PIERRINGER AGREEMENTS: SEVERAL LIABILITY AND DIVISIBILITY OF DAMAGES

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Pierringer and Mary Carter agreements are powerful weapons in the hands of plaintiffs' counsel and have become increasingly common in Canada.

Mary Carter agreements were created by a Florida lawyer in 1967 in *Booth v. Mary Carter Paint Co.*[1] True Mary Carter agreements are not allowed in Ontario because a true Mary Carter agreement is supposed to remain a secret. In Ontario, the commentary to Rule 4.01 of the *Rules of Professional Conduct* prohibits secret Mary Carter agreements[2] and the case law has found that the existence of a Mary Carter agreement has to be disclosed very quickly after it has been entered into or else costs may be payable by the non-disclosing party,[3] but these modified Mary Carter agreements are widely accepted in Canada. A typical Canadian Mary Carter agreement includes the following:

1) the settling defendant guarantees a minimum recovery to the plaintiff;
2) the exposure of the settling defendant is capped;
3) the settling defendant *remains in the lawsuit*;
4) the settling defendant's liability for damages reduces in direct proportion to any increase in the liability of the non-settling defendant's liability.

Justice Harper in *Nikota v. Avmor Ltd.*[4] has noted that "the chief problem associated with Mary Carter agreements is that a hidden

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1. 202 So. 2d 8 (U.S. Fla. Ct. App. 2 Dist., 1967)
2. Commentary: "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 litigation who has made an agreement 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 judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings."
3. See for instance *Pettey v. Avis Car Inc.* (1993), 103 D.L.R. (4th) 298, 18 C.P.C. (3d) 50, 13 O.R. (3d) 725 (Ont. Gen. Div.); and *Evans v. Jenkins* (2003), 29 C.P.C. (5th) 299, 2003 CarswellOnt 463, [2003] O.J. No. 5796 (Ont. S.C.J.) at para. 8.

alteration of the relationship between some of the parties will give a jury a misleading and incomplete evaluation of the evidence".[5]

To avoid this concern and to escape the litigation entirely, thereby eliminating future defence costs, many defence counsel attempt to negotiate Pierringer agreements instead of Mary Carter agreements.

Pierringer Agreements were created by a Wisconsin lawyer in 1963 in the case *Pierringer v. Hoger*.[6] Pierringer agreements are similar to Mary Carters in the tactical goals they accomplish:

1. to increase exposure on the remaining defendants,
2. to limit the exposure on the settling defendants, and
3. to put money in the plaintiff's pocket.

But there is a significant difference between the two: in a Mary Carter the settling defendant remains in the action and tries to shift liability to the non-settling defendant, while in Pierringer Agreements the settling defendant is released from the action and the plaintiff then amends the claim to eliminate joint liability and proceed against the non-settling defendants for their several liability only. This why Pierringer agreements are also known as "proportionate share settlement agreements".

As such, Pierringer agreements are one of the few remaining instances in modern litigation where the ancient laws of several liability are of key importance; several tortfeasors cannot look to other defendants for contribution and indemnity,[7] and if damages are divisible each tortfeasor is responsible only for the damage caused by his direct action.[8] The Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.*[9] stated:

> As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

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4. *Nikota v. Avmor Ltd.* (2007), 88 O.R. (3d) 290, 162 A.C.W.S. (3d) 595, [2007] O.J. No. 4797 (Ont. S.C.J.) at para. 19.
5. *Ibid.*
6. 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C., 1963).
7. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, 359 D.L.R. (4th) 381 (S.C.C.) at para. 26.
8. *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, 31 C.C.L.T. (2d) 113 (S.C.C.) at para. 24.
9. *Supra* footnote 7 at para. 26.

Joint and Several Liability Under the Negligence Act, S.O. 1930, c. 27

The law on joint and several liability is ancient and dates back to before the year 1400.[10] Prof. Glanville Williams in his seminal text *Joint Torts and Contributory Negligence* quotes *Y.B.* (1400) M. 2 H. 4 IIA, pl. 48 (Bro. Ionder in accion 119) where the court stated: "There is an ancient authority for saying that those who separately obstruct a way over land are not concurrent tortfeasors".[11]

The old laws on negligence were harsh by modern standards; there was no joint liability between several tortfeasors, and while joint liability existed between joint tortfeasors there was no automatic right to contribution and indemnity between at fault defendants. Both concepts were changed in Ontario by the passage of the first *Negligence Act*[12] such that joint liability now exists automatically for several tortfeasors contributing to damages and concurrent tortfeasors[13] causing the damages have a right to seek contribution from each other in accordance with their proportionate liability.

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10. Glanville Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (London, England: Stevens and Sons, 1951).
11. *Ibid.* at p. 21, footnote 8.
12. S.O. 1930, c. 27.
13. Concurrent tortfeasors is an esoteric concept that most practitioners are not faced with on a daily basis. Prof. Williams explains various terms as follows:

    The term 'joint tortfeasor' is, in essence, well understood. Two or more tortfeasors are joint tortfeasors (*a*) where one is the principal of or vicariously responsible for the other, or (*b*) where a duty imposed jointly upon them is not performed, or (*c*) where there is concerted action between them to a common end. Except in the case of nonfeasance in breach of a joint duty, parties cannot be joint tortfeasors unless they have mentally combined together for some purpose.

    Where tortfeasors are not joint they are necessarily 'several', 'separate', or 'independent'. Several (*i.e.* separate or independent) tortfeasors are of two kinds: several tortfeasors whose acts combine to produce the same damages, and several tortfeasors whose acts cause different damage. The latter are outside the scope of this work, except in so far as reference to them is necessary in order to throw into relief the rules relating to the former.

    The modern tendency has been to assimilate to a considerable extent the position of joint tortfeasors and several tortfeasors whose acts concur to produce the same damage, though some differences remain. It is desirable to have a generic name for the two kinds of tortfeasors, and the name here suggested is 'concurrent tortfeasors.' Concurrent tortfeasors are tortfeasors whose torts concur (run together) to produce the same damage . . . (page 1) Several concurrent tortfeasors are independent tortfeasors whose acts concur to produce a single damage. The *damnum* is single, but each

Section 1 of the *Negligence Act*[14] states that where damages are contributed to by two people they are jointly responsible for the damage:

> Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

These ameliorative changes were passed for the benefit of the plaintiff. Plaintiffs greatly benefitted in that several tortfeasors were forced to become jointly liable for damages such that a deep pocketed defendant with minimal proportionate liability would be required to indemnify the plaintiff completely under the rules of joint liability. While that deep pocketed defendant was entitled to contribution and indemnity from the most responsible defendant, this was cold comfort when the most responsible defendant was impecunious.

Pierringer agreements, by directly and purposively eliminating joint liability and proceeding solely with several liability,[15] return plaintiffs to the situation that existed before the passage of the *Negligence Act* in 1930. Mary Carter agreements, by keeping the settling defendants in the action, do not eliminate joint liability in the same manner.

Several Liability and Divisibility of Damages

The ancient law is that where damages are divisible, several tortfeasors are responsible only for the damages they directly cause.

In 1951, Professor Glanville Williams stated:

> Thus if A and B trespass on C's land, each physically causes a separate portion of damages, and if there is no concert between them they are not concurrent tortfeasors of any kind and each is (generally) liable only for his own share in the damage.[16]

commits a separate *injuria* (page 16).

Damnum is defined by Black's law dictionary as "A loss; damage suffered" and *Injuria* is defined as a wrong contrary to law or "an assault on a person's reputation or body".

14. R.S.O. 1990, c. N.1.
15. *Supra* footnote 6 at para. 26.
16. Glanville Williams, at p. 4, footnote 2.

. . . . .

> If two defendants, struggling for a single gun, succeed in shooting the plaintiff, there is no reasonable basis for dividing the injury, and each will be liable for all of it. If they shoot him independently, with separate guns, and he dies, there can still be no division, for death cannot be apportioned except by an arbitrary rule. If they merely inflict separate wounds, and he survives, a basis for division exists, because it is possible to regard the two wounds as separate injuries.[17]

. . . . .

> Parties are not concurrent tortfeasors, whether joint or several, when there is no concerted action and their acts cause different items of damage. In such a case there is no solidary obligation; each is severally liable for the damage that he causes, and is not liable for the damage caused by the other. The plaintiff's total damage must therefore be apportioned between the defendants. If the true proportions cannot be determined, they may be apportioned equally. This rule has been applied where dogs belonging to different owners make separate incursions and worry sheep. Both injuria and damnum are distinct, and, in the absence of evidence the damage may be divided equally.[18]

Although Professor Williams was an English scholar writing more than half a century ago, his formulations of the law on joint and several liability are still the gold standard. They have been directly approved of in recent Canadian case law and are widely quoted from by Canadian authors. In 1982, David Cheifetz published *Apportionment of Fault in Tort*, which is a text dedicated to the interpretation of the *Negligence Act* of Ontario. Cheifetz reiterates the position taken by Williams:

> Several tortfeasors causing different damages are not concurrent tortfeasors and are not discussed in this text. As between them, there is not even concurrence in the realm of causation. Such tortfeasors are liable only for the different damages each causes, even if the damages are caused to the same person.[19]

> . . . several tortfeasors causing different damages, even to the same person, were liable only for the damage they each caused.[20]

In 1988, the Ontario Law Reform Commission issued their *Report on Contribution Among Wrongdoers and Contributory Negligence*.

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17. Glanville Williams, at p. 5.
18. Glanville Williams, at p. 20.
19. David Cheifetz, *Apportionment of Fault in Tort* (Aurora, Ont.: Canada Law Book Limited, 1981) at p. 6.
20. *Ibid.* at p. 7.

The OLRC came to the conclusion that non-concurrent several tortfeasors are responsible only for the damage they have caused:

> First, each of two or more concurrent wrongdoers, whether joint or several, is liable *in solidum* for the whole of the loss suffered by P. However, in the case of non-concurrent, several tortfeasors, whose acts have produced different damage, each tortfeasor is liable to P only for the damage he has caused. P's "total damage must therefore be apportioned between the defendants" who are severally, but not concurrently, liable.[21]

Professor Lewis Klar, in his text, *Tort Law*, has also confirmed that "where each party caused different injuries, each is responsible in full for that injury, and contribution cannot be claimed".[22]

Courts in Canada are not often confronted with situations where tortfeasors are sued severally for one incident and the damages are divisible. But when such a claim does occur the courts have repeatedly found that if damages can be divided, they must be, and several tortfeasors are responsible only for the damages they cause.[23]

Justice DesRoches in *Reeves v. Arsenault*,[24] sitting on the P.E.I. Superior Court Trial Division in 1995, considered a situation where a plaintiff is knocked down by one negligent driver and then struck by a second negligent driver while still lying on the road. Justice DesRoches stated that "in such a case, it would be clear that the first driver would be solely responsible for the injuries caused before the pedestrian was run over by the second driver".

Such reasoning has been confirmed by the Supreme Court of Canada as well in *Athey v. Leonati*.[25] The Supreme Court confirmed that where two defendants caused different damage they are responsible only for that damage which they cause: "Separation of distinct and divisible injuries is not truly apportionment; it is simply

21. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (Ontario Ministry of the Attorney General) at p. 8. Footnote 5 makes it clear that: "the question whether several tortfeasors are or are not concurrently liable, and therefore the question whether the damages can be divided, or apportioned, is one of fact."
22. Lewis N. Klar, Q.C., *Tort Law*, 5th ed. (Carswell: Toronto, 2012) at p. 576.
23. See for instance; *O'Neil v. Van Horne* (2002), 212 D.L.R. (4th) 558, 59 O.R. (3d) 384, (*sub nom.* A.O. v. J.V.) 158 O.A.C. 188 (Ont. C.A.) at para. 14; *Katzman v. Yaeck* (1982), 136 D.L.R. (3d) 536, 37 O.R. (2d) 500, 14 A.C.W.S. (2d) 519, 1982 CarswellOnt 414, [1982] O.J. No. 99 (Ont. C.A.) at para. 27; *Williams v. Woodworth* (1899), 32 N.S.R. 271, 1899 CarswellNS 34 (N.S. C.A.); *Reeves v. Arsenault* (1995), 20 M.V.R. (3d) 303, 136 Nfld. & P.E.I.R. 91, [1995] P.E.I.J. No. 159 (P.E.I. T.D.).
24. *Ibid.*
25. [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, 31 C.C.L.T. (2d) 113 (S.C.C.).

making each defendant liable only for the injury he or she has caused, according to the usual rule."[26]

The Ontario Court of Appeal has also confirmed the same result. In *A.O. v. J.V.*[27] the defendant sexually assaulted the plaintiff when she was three years old. The defendant tried to third party the plaintiff's father and subsequent boyfriend whom he alleged also sexually assaulted the plaintiff. The Court of Appeal found that the tortfeasors were obviously severally liable because they did not commit the acts jointly. More importantly, the court found that the injuries from the sexual assault were divisible and that the plaintiff could not claim contribution and indemnity from the other tortfeasors. The court found that even though the damages were all of a psychological nature stemming from sexual assaults, the injuries were divisible and that it was up to the plaintiff to prove that they were divisible at trial as a question of fact. The court highlighted the fact that the plaintiff "seeks only damages for which the defendant is solely to blame" as pled in the amended statement of claim:

> This is clearly not a complaint related to a foot and an arm and it may be difficult to separate out the consequences, if any, of the defendant's conduct from all the influences upon the plaintiff over the intervening years – but that is her task as a plaintiff. And she has not backed away from that obligation. In repeated references in her factum filed in this court it is said that she seeks only damages for which the defendant is solely to blame. There is no suggestion that she seeks damages against him as a contributor along with other tortious or non-tortious causes. Nor could she, because the appellant is no more a contributor to any damages suffered as a result of the proposed third parties' wrongdoing than they are for his conduct and its consequences. The tortfeasors are each distinct. Whatever difficulties may be presented at trial, the plaintiff will have to meet the onus of satisfying the court that the defendant's conduct led to particular consequences.[28]

Pierringer Agreements and Divisibility of Damages

Ontario lawyers have operated under the *Negligence Act* for 85 years now. The old law governing joint and several liability has long since become blurred in the haze of time. The recent resurgence of Pierringer agreements has brought several liability to the forefront

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26. *Ibid.* at para. 24.
27. (2002), 212 D.L.R. (4th) 558, 59 O.R. (3d) 384, [2002] O.J. No. 1528 (Ont. C.A.).
28. *Ibid.* at para. 14.

again, with all of the implications elimination of the protection of joint liability has for the plaintiff.

If the damages can be divided between the several tortfeasors at all, plaintiff's counsel must be cognizant that the non-settling defendant will strenuously argue that they are not responsible for the damages caused by the settling defendant.

The situations where several tortfeasors act at or around the same time and cause separate damages are myriad. Under the laws of joint liability, several tortfeasors do not typically argue that they are not responsible for the whole damages, but where a plaintiff proceeds against the defendants severally issues of divisibility become paramount.

The example given by Justice DesRoches of a plaintiff being struck by one car and then lying in the road as a result of his injuries and being struck by another car is a prime example. With a typical lawsuit under the *Negligence Act*, the defendants will normally agree that they are each jointly liable for the full amount and negotiate damages as between them, but where the plaintiff enters into a Pierringer agreement with either the first or second driver and proceeds against the other severally, that defendant has a strong incentive to argue that the damages from the first car are divisible from the damages from the second car and they are not responsible for the portion of the damages caused by the other driver.

Similarly, consider a situation where individuals are involved in a fight and the plaintiff is pushed into a roadway where he is run over. If the plaintiff enters into a Pierringer agreement with either the driver or the other pugilist the remaining defendant will be strongly motivated to argue that the injuries caused by the push are distinct from the injuries caused by the vehicle, and the non-settling defendant is not responsible for the injuries caused by the settling defendant.

In the above situation, where several tortfeasors have caused distinct damages, the plaintiff's counsel should be aware that entering into a Pierringer agreement with one several defendant will likely result in the non-settling defendant arguing that damages must be divided and they are responsible only for the portion of damages attributable to their several negligence. If the plaintiff does not receive full compensation for the portion of the damages attributable to the settling several defendant, the plaintiff may not be entitled to full compensation at all.