowledge of the relevant facts. Once, however, all of the litigants and the judge know what the arrangements are and are able to see the true relationships between the various parties the risk of wrongdoing or unfairness or lack of integrity in the system is resolved.

The Court of Appeal rejected the suggestion that disclosure resolves all potential problems with *Mary Carter* Agreements. The Court made the following comment about this suggestion:

But it must be clearly understood that disclosure alone of the contents of the agreement will not operate as a cleansing agent if the mischief, which upon careful scrutiny emerges apparent, remains extant. Full disclosure, in other words, is a condition precedent but it will not alone save an agreement that is rife with taint...

I would instead suggest that disclosure operates to minimize rather than "resolve" the risk of wrongdoing or unfairness or lack of integrity in the system.³⁹

³⁶ *Walker Estate v. York Finch General Hospital*, [1998] O.J. No. 2271 (Gen. Div.); *Hudson Bay Mining and Smelting Co. v. Fluor Daniel Inc.* (1997), Man. R. (2d) 214 (Q.B.); *Avis; Bodnar v. Home Insurance Co.* (1987), 25 C.P.C. (2d) 152 (Ont. S.C.); *J.M. Chartrand Realty Ltd v. Martin*, [1981] O.J. No. 739 (Ont. S.C.)

³⁷ Barbara Billingsley, "Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" *Alberta Law Review*, (1998) 36 *Alta. L. Rev.* (No. 4) 1017

³⁸ *Margetts* at 51.

³⁹ *Margetts* Court of Appeal at paragraphs 18 and 20.

Having determined that *Mary Carter* Agreements must be disclosed, Justice Dea proceeded to discuss when the agreements must be disclosed and what portion of the agreements must be disclosed.

In terms of timing of disclosure Justice Dea stated as follows:

While immediate disclosure is required when a *Mary Carter* settlement is made in the course of trial such immediacy does not, it seems to me, become so significant in the pre-trial context unless some prejudice is done to one or more of the non-settling parties. In this case the evidence is that there was no prejudice occasioned by delay in disclosure and no allegation of prejudice.

Indeed, because of the growth of pre-trial and case management procedures of various kinds it is likely that settlements of this kind will more and more come to be disclosed, as in this case, long before trial or even before trial dates are set. That is of course the situation in this case where much remains to be done to prepare for trial. In such cases, as aforesaid, immediate disclosure is not as significant as disclosure occurring at trial unless of course there is prejudice. What is needed is a clear understanding that parties have not changed their positions or put themselves at risk in ways that would not have occurred had they been aware of the settlement. I do not think that discussions of settlement between litigants constitutes a settlement that needs to be disclosed but clearly arrangements between counsel to settle may constitute a settlement for these purposes long before written agreements and final details are all committed to writing.

Accordingly, while Justice Dea recognizes the general need for prompt disclosure, he concludes that where a *Mary Carter* Agreement is entered into prior to the trial, the notion of “prompt” disclosure requires only that disclosure be made before any steps are taken which could prejudice the interests of the non-settling parties.⁴⁰ This would be determined based on the evidence presented on a case by case basis.

In *Margetts*, the settling defendants had provided the non-settling defendant and the court with copies of both the interim and final *Mary Carter* Agreements but had blocked out all references to the settlement amounts.⁴¹

⁴⁰ Barbara Billingsley, “*Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements*” *Alberta Law Review*, (1998) 36 *Alta. L. Rev.* (No. 4) 1017

⁴¹ *Margetts*

In *Avis* the Court held that proper disclosure must include all of the terms of a *Mary Carter* Agreement except for the actual settlement figures.⁴² The court held that the disclosure of settlement figures is a matter for the discretion of the court.

In *Margetts*, Justice Dea stated:

There is nothing in knowledge of quantum arrangements between the settling parties that needs be given to non-settling parties in order to maintain the integrity of the process. Indeed, the giving of such information seems to me to have two undesirable effects. The first is that such disclosure would discourage settlement and that is of course contrary to the general policy of the law. Second is that such knowledge in the trial judge would probably disqualify him from hearing the case.⁴³

Justice Dea while supporting the *Avis* ruling that the disclosure of settlement figures is a matter of the courts discretion, does take it one step further stating that the presumption should be against disclosure of the settlement.⁴⁴

In *Avis* it was concluded that disclosure, other than of amounts, must be made to the trial judge and to the other parties to the action. *Avis* also concluded that immediate disclosure was required both to the court and to the other parties. However, in *Avis* the agreement was made during trial and the necessity for prompt disclosure is clear. Prompt disclosure to the other parties may not be necessary, as is intimated by Justice Dea in *Margetts*, when the agreement is reached before trial.

Practical Considerations

Now that we have considered the cases, we thought it would be useful to consider the practical concerns that counsel should have in deciding what type of agreement to enter into, the circumstances where it might be too late to enter into the agreement and when disclosure ought to be made.

⁴² *Avis*

⁴³ *Margetts* at 52.

⁴⁴ Barbara Billingsley, "Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" *Alberta Law Review*, (1998) 36 *Alta. L. Rev.* (No. 4) 1017

Both plaintiff and defence counsel must consider what they hope to achieve before entering into a *Mary Carter* Agreement. A number of considerations must be addressed or the agreement may fail to achieve what was intended. In fact, unless careful thought is put into the agreement, there is a serious risk that the agreement could have completely unintended and catastrophic results.

Let us address these concerns by considering the three situations where parties wish to consider entering into such agreements. The first such situation arises when one or more of the defendants have minimal exposure and it is in the interests of the plaintiffs and those defendants to extricate them from the litigation. Motivations for settling include shortening and/ or simplifying the trial and reducing the parties' exposure to costs and, in the plaintiffs' case, obtaining a contribution towards the costs of mounting an effective case against the non-settling defendants. In these circumstances, the settling defendants want to ensure that in exchange for paying the plaintiff that they are excused from attending the trial and have capped their clients' exposure to all parties. Most of these agreements do not provide for any potential future recovery by the settling defendants. The plaintiff is simply paid out and the settling defendants attempt to extricate themselves entirely from the litigation.

The usual way to approach this type of agreement is to provide that the plaintiff will indemnify the settling defendants in respect of any judgment that the non-settling defendants might obtain against the settling defendants. Frankly, this approach is problematic. The non-settling defendants can and usually will attempt to demonstrate that the settling defendants are substantially at fault. This will reduce the amount they will ultimately be obliged to pay to the plaintiff. However, this type of settlement does not actually get rid of the crossclaims. As a consequence, the costs that have been incurred to date by the non-settling defendants in defending such crossclaims must be dealt with. The usual approach to this issue is to provide that these costs have been taken into account in reaching the settlement and will be borne by one of the parties at the end of the lawsuit. Since past costs can be reasonably estimated, this approach may work well. However, if they are to be borne by the plaintiffs, the settling defendants have no assurance that the plaintiff will actually have sufficient funds at the end of the lawsuit to pay such costs. It is possible

that the settling defendants could find themselves paying such costs at the end of the trial notwithstanding the terms of the settlement.

However, the larger problem stems from the costs that will be incurred by the non-settling defendants in the future. This has the potential to be a significant problem if the case is settled at an early stage and the costs of the trial are significantly higher than was anticipated at the time of the agreement. Unless all of the parties agree to a dismissal of those crossclaims at the time the agreement is entered into, a finding of liability at trial against the settling defendants could leave them exposed to a significant cost award at the end of the trial.⁴⁵ It is for this reason that the non-settling defendants need to consider this potential future cost recovery before agreeing to a dismissal of any crossclaims. Assuming the agreement is disclosed at this stage, counsel for the non-settling defendants should review the cost provisions carefully. If the plaintiff is liable for all future costs, then the non-settling defendants may not want to agree to a dismissal of the crossclaims unless they receive an amount that takes into account the amount the non-settling defendant would be obliged to contribute to the plaintiff's costs after the trial. If the non-settling defendant is content to see the settling defendants withdraw, then this amount may be easy to negotiate. However, if the non-settling defendant would prefer that the settling defendants remain as target defendants at trial, then they may wish to be obstinate about the appropriate contribution. In fact, I have seen proposed *Mary Carter* Agreements flounder on this issue. If the settling defendant cannot properly assess its risks on costs, it may well decide to refrain from entering into any agreement with the plaintiff.

Additionally, the non-settling defendant needs to consider the utility of commencing or continuing documentary or oral discovery of the settling defendants. It must ensure that it has the ability to gather the evidence it requires to reduce its exposure to the plaintiff by demonstrating the fault of the settling defendants. In complex cases, settling defendants must recognize that their continuing discovery obligations might well make the proposed agreement unattractive.

⁴⁵ Under the provisions of the *Negligence Act* the non-settling defendants would have a strong argument in favour of recovering a percentage of the costs of defending the trial from the settling defendants.

Another approach to such agreements is to dispense with the indemnity in favour of the settling defendants. Instead it is agreed that the plaintiff will only pursue their claims against the non-settling defendants on a several basis. Where this is done the settling defendants usually request a bar order preventing the non-settling defendants from prosecuting any cross or third party claims against them. This is really a *Pierringer* Agreement and will be discussed in more detail below. The advantage to this approach is that it actually extricates the settling defendants from the litigation and, when it can be negotiated, has significant cost advantages for the settling defendants. This approach has become quite common in class action litigation.⁴⁶ This approach tends to hide the cost question. In the leading case of *Ontario New Home Warranty Program v. Chevron*, Justice Winkler considered the argument that such an agreement was procedurally unfair to the non-settling defendants. He rejected this contention. However, a close reading of the case indicates that the only unfairness argued was substantive procedural unfairness. The court was apparently never asked to address, nor did it address, the fact that the non-settling defendants would be obliged to bear all of the plaintiff's costs going forward. If this approach is adopted, usually the crossclaims are settled on the basis of the costs incurred to date and the parties forget that the plaintiff's future costs will only be borne by the non-settling defendants. In some cases this is only fair, but in others it is not. However, Justice Winkler did recognize that to be procedurally fair such an agreement could not deprive the non-settling defendants of their rights of discovery.

That takes us to the second type of situation where such agreements are often negotiated. These arise where the plaintiff wants to settle with a substantially at fault group of defendants and guarantee themselves a minimum recovery. The *Avis* case is typical of such agreements. In it the parties agree to guarantee the plaintiff's minimum recovery and continue the action against the non-settling defendants. If the minimum recovery is premised on the plaintiff's and the settling defendants' assessment of the likely degree of contribution of the settling defendants, then the agreement usually provides for several liability only against the non-settling defendants. The settling defendants walk away with their exposure capped. However, they may have continuing discovery obligations. If the

⁴⁶ *Ontario New Home Warranty Program v. Chevron Chemical Company* (1999), 46 O.R. (3d) 130.

minimum recovery is based on 100% contribution towards the plaintiff's damages, then such agreements typically provide for a mechanism that allows the settling defendants to recover some portion of their contribution depending on the result at trial. The agreement in *Avis* is such an agreement.

That brings us back to the issue of disclosure and prejudice to the non-settling defendants. Clearly, the best rule and possibly the mandatory rule is that the agreement, excluding the amounts paid, must be disclosed to the non-settling defendants as soon as possible after the agreement is reached. The earlier the disclosure the less likely it is that the non-settling defendants will take steps in ignorance of the settlement that prejudices them. For example, it is not uncommon for co-defendants to go easy on each other at examinations for discovery. If the settling defendants are examined after the agreement is reached but before the non-settling defendants are apprised of the agreement, then the non-settling defendants could suffer prejudice. In our opinion, settlements during trial are fraught with danger. If the settlement occurs at a point after a material witness has been examined, then even immediate disclosure may not overcome the potential prejudice to the non-settling defendants. Although we are not aware of an example in Canada, situations could arise where the Agreement has been made but there is no remedy for the prejudice suffered by the non-settling defendants. In such a situation the court might refuse to permit the trial to proceed or might well declare a mistrial. To put it more bluntly, while the courts have suggested that disclosure will overcome any concerns that these Agreements will lead to abuse, situations can be envisioned where immediate disclosure will not be sufficient to address the non-settling defendants' prejudice.

We wanted to address another issue that is suggested by the *Margetts* decision. In that case, it would appear that the plaintiffs simply settled and assigned their claims to the settling defendants. This *Mary Carter* Agreement would permit the settling defendants to recover more than they could under a section 2 *Negligence Act* claim. However, the agreement apparently would not allow the plaintiffs any additional recovery even if the damages proven at trial exceeded the settlement amount. For argument's sake, let us assume that the amount paid to the plaintiffs was \$1,000,000.00. Let us also assume that the court found the damages were \$2.5 million and that the split in liability between the settling and non-settling

defendants was 50:50. The non-settling defendants would pay the settling defendants \$1,000,000.00, thereby totally reimbursing the settling defendant for the amount paid to the plaintiff.⁴⁷ It seems incongruous that the court could find that the plaintiff's damages are \$2.5 million, the settling defendant is 50% at fault and the plaintiff only recovers \$1,000,000.00 which ultimately is paid by the non-settling defendants. While the Alberta courts did not seem disturbed by this fact, we suspect an Ontario court might be. We would suggest always providing for some additional recovery by the plaintiff in such circumstances. We believe that the approach taken by the parties in the *Avis* case is the preferable one.

That takes us to the issue of trying such cases in front of a jury. The jury clearly must be informed of the particulars of the agreement and they must be explained to the jury by the trial judge. However, a jury does not have the experience of a trial judge and cannot properly evaluate the changes in strategy that are occurring solely do to the existence of the Agreement. An analogous situation will illustrate what can happen. It is taken from an actual case. A single vehicle accident occurs where a passenger is killed. The driver of the van contends that he was run off of the road by another driver. In this case, the family of the deceased passenger can only recover \$200,000.00 in damages if the driver's story is believed. However, if the driver himself is at fault, then the family has access to \$5 million of insurance. The same insurer provides both primary third party liability coverage to the driver and unidentified motorist coverage to the plaintiffs. As expected, the defence filed on behalf of the driver blames the unidentified driver for the accident. The insurer in its defence under the unidentified motorist coverage admits that the unidentified driver is at fault for the accident. Although this does not happen in most unidentified motorist claims, there is nothing improper about the insurer making an admission which is in its best monetary interests. However, both defendants served jury notices. We contended that the jury would not know that both defendants were insured by the same insurer and would simply not understand why we were attempting to prove that the driver was at fault when both of the defendants were blaming the accident on the unidentified driver. The late Justice Morin struck the jury and commented that to allow the matter to proceed before a jury without any awareness of the strategy that was at play would render the trial a sham.

⁴⁷ It must be remembered that the Court of Appeal specifically commented that the settling defendants could not recover more than they paid from the non-settling defendants.

Similar situations are bound to arise if juries are asked to judge cases where *Mary Carter* Agreements exist. However, we are aware of cases involving *Mary Carter* Agreements which have been tried by juries.

Before entering into a *Mary Carter* Agreement, or if you find yourselves on the outside of such an agreement, we would suggest considering the following questions when reviewing it:

1. Is the Agreement intended to cap the plaintiffs' damages or does it only provide a floor for them?
2. Are the costs already incurred by all of the parties dealt with?
3. Are the costs of all of the parties subsequent to the Agreement dealt with?
4. Are all potential outcomes at trial addressed? Should there be a basket clause that would deal with unanticipated or unlikely results?
5. Have the settling parties terminated any agreements or understandings with the non-settling parties that could lead to prejudice if the agreement is not disclosed in a timely fashion or during negotiation of the Agreement?
6. Have the settling parties disclosed all agreements or understandings they have had with the non-settling parties which could affect the enforceability of the Agreement?
7. Have any of the parties entered into agreements or understandings with the non-settling parties that could affect the enforceability of the Agreement and, if so, would disclosure of these understandings or agreements prejudice the disclosing party?
8. If considering entering into an Agreement at trial, has the trial reached a point where any prejudice to the non-settling party cannot be undone?
9. Are any non-parties affected by the Agreement? (for example, does the agreement impinge on the subrogation rights of non-parties)

10. If the Agreement involves a person under disability, is there a risk that the Agreement will not be approved by the Court?
11. Is there a jury? What impact will its presence, assuming it is not struck, have on the trial?

There is one final caveat that would point out with respect to these Agreements. There is a significant risk of being embarrassed if one fails to accurately predict the result at trial. For example, as the discussion on *Avis* demonstrates, where a plaintiff underestimates the ultimate damages awarded at trial in the Agreement, the plaintiff will actually recover a sum smaller than the trial damage award. In the example posited by the judge in *Avis*, the plaintiffs would recover \$1,500,000 less than they would have at trial. Similar and equally embarrassing situations can arise for the settling defendants. Clients need to have this explained to them in the clearest possible terms.

Pierringer Agreements

We have indirectly already discussed *Pierringer* Agreements. In reality, a *Pierringer* Agreement is simply a variation of the classic *Mary Carter* Agreement. The classic *Pierringer* Agreement provides that the plaintiff will recover against the non-settling defendants on a joint and several basis but with the plaintiff's damages reduced by the liability of the settling defendants. A so-called bar order is obtained which prevents the settling defendants from continuing any cross-claims or third party claims against the settling defendants. The claims against the settling defendants are dismissed and there is no longer any defence costs incurred by the settling defendants. A term of many orders approving a *Pierringer* Agreement provides that the settling defendants are still obliged to make full production, be examined for discovery and make themselves available as witnesses at trial.

The plaintiff then attempts to prove his or her case against the non-settling defendants. The tension at the trial flows from the fact that the plaintiff will attempt to prove that the non-settling defendants are not at fault or are only minimally at fault and the plaintiff will attempt to prove the opposite. As the settling defendants are not actually represented at trial by counsel, plaintiff's counsel is left with the unenviable task of not only proving the negligence

of the non-settling defendants but defending the attacks of the non-settling defendants upon the settling defendants.

These agreements must be approved by the Court to be implemented. This is due to the fact that the bar order must be obtained. Unlike *Mary Carter* Agreements this disclosure usually involves the disclosure of the amount received from the settling defendant. To date, arguments by non-settling defendants that bar orders are substantially unfair to the settling defendants have been rejected by the courts. However, none of the cases to date has expressly raised the issue of the potential unfairness of making a deep pocket non-settling defendant jointly and severally liable with a number of impecunious non-settling defendants to the plaintiff. It may be that if the settling defendants have assets in excess of what they are offering to settle the claim, that the deep pocket non-settling defendant is losing a substantive right. That would be the potential right to split the liability of the impecunious non-settling defendants between the deep pocket non-settling defendants and the solvent settling defendants.

A numerical example may assist in explaining this concern. Let us assume that the plaintiff's damages would assess at \$5 million; that defendant A is probably 50% at fault for the accident and has \$5 million in insurance; that defendant B, a municipality, has significant insurance and may only be 10% at fault for the accident and that the remaining defendants have no assets and are likely 40% at fault for the accident. If the plaintiff and defendant A agree to enter into a *Pierringer* Agreement pursuant to which A will pay \$1 million, then the municipality may suffer substantive prejudice if a bar order is made. The municipality will be obliged to pay 50% of the damages as it is jointly and severally liable with the impecunious defendants for \$2.5 million. On the other hand, if A remained as a defendant it is arguable that the 40% owed by impecunious defendants (\$2 million) would be split in the ratio of 5:1 as between A and B reducing B's exposure from \$2.5 million to slightly under \$2.2 million.

In most cases this result is unlikely to occur. In the above example, if the *Pierringer* Agreement received court approval, then the plaintiff would only recover \$3.5 million instead of \$5 million and would be unlikely to enter into the agreement. However, a plaintiff might enter into such an agreement if he or she was desperate for cash or if his or her counsel misjudged the exposure of A.

The potential for a *Pierringer* Agreement to result in substantive unfairness to some of the settling defendants is real. I am aware of one case where this issue may well find its way to the Court of Appeal. How that court will deal with this problem is difficult to predict.

The advantages of a *Pierringer* Agreement for the settling defendant are obvious. However, there can be advantages for the non-settling defendants as well. If the settling defendant is paying out all or most of its assets, then the non-settling defendants will not suffer any substantive prejudice. The fact that the settling defendant will not be represented at trial may make it easier to demonstrate that the settling defendant is substantially at fault. If the settling defendant is substantially at fault for the accident and the remaining deep pocket defendants have minimal exposure, the claim may be less attractive to top rated plaintiff's counsel. The *Pierringer* Agreement may effectively ensure that the file stays with the counsel who already has it. The downside is that the court, being aware of the agreement, may be inclined to focus its attention on the remaining deep pocket defendants in a way it would not have if the agreement had not been entered into.

All of these types of agreements are really methods used by defendants to minimize the impact of the 1% rule. They are complex agreements that require careful thought and consideration before they are entered into. They hold the potential not only to minimize a defendant's exposure to liability and costs but also to embarrass the claims examiner and defence counsel if they misjudge what actually occurs at trial.

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