

# Settling the Score



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## Are Pierringer agreements and Mary Carter agreements still effective tools for minimizing litigation risk?

Parties, particularly in large, multi-party lawsuits, have always looked for tools to minimize their risk and exposure. The courts have largely accepted two such tools, Pierringer and Mary Carter Agreements, subject to certain criteria. This acceptance is based on a public policy rationale that settlements are to be encouraged.

Three recent cases from the appeal courts in British Columbia, Ontario and Alberta have brought into question the utility of these agreements.

### Pierringer Agreement

Here are some basic elements of the Pierringer agreement:

- the plaintiff receives some consideration from the settling defendants, in full satisfaction of the plaintiff's claim against the settling defendants;
- the plaintiff agrees to discontinue the action against the settling defendants;
- amendments to the pleadings remove the settling defendants from the action; and
- the plaintiff continues against the non-settling defendants, who are then responsible only for their several liability.

### Mary Carter Agreement

Mary Carter agreements, also known as Guaranteed Verdict agreements, were first reviewed in the 1967 American decision of *Booth v. Mary Carter Paint Company*. Mary Carter agreements did not

emerge in Canadian litigation until *J & M Chartrand Realty Ltd. v. Martin* was decided in 1981. In a Mary Carter agreement, the plaintiff and settling defendant agree to cap the settling defendant's exposure. That is the guaranteed verdict element.

Unlike in Pierringer agreements, in a Mary Carter agreement, the settling defendant remains in the action and participates at trial. The settling defendant's liability is reduced in direct proportion to the liability of the non-settling defendant as determined at trial. In Mary Carter situations, there is an incentive for the settling defendant to maximize the liability of the non-settling defendant.

Until recently, parties were not required to disclose the settlement amount. However, recent appellate decisions have found the settlement amount must be disclosed, and that amount must be deducted from any further amount the trial court awards.

### CASE LAW

#### *Ashcroft v. Dhaliwal*

The 2008 British Columbia Court of Appeal decision in *Ashcroft v. Dhaliwal* was the first such decision. In *Ashcroft*, the plaintiff had been in two accidents approximately two years apart. In each case, the defendants admitted liability.

The plaintiff settled her claim from the second accident for \$315,000. At trial, she sought only an assessment of damages arising from the first accident. She argued that the second accident aggravated and exacerbated her injuries. The court found the plaintiff's injuries from the second accident were "indivisible" from the injuries arising from the first accident. The judge awarded total damages of

\$400,000 and found that the first accident caused 70%, while the settling defendant (the second accident) caused 30%.

The court held the plaintiff was only entitled to collect \$85,000 from the non-settling defendants. This was obviously a much lower amount than they would have paid otherwise. The Court of Appeal upheld the trial decision and reviewed the issue of concurrent and consecutive torts. The court held there was no policy reason for treating concurrent and consecutive torts differently, when both were necessary causes of an indivisible injury. The court found that separate torts, when linked by an indivisible injury, do not equate to two separate causes of action. The indivisible injury is the link that brings in not only joint and several liability, but the rule against double recovery. Ultimately the court determined that avoiding double recovery on the part of the plaintiff trumped the public interest in settlement privilege and deducted the full settlement amount from the damage award. Leave to appeal to the Supreme Court of Canada was denied.

#### *Laudon v. Roberts*

The Ontario Court of Appeal followed this trend in 2009 in *Laudon v. Roberts*. Rick Laudon was injured in a boating accident and sued the driver of the boat he was in, Keith Sullivan, and the driver of the other boat, Will Roberts. Prior to trial, Roberts settled with Laudon pursuant to a Mary Carter Agreement and paid the plaintiff \$365,000. Laudon went to trial against Sullivan.

At trial, the jury assessed Laudon's total damages at \$312,021 and apportioned liability of 50% to Roberts, 39% to Sullivan and 11% contributory negligence against the plaintiff. The trial judge granted the plaintiff judgment against Sullivan for \$121,688 based on Sullivan's liability of 39%. Earlier, the judge had ruled that the plaintiff did not have to deduct the undisclosed settlement amount from any damages that were ultimately awarded.

However, the Court of Appeal found that, since the plaintiff could not be allowed double recovery, the plaintiff did

have to deduct the [\$365,000] settlement amount from the [\$121,688] damage award. As a result, Sullivan did not owe the plaintiff anything; in fact, the plaintiff was directed to pay Sullivan's costs. Costs were estimated in the hundreds of thousands of dollars, which may ultimately leave the plaintiff with nothing, notwithstanding that a jury decided his claim was worth over \$312,000.

In the end, Sullivan as the non-settling defendant got the benefit of a very good

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settlement achieved by the plaintiff with the settling defendant. As in *Ashton v. Dhaliwal*, leave to appeal to the Supreme Court of Canada in *Laudon v. Roberts* was also denied.

It should be noted that although the agreement in *Laudon v. Roberts* was called a Mary Carter agreement, the court noted that the agreement in issue was technically not a true Mary Carter agreement. For example, the agreement had no provision whereby the settling defendant was able to recover some of the monies paid in the event that the plaintiff recovered more than he was paid under the agreement. The Court of Appeal noted such a term was common to Mary Carter agreements. However, because the parties had described the agreement as a Mary Carter agreement, the court used the same terminology in its reasons.

#### *Bedard v. Amin*

In 2010, the Alberta Court of Appeal, in *Bedard v. Amin*, followed the British Columbia and Ontario Courts of Appeal. The Alberta appellate court stated the principal of avoiding double recovery outweighed the public policy argument of encouraging settlement.

In *Bedard*, plaintiff Logan Bedard suffered injury within days of his birth,

which led to cerebral palsy, severe developmental delay and physical disabilities. Bedard settled with the Hospital and Health Region and the matter continued to trial against two doctors. At trial, the doctors were found 25% liable for a total of \$700,000. Due to the Pierringer agreement terms, the trial judge assessed the liability of the settling defendants and concluded they were not liable.

The judge then deducted the settlement amount from the damages that were to be paid by the two doctors. This was upheld on appeal. The Alberta Court of Appeal confirmed the British Columbia and Ontario decisions and determined that even if the settlement was deducted from the overall award, the plaintiff would still receive full compensation for his injuries as assessed at trial.

However, the court did include one qualification. Only the net settlement proceeds, after an appropriate deduction for costs incurred in the claim against the settling defendants, should be set off against the damages awarded at trial. Although the court did recognize some unfairness in allowing the non-settling defendants to receive the benefit of the settlement, that unfairness was outweighed by the principal against double recovery.

### **RISKS OF MARY CARTER AND PIERRINGER AGREEMENTS**

All counsel must now consider the risks of entering into Pierringer and Mary Carter Agreements. New risks exist for counsel representing plaintiffs and settling defendants to consider. If a particularly good settlement is made with the plaintiff, a chance exists that the non-settling defendants will receive the benefits of that agreement at trial. In some extreme cases, non-settling defendants may not have to pay anything towards the plaintiff's damages.

Although both Pierringer agreements and Mary Carter agreements can be effective tools for minimizing litigation risk, in light of these three Court of Appeal decisions (decided in three different jurisdictions), these types of agreements may be losing some of their past attractiveness as a risk management tool. ≡