Pettey et al. v. Avis Car Inc. et al.

[Indexed as: Pettey v. Avis Car Inc.]

13 O.R. (3d) 725
[1993] O.J. No. 1454
Action No. 4308/85

Ontario Court (General Division),
Ferrier J.

June 23, 1993

Courts — Abuse of process — Champerty and maintenance — "Mary Carter" settlement agreement not objectionable on grounds of champerty and maintenance.

Trial — "Mary Carter" settlement agreement — Terms of agreement except monetary amounts must be immediately disclosed to parties and to court — Court has discretion to order disclosure of monetary amounts and to impose terms to regulate conduct of trial.

The plaintiffs claimed damages arising from a tragic accident in the Town of Barrhead, Alberta involving two motor vehicles. The five defendants were: A Inc., the owner of the vehicle in which the plaintiff CP was a passenger; DP, the driver of that vehicle; R Ltd., the owner of the second vehicle; Y, the driver of the second vehicle; and, the Town of Barrhead. There were cross-claims for contribution and indemnity between all the defendants. On the second day of a non-jury trial, the plaintiff and the defendants A Inc. and DP advised the court that they were in the process of signing a "Mary Carter" type of settlement agreement. Under this type of agreement, the action continues but the contracting defendant guarantees that the plaintiff will recover a certain sum, which sum fixes the contracting defendant's maximum liability. Under the agreement, the contracting defendant's obligation to pay is reduced in direct proportion to any increase in the non-contracting defendant's liability; viz. , if the contracting defendant guaranteed $3,000,000 and the court assessed damages at $6,000,000 with liability attributed equally between the defendants, then the plaintiff would receive $1,500,000 from the contracting defendant and $3,000,000 from the non-contracting defendant. In the case at bar, the terms but not the monetary amounts in the agreement were disclosed and a copy of the complete text in a sealed envelope was provided should the court wish disclosure. The other defendants moved for a stay of the action on the grounds that the agreement was an abuse of process and void as against public policy, or, alternatively, for a mistrial because the agreement was disclosed after the trial was underway.

Held, the defendants' motion should be dismissed.

No blanket approval of all Mary Carter type agreements should be given; each particular agreement should be assessed in the light of (a) the general principles that: parties are free to contract and to settle lawsuits, the court will not lightly interfere with such settlements, and the court encourages settlements, and (b) the following particular principles for Mary Carter agreements. Excepting the dollar amounts and gratuitous and self-serving language, the

agreement must be disclosed to the parties and to the court as soon as it is made. Immediate disclosure is necessary as a matter of procedural fairness and to allow the court to properly control the judicial process. It is in the discretion of the court in the circumstances of each case whether the dollar amounts should also be disclosed. It is not objectionable that the agreement is disclosed after the trial has commenced, if that is when the agreement was made. It is not objectionable that the contracting defendants have a right to pursue their cross-claims against the non-contracting defendants. However, since the structure of this type of agreement makes it in the interest of the contracting defendant that the plaintiff's damages be assessed as high as possible, procedural safeguards must be introduced to prevent any distortion and abuse of the judicial process. Accordingly, in the case at bar, the contracting defendants may not cross-examine on issues about the quantum of damages, except with leave.

The agreement in this case did not constitute champerty or maintenance. There was no improper purpose, no officious intermeddling with a law suit, and no stirring up of litigation. The agreement did not change the position of the parties on questions of liability, and both before and after the agreement, the contributing defendants had reasons for pursuing their cross-claims.

Cases referred to

351061 Alberta Ltd. v. Mega Technical Industries Ltd. (1992), 31 A.C.W.S. (3d) 987 (Alta. Q.B.); Bodnar v. Home Insurance Co. (1987), 25 C.P.C. (2d) 152 (Ont. Master), affd [1990] O.J. 428 (C.A.); Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 1967); Cox v. Kelsey-Hayes Co. , 594 P. 2d 354 (1978); Dixon v. R. (1980), 24 B.C.L.R. 382, [1980] 6 W.W.R. 406, 128 D.L.R. (3d) 389 (C.A.); Dosdourian v. Carsten, 580 So. 2d 869 (Fla. App. 4 Dist. 1991); Elbaor v. Smith , 845 S.W. 2d 240 (Tex. 1992); Everman v. Superior Court, 10 Cal. Rptr. 2d 176 (Cal. App. 1992); Findon v. Parker (1843), 11 M. & W. 675, 152 E.R. 976; General Motors v. Lahocki , 410 A. 2d 1039 (My. 1980); Goodman v. R., [1939] S.C.R. 446, [1939] 4 D.L.R. 361, 72 C.C.C. 305; Hatfield v. Continental Homes, 610 A. 2d 446 (Pa. 1992); Hoops v. Watermelon City Trucking , 846 F. 2d 637 (U.S.C.A. 10th Cir. 1988); Insurance Co. of North America v. Sloan , 432 So. 2d 132 (Fla. App. 4 Dist. 1983); J. & M. Chartrand Realty Ltd. v. Martin (1981), 22 C.P.C. 186 (Ont. H.C.J.); Langtry v. Dumoulin (1885), 7 O.R. 644 (Div. Ct.), affd (1886), 13 S.C.R. 258; Lum v. Stinnett, 488 P. 2d 347 (Nev. 1971); Moro v. Perritt, Ont. C.A., December 8, 1992, 37 A.C.W.S. (3d) 289 sub nom. Moro v. Newcomer; Murphy v. Keating (1990), 108 N.B.R. (2d) 85, 269 A.P.R. 85 (Q.B.); Nash v. Glickman (1975), 7 O.R. (2d) 711 (C.A.); Newswander v. Giegerich (1907), 39 S.C.R. 354; Pioneer Machine (Rentals) Ltd. v. El-Jay Inc. (1978), 93 D.L.R. (3d) 726, 8 C.P.C. 168, [1978] 6 W.W.R. 168, 15 A.R. 588 sub nom. Pioneer Machine (Rentals) Ltd. v. Aggregate Machine Ltd. (T.D.) [affd (1979), 105 D.L.R. (3d) 384 (Alta. C.A.), leave to appeal to S.C.C. refused (1980), 105 D.L.R. (3d) 384 n, 23 A.R. 89n]; Ratterree v. Bartlett, 707 P. 2d 1063 (Kan. 1985); Security Union Title Insurance v. Superior Court, 281 Cal. Rptr. 348 (Cal. App. 1991); Syncrude Canada Ltd. v. Canadian Bechtel Ltd. (1990), 23 A.C.W.S. (3d) 137 (Alta. Q.B., Master), (1991) 25 A.C.W.S. (3d) 1209 (Alta. Q.B., Master); Trepca Mines Ltd. (Re), [1962] 3 All E.R. 351 (C.A.); Tucson (City) v. Gallagher , 493 P. (2d) 1197 (Ariz. 1972); Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973); Wiegand v. Huberman (1979), 108 D.L.R. (3d) 450 (B.C.S.C.); Woroniuk v. Woroniuk (1977), 17 O.R. (2d) 460, 4 C.P.C. 143 (Master)

Statutes referred to

Family Law Act, R.S.O. 1990, c. F.3

Negligence Act, R.S.O. 1990, c. N.1, s. 2

Authorities referred to

Rules of Professional Conduct, Law Society of Upper Canada, Rule 10, commentaries 4, 6

MOTION during a trial for a stay on the grounds that a "Mary Carter" settlement agreement was an abuse of process and void as against public policy.

L.H. Mandel, Q.C., and R.M. Bogoroch, for plaintiffs.

R.D. McLean, Q.C., and S. Roherty, for defendant, Douglas Pettey.

R. Bell and Anne Spafford, for defendant, Avis Car Inc.

Bert Raphael, Q.C., for defendants, Reuben Transport Ltd. and Claude St. Yves.

B. Percival, Q.C., for defendant, Town of Barrhead.

FERRIER J.:—

Reasons for ruling on mid-trial motion

The plaintiffs claim damages for injuries and losses arising out of a tragic motor vehicle accident which occurred on August 19, 1983, in the Town of Barrhead, Alberta. There are five defendants. Soon after the commencement of the trial, the plaintiffs entered into a settlement agreement with two of the defendants, Avis Car and Douglas Pettey (the "contracting defendants"). The agreement was a "Mary Carter" type of agreement. The remaining defendants (the "non-contracting defendants") immediately moved for a stay of the action by the plaintiffs as against them, taking the position that the agreement was an abuse of process and void as against public policy. I dismissed the motion for reasons to be delivered in due course. Eventually, the entire action was settled, in the third week of trial, but because the issues raised in the motion brought by the non-contracting defendants are of general importance, I now deliver my reasons for the dismissal of the motion.

Background

This was a non-jury trial. The action having been settled, no findings of fact were made by the court. What follows as a factual description is a summary of the allegations in the pleadings, although there can be no doubt that the plaintiff Colleen Pettey and her husband Douglas Pettey suffered serious and permanent injuries as a result of the collision.

Colleen Crowley and Douglas Pettey, Ontario residents, were married on August 13, 1983, and the following day flew to Vancouver on their honeymoon. They rented a car from Avis Car Inc. and motored through parts of British Columbia, through the Canadian Rockies into Alberta, eventually arriving in the Town of Barrhead, Alberta. At the time of the accident, Douglas Pettey was driving the rented car and his bride was in the front passenger seat. It is alleged that Douglas Pettey drove through a stop sign. Whether he did or not, the Pettey vehicle was struck broadside

by a tractor trailer which was travelling on a main thoroughfare in the Town of Barrhead. It is alleged by the plaintiffs that the stop sign was improperly located, being too far off the travelled portion of the road to be readily visible. It is also alleged that the stop sign was obscured by trees. Hence the claim against the Town of Barrhead. Reuben Transport Ltd., a Saskatchewan company, owned the tractor trailer. Claude St. Yves, the driver of the tractor trailer, was a resident of Saskatoon. It is apparent that in addition to the questions of liability on the part of the various defendants and quantum of damages, there were substantial choice of law issues in the action.

The first day of trial was taken up with preliminary matters and opening for the plaintiffs, followed by the testimony of one witness, John Fiorilli, a Barrhead police officer called as a witness on the issue of liability. He gave evidence concerning the intersection, the location of the stop sign, the events shortly after the accident, the damaged vehicles and the point of impact. He was cross-examined by counsel for each of the defendants.

Summary of claims in the action

The plaintiffs claim against Douglas Pettey in negligence and against Avis Car as owner of the vehicle driven by Douglas Pettey. They also claim against the defendant Claude St. Yves in negligence and against Reuben Transport Ltd. as owner of the tractor trailer. The plaintiffs claim in negligence against the Town of Barrhead, in very short summary, because of the location of the stop sign and the obscuring of the stop sign by foliage. Albert Crowley, Colleen's father, claims as a Family Law Act (now R.S.O. 1990, c. F.3) claimant for himself and other members of Colleen's family (her siblings and her mother).

Avis Car and Douglas Pettey allege negligence on the part of their co-defendants and cross-claim against their co-defendants for contribution and indemnity. In addition, Douglas Pettey claims against his co-defendants for his own damages suffered as a result of the collision.

The defendants Reuben Transport and Claude St. Yves cross-claim against their co-defendants for contribution and indemnity.

The defendant, the Town of Barrhead, cross-claims against its co-defendants for contribution and indemnity in reference to the plaintiff's claims; and against St. Yves and Reuben Transport Ltd. in reference to the cross-claims of Avis Car and Douglas Pettey against it; and further claims contribution and indemnity from Avis Car and Douglas Pettey in respect of the cross-claim of St. Yves and Reuben Transport against it.

All defendants raise the defence of negligence of their respective co-defendants and the plaintiff Colleen Pettey in defence of the main claims of the plaintiffs. All defendants plead that Alberta law applies to the issues of negligence and damages.

It was alleged that Alberta legislation at the time prohibited actions in tort by a wife against her husband; that there was "gratuitous passenger" legislation in force at the time in Alberta, requiring the plaintiffs in this case to establish gross negligence against the driver of the vehicle in order to recover damages. Barrhead pleaded additional Alberta "municipal" legislation which it raised against the claim made by the plaintiffs.

The agreement

At the beginning of the second day of trial, counsel for the plaintiffs advised the court that an agreement had been reached which was in the process of being committed to writing. Counsel for the plaintiff advised the court of the complete terms of the agreement, but did not disclose the dollar amounts in the agreement. Counsel for the plaintiff was willing to disclose the dollar amounts but did not do so because counsel for the defendants Reuben Transport Ltd. and St. Yves objected to the amounts being disclosed. Up to this point, Avis Car and Douglas Pettey were represented by the same counsel. At this juncture, however, the court was advised that Avis Car's and Douglas Pettey's interests might diverge at this point on the choice of law questions. Accordingly, new counsel, from this point forward, acted for Avis Car separately. The court was also advised by Avis Car's new counsel that as between Avis and Pettey there was an outstanding insurance issue outside this action, and that Avis had undertaken in reference to Mr. Douglas Pettey that it would not make any claim against Douglas Pettey's assets in the event it achieved any form of judgment against Douglas Pettey.

On the morning of the next day, a letter setting out the terms of the agreement was faxed by counsel for Avis to counsel for the plaintiffs. A copy was provided to counsel for all other parties. At the opening of trial that day, counsel for the plaintiffs indicated that he was prepared to disclose the letter agreement in its entirety to the court; counsel for the non-contracting defendants agreed that full disclosure was necessary but took the position that once the dollar amounts were disclosed, the trial judge would be disqualified. Because of that position, counsel for the plaintiffs disclosed the entire agreement to the court blanking out the settlement numbers. The paragraph dealing with the arrangement between Avis and Pettey was also blanked out as being irrelevant to this action. A sealed copy of the full agreement was filed as an exhibit, giving the court access to the full terms of the agreement, if necessary.

The following is the text of the agreement entered into between the plaintiffs, and Avis Car and Douglas Pettey. It is in the form of a letter from Borden Elliot to Thomson Rogers dated April 1, 1993. I have inserted dollar amounts into the text where appropriate. These numbers have been inserted for ease of understanding and are for example only:

> We are the solicitors appointed pursuant to a policy for the Avis Group of Companies called a Commercial Comprehensive Catastrophe Liability Policy. Thompson, Tooze & McLean are solicitors for Aviscar Inc.'s primary insurer. Mr. Scott acts for Aviscar with respect to its self insured retention.
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> With the concurrence of insurers under the Catastrophe Liability Policy, the primary insurer and with Avis's agreement, we confirm our agreement with you on behalf of Colleen Pettey and all Family Law Act claimants in your action presently being tried before Justice Ferrier as follows:
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> 1. The plaintiffs are to receive $3,000,000 inclusive of all claims and pre-judgment interest plus $300,000 in costs. It is understood that all or part of the $3,000,000 may be structured and it is agreed that the various insurers as may be necessary will execute assignment forms in this regard. Assignment fees are for the account of Colleen Pettey.

Mr. McLean's principals have advised that their limits, along with Aviscar's self insured retention amount to (Canadian). We understand that Mr. McLean has requested funds in this amount to be payable to the plaintiffs or as they may direct. Mr. McLean's principals are paying the in costs. Our principals will pay (Canadian) and we have requisitioned these funds.

2. The Plaintiffs are at liberty to continue with all claims as against Reuben Transport and Barrhead. Aviscar Inc. and Mr. Pettey are at liberty to continue with their cross-claims for indemnity as against Reuben Transport and Barrhead. In no event will the liability of Aviscar Inc. and Mr. Pettey exceed the $3,000,000 amount referred to above.

3. Any finding of liability or apportionment of liability to Reuben Transport and Barrhead is to be applied first to reduce the $3,000,000 payment by whatever percentage of liability, if any, is found as against Reuben Transport and Barrhead with any amounts beyond the $3,000,000 going to the plaintiffs. For example, if 50% of any assessment over $3,000,000 is found against the other defendants, $1,500,000 would go to our principals and the remainder to your clients. If the assessment is less than $3,000,000, our principals would receive 50% of that assessment.

4. The plaintiffs shall hold Mr. Pettey and Aviscar harmless in respect of the Reuben Transport and Barrhead cross-claims. In effect, this means that Reuben Transport and Barrhead are not exposed to joint and several liability but only to several liability.

5. The reasonable fees and disbursements of your firm in prosecuting the claims from this point forward are for the account of our principals. Any costs recovery beyond the referred to above are to be reimbursed to our principals. Our principals hold your clients harmless in respect of any costs which may be awarded as against the plaintiffs in favour of Reuben Transport or Barrhead or any defendants. If there is any costs recovery beyond reimbursement to our principals of your reasonable fees and disbursements in prosecuting the action from this point, such will go to Mr. McLean's clients to defray their payment of costs.

The effect of the agreement is that the plaintiffs are guaranteed a $3,000,000 recovery plus $300,000 in costs from the contracting defendants. In addition, the contracting defendants have capped their exposure to the plaintiffs in an amount certain. The plaintiffs are at liberty to continue their claims against the non-contracting defendants. The contracting defendants are at liberty to continue with their cross-claims for indemnity against the non-contracting defendants. The non-contracting defendants are no longer exposed to joint and several liability, but only to several liability. In addition, the contracting defendants have agreed to indemnify the plaintiffs for their reasonable fees and disbursements in prosecuting their claims beyond the date of the agreement.

The effect of para. 3 of the agreement needs close examination. An example of a possible result was tendered in argument by counsel for Barrhead. If the plaintiffs' damages were assessed by the court at $6,000,000 and the liability attributed 50 per cent to the contracting defendants and 50 per cent to the non-contracting defendants, then the result would be that the contracting defendants would achieve a return of $1,500,000 (leaving them having paid a net of $1,500,000) and the non-contracting defendants would be required to pay $3,000,000. In this example, while the plaintiffs would obtain judgment at trial for $6,000,000 damages, they would only, in fact, receive a net of $4,500,000. The balance of $1,500,000 would be recovered by the plaintiffs for the benefit of the contracting defendants.

The motion

In the face of this agreement, the defendant Barrhead moved for an order that the main action be stayed and Reuben and St. Yves joined with Barrhead in seeking the same relief. In argument, the moving parties also sought a declaration that the agreement was null, void and unenforceable as against the non-contracting defendants. Alternatively, the moving parties sought a declaration of a mistrial because the agreement was revealed only after the police officer had testified.

The issues

The issues can be summarized as follows:

1. If such an agreement is entered into, when must it be disclosed?

2. Must the complete terms of the agreement, including the dollar amounts of the settlement, be disclosed to the court?

3. Does such an agreement amount to an abuse of process?

The law

The expression "Mary Carter agreement" has its origins in the Florida case Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 1967). Cases in the United States have indicated that a typical Mary Carter agreement contains the following features:

1. The contracting defendant guarantees the plaintiff a certain monetary recovery and the exposure of that defendant is "capped" at that amount.

2. The contracting defendant remains in the lawsuit.

3. The contracting defendant's liability is decreased in direct proportion to the increase in the non-contracting defendant's liability.

4. The agreement is kept secret.

See Hoops v. Watermelon City Trucking, 846 F. 2d 637 (U.S.C.A. 10th Cir. 1988) at p. 640; General Motors v. Lahocki, 410 A. 2d 1039 (My. 1980) at p. 1042, and Elbaor v. Smith , 845 S.W. 2d 240 (Tex. 1992).

In reported decisions, the majority of the courts in the United States which have considered the validity of Mary Carter agreements have allowed them to stand provided the agreement is

disclosed to the parties and to the court: see General Motors v. Lahocki , supra; Ratterree v. Bartlett, 707 P. 2d 1063 (Kan. 1985); Tucson (City) v. Gallagher, 493 P. 2d 1197 (Ariz. 1972); Dosdourian v. Carsten , 580 So. 2d 869 (Fla. App. 4 Dist. 1991), and Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973).

In Nevada and Texas, Mary Carter type of agreements have been declared void as against public policy: see Lum v. Stinnett, 488 P. 2d 347 (Nev. 1971); Elbaor v. Smith; Tucson (City) v. Gallagher; Dosdourian v. Carsten, and Ward v. Ochoa .

Some courts in the United States, and in particular in California because of statute, have imposed a good faith standard as a condition of validity of a Mary Carter agreement. This requires that the consideration payable by the defendant to the plaintiff under the agreement be "within the ball park" or "an educated guess" or a "rough approximation" of the probable liability of that defendant to the plaintiff. The burden is upon the party objecting to the proposed settlement to prove an absence of good faith: see Security Union Title Insurance v. Superior Court , 281 Cal. Rptr. 348 (Cal. App. 1991), and Everman v. Superior Court, 10 Cal. Rptr. 2d 176 (Cal. App. 1992). The good faith issue was not advanced or argued by the moving parties.

In Elbaor v. Smith, a 1992 decision, the Supreme Court of Texas considered the issues at length, at p. 247 and following:

> The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgment recovered at trial. . . . This creates a tremendous incentive for the settling defendant to ensure that the plaintiff succeeds in obtaining a sizable recovery, and thus motivates the defendant to assist greatly in the plaintiff's presentation of the case (as occurred here). Indeed, Mary Carter agreements generally, but not always, contain a clause requiring the settling defendant to participate in the trial on the plaintiff's behalf.
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> Given this Mary Carter scenario, it is difficult to surmise how these agreements promote settlement. Although the agreements do secure the partial settlement of a lawsuit, they nevertheless nearly always ensure a trial against the non-settling defendant. . . .
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> In his concurring opinion in Scurlock Oil Co. v. Smithwick, 724 S.W. 2d 1, 8 (Tex. 1986) (on motion for rehearing), Justice Spears pointed out that "Mary Carter agreements should be prohibited because they are inimical to the adversary system, and they do not promote settlement -- their primary justification." The truth of this statement has been recognized by commentators and has been proven by the subsequent history regarding the use of Mary Carter agreements.
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> Many jurisdictions have decided to tolerate the ill effects of Mary Carter agreements, presumably because they believe that the agreements promote settlement.

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Mary Carter agreements not only allow plaintiffs to buy support for their case, they also motivate more culpable defendants to "make a `good deal' [and thus] end up paying little or nothing in damages." Id.; cf. Slayton v. Ford Motor Co., 140 Vt. 27, 435 A. 2d 946, 947 (1981) (jury may infer that non-settling defendant was the most culpable defendant because plaintiff did not settle with that defendant). Remedial measures cannot overcome nor sufficiently alleviate the malignant effects that Mary Carter agreements inflict upon our adversarial system. No persuasive public policy justifies them, and they are not legitimized simply because this practice may continue in the absence of these agreements. The Mary Carter agreement is simply an unwise and champertous device that has failed to achieve its intended purpose. See Lum , 488 P. 2d at 351 (Mary Carter agreements essentially champertous because settling defendant retains financial interest in plaintiff's success against non-settling defendant); cf. Monjay v. Evergreen School Dist. 18 Wash. App. 654, 537 P. 2d 825, 830 (1975).

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The conduct of this trial, however, confirms the apprehension expressed by Justice Spears in Smithwick: that these remedial measures would only mitigate and not eliminate the unjust influences exerted on a trial by Mary Carter agreements. Equalizing peremptory strikes, reordering proceedings, thoroughly disclosing the true alignment of the parties, and revealing the agreement's substance cannot overcome collusion between the plaintiff and settling defendants who retain a financial interest in the plaintiff's success. In fact, Mary Carter agreements may force attorneys into questionable ethical situations under Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct, which is titled "Maintaining the Impartiality of the Tribunal." Comment 2 to that rule notes, regarding alternate methods of dispute resolution (like Mary Carter agreements), that "a lawyer should avoid any conduct that is or could reasonably be construed as being intended to corrupt or to unfairly influence the decisionmaker."

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As a matter of public policy, this Court favours settlements, but we do not favor partial settlements that promote rather than discourage further litigation. And we do not favor settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment. The bottom line is that our public policy favoring fair trials outweighs our public policy favoring partial settlements.

This case typifies the kind of procedural and substantive damage Mary Carter agreements can inflict upon our adversarial system. Thus, we declare them void as violative of sound public policy.

Justice Dogget in a strong dissent, supported by two other members of the court, said this at p. 252 and following:

> At the outset let it be clear that I am opposed to litigation agreements in any form that "skew the trial process, mislead the jury" or endanger the public. . . . A lawsuit is more than a battle of private contestants; it is conducted in a taxpayer-funded forum with the involvement of public employees and invested with a public interest. Careful scrutiny is appropriate for agreements with a potential to distort the search for truth that lies at the heart of the litigation process, and public policy will sometimes require their disapproval. See, e.g., Tom L. Scott, Inc. v. McIlhany, 798 S.W. 2d 556, 560 (Tex. 1990) (orig. proceeding) (invalidating a private agreement permitting one party from purchasing control of an opponent's expert witnesses). Just as litigants can no longer enter legally enforceable agreements to bar the public's right to know about the dangers to health and safety lurking in discovery documents, see Tex. R. Civ. P. 76a, they should not be permitted to distort their relationship with one another in the courtroom so as to subvert a fair trial. Usually before invalidating such an agreement, however, we first ascertain whether the integrity of the judicial process can be preserved through reasonable procedural safeguards. See Cypress Creek Util. Serv. Co. v. Muller, 640 S.W. 2d 860, 866 (Tex. 1982) (noting that procedural modifications are preferable to changes in the substantive law in protecting against potentially collusive trial tactics). Here a procedural remedy was adequate; the trial judge handled this matter in a responsible manner. The truth finding process was appropriately preserved, but, dissatisfied with the truth determined, the majority once again overrules precedent to achieve a desired result.
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> The chief problem associated with a Mary Carter agreement is that a hidden alteration of the relationship of some of the parties will give the jury a misleading and incomplete basis for evaluating the evidence. As is true in so many areas of jurisprudence, secrecy is the first enemy of justice. To address this concern, trial judges have appropriately implemented several procedural safeguards that remove the veil of secrecy from such settlements. Accordingly, we have emphasized the importance of complete disclosure of these arrangements.
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> Simply because jurors may initially expect the plaintiff to have interests adverse to all defendants does not mean that they are incapable of understanding that certain defendants have an incentive for the plaintiff to succeed. Indeed the same may occur in some multiparty litigation where no Mary Carter agreement is involved. The trial cannot be a "sham of adversity,". . . when the jury, as here, is fully aware of this shift in alliances. Nor does the trial become less adversarial merely because some of the parties have switched sides -- the names may have changed but the struggle is left intact. So long as at least two parties with antagonistic interests remain, the likelihood that the truth will emerge is not diminished.

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> Accordingly, most jurisdictions allow Mary Carter agreements when trial courts implement similar procedural safeguards to those adopted here. . . . In rejecting the full disclosure approach, today's opinion embraces a decidedly minority view accepted in only "a couple of states" that have previously chosen to prohibit such agreements. . . . Indeed, the majority cannot point to a single case in any jurisdiction that has ever approved today's prohibition of a named party from participating at trial because of a disclosed pretrial agreement.

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> Texas has today become the first state in the nation to lock the courthouse door on a party solely because of a pretrial contract involving a partial settlement which the majority dislikes. The elitist view that ordinary people acting as jurors are incapable of determining the facts after full disclosure has once again prevailed. . . .

In the Oklahoma case of Cox v. Kelsey-Hayes Co., 594 P. 2d 354 (1978) at p. 358, the Oklahoma Supreme Court said that the feature of the Mary Carter agreement whereby the contracting defendant's liability is decreased in direct proportion to the increase in the non-contracting defendant's liability, is the element that is unique to such agreements and creates the most unfair prejudice to the non-agreeing defendant and his right to a fair trial:

> The plaintiff is guaranteed a certain amount from one defendant regardless of the outcome of the verdict. In return that defendant receives the right to benefit from any joint verdict or a verdict solely against the non-agreeing defendants. The agreeing defendant therefore partakes of direct interest in the outcome of the litigation. The normal adversarial relationship between plaintiff and defendant becomes distorted, if not destroyed.
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> If the agreement does not absolutely settle the conflict, but rather hinges on the amount of the verdict, the trial court should review the circumstances of the agreement and either hold that portion of the agreement granting agreeing defendant an interest in a large plaintiff's verdict unenforceable as against public policy or dismiss the agreeing defendant from the suit. In no circumstances should a defendant who will profit from a large plaintiff's verdict be allowed to remain in the suit as an ostensible defendant.

Apparently, Mary Carter agreements have become commonplace in the majority of states in the United States, and are increasingly in use in Canada. Although one Canadian decision (J. & M. Chartrand, infra), expressly left open the question of the validity of such agreements, there is apparently no Canadian decision that has found them to be invalid. All judgments in cases in which a Mary Carter agreement had been entered into were unaffected by the existence of that agreement. In none of the reported Canadian decisions were the proceedings stayed by the court on its own initiative pursuant to its inherent right to control its process: see J. & M. Chartrand Realty Ltd. v. Martin (1981), 22 C.P.C. 186 (Ont. H.C.J.); Nash v. Glickman (1975), 7 O.R. (2d) 711 (C.A.); Dixon v. R. (1980), 24 B.C.L.R. 382, [1980] 6 W.W.R. 406 (C.A.); Bodnar v. Home

Insurance Co. (1987), 25 C.P.C. (2d) 152 (Ont. Master); affirmed [1990] O.J. 428 (C.A.); Moro v. Perritt (Ont. C.A., December 8, 1992, C.A. file No. 352/90 [summarized 37 A.C.W.S. (3d) 289 sub nom. Moro v. Newcomer]); 351061 Alberta Ltd. v. Mega Technical Industries Ltd. (Alta. Q.B., February 19, 1992 [summarized 31 A.C.W.S. (3d) 987]); Syncrude Canada Ltd. v. Canadian Bechtel Ltd. (Alta. Q.B., Master, October 9, 1990 [summarized 23 A.C.W.S. (3d) 137], March 12, 1991 [summarized 25 A.C.W.S. (3d) 1209 (Alta. Q.B., Master)]).

The Rules of Professional Conduct enacted by the Law Society of Upper Canada address the question of the encouragement of settlements and the disclosure of agreements. Commentary 4 to Rule 10 under the heading "Abuse of Process" provides as follows:

> 4. In civil proceedings, the lawyer has a duty not to mislead the court as to the position of the client in the adversary rocess. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, shall forthwith reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

Commentary 6 to Rule 10 provides:

Encouraging Settlements

> 6. Whenever the case can be fairly settled, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings.

The minutes of Convocation of the Law Society of Upper Canada make it clear that commentary 4 above was specifically enacted to take account of Mary Carter type agreements. While the Law Society Rules of Professional Conduct do not bind the court, they ought to be given significant weight in consideration of the issues.

Before addressing the specific issues, some general observations may be made.

Quite obviously any consideration of the issues and the principles to be applied must be made in the context of the terms of the agreement in question. The ruling I have made and the application of the principles must be considered only in the context of the agreement before the court and not as a blanket approval of all Mary Carter type agreements.

Further, it is trite that parties are free to contract and to settle lawsuits; the court will not lightly interfere with such settlements freely entered into by the parties.

Also, it is trite that this court encourages settlements of all issues and when that is not achieved encourages settlement of as many issues as possible.

1. When must such agreements be disclosed?

The answer is obvious. The agreement must be disclosed to the parties and to the court as soon as the agreement is made. The non-contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and evidence to be led by them. The non-contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the

plaintiff and the contracting defendants. In short, procedural fairness requires immediate disclosure. Most importantly, the court must be informed immediately so that it can properly fulfil its role in controlling its process in the interests of fairness and justice to all parties.

The non-contracting defendants argue that the agreement should have been disclosed to the court before the commencement of the trial of the action. I would agree with that proposition if the agreement had in fact been made before the trial commenced. Such was not the case here. The agreement was not made until the morning of the second day of trial and the court was immediately advised. I note that commentary 4 to Rule 10 of the Rules of Professional Conduct contemplates the possibility that such an agreement would be made after the commencement of a trial. The non-contracting defendants further argue that since the agreement was not made and the court advised until after evidence had been given by the plaintiffs' first witness, the non-contracting defendants were prejudiced. I was unable to glean any resulting prejudice to the defendants in this case. The witness in question was called on the issues of liability. All defendants cross- examined the witness. All defendants, at that point, were exposed to the claims of the plaintiffs ranging from zero to 100 per cent liability.

2. Must the complete terms of the agreement including the dollar amounts of the settlement be disclosed to the court and to the parties?

Excepting the dollar amounts, it is rather obvious that all of the terms of the agreement must be disclosed, especially for the purpose of enabling the court to control its own process. I agree with the statements in the Florida case of Insurance Co. of North America v. Sloan, 432 So. 2d 132 (Fla. App. 4 Dist. 1983), to the effect that gratuitous and self-serving language ought not to be part of the disclosure.

The disclosure of the dollar amounts is patently in the discretion of the court. In the case at bar, as above noted, a copy of the full text of the agreement, including the dollar amounts, was sealed and made an exhibit in the trial, so that full disclosure was entirely within the court's control. I declined to be apprised of the dollar amounts, being of the view that they would be of no assistance to me in controlling the process or in deciding the issues. It is not for me to consider whether, in given circumstances, the court ought to learn the dollar amounts. I note that in some jurisdictions in the United States, disclosure of the amounts to the jury is prohibited: see Ratterree v. Bartlett , supra; see also Hatfield v. Continental Homes, 610 A. 2d 446 (Pa. 1992) at p. 452.

3. Does such an agreement amount to an abuse of process?

The agreement here has not been kept secret. Accordingly, the court is able to control its process with full knowledge of all relevant circumstances.

The contracting defendants remain in the lawsuit. They remain for the specific purpose of establishing their claims for contribution and indemnity against their co-defendants. Such claims would have been vigorously pursued even in the absence of the agreement. The agreement did not bring those cross-claims into existence, nor did it prejudice the non-contracting defendants' position in defending the cross-claims. I see no reason why the agreement should prohibit the pursuit of those cross-claims.

The additional feature similar to a Mary Carter agreement is that the contracting defendants' exposure is decreased in direct proportion to the increase in the non-contracting defendant's exposure. This is so to a degree in the case at bar. With such an agreement, it is in the interests of the contracting defendants to pursue the non-contracting defendants on the issues of liability; but this would be so as well in the absence of an agreement. However, it is also in the interests of the contracting defendants, once having made the agreement, to have the plaintiffs' damages assessed as high as possible in the circumstances. The higher the assessment, the greater the return to the contracting defendants. I note what happened at trial in Elbaor v. Smith, supra (at pp. 246-47):

> During the trial, the settling defendants' attorneys, who sat at the table with Dr. Elbaor's attorneys, vigorously assisted Ms. Smith in pointing the finger of culpability at Dr. Elbaor. This created some odd conflicts of interest and some questionable representations of fact. For example, although Ms. Smith's own experts testified that Dr. Syrquin committed malpractice, her attorney stated during voir dire and in her opening statement that Dr. Syrquin's conduct was "heroic" and that Dr. Elbaor's negligence caused Ms. Smith's damages. And during her closing argument, Ms. Smith's attorney urged the jury to find that Dr. Syrquin had not caused Ms. Smith's damages. This is hardly the kind of statement expected from a plaintiff's lawyer regarding a named defendant. ACH and Drs. Syrquin and Stephens had remained defendants of record, but their attorneys asserted during voir dire that Ms. Smith's damages were "devastating", "astoundingly high," and "astronomical." Furthermore, on cross-examination they elicited testimony from Ms. Smith favorable to her and requested recovery for pain and mental anguish. The settling defendants' attorneys also abandoned their pleadings on Ms. Smith's contributory negligence, argued that Ms. Smith should be awarded all of her alleged damages, and urged that Dr. Elbaor was 100 percent liable.

Without some procedural safeguards to prevent the kind of distortions which occurred in Elbaor, there would be a legitimate concern that the agreement resulted in an abuse of process.

Accordingly, I directed, when dismissing the motion for a stay, that the contracting defendants would not be permitted to cross- examine on issues related to the quantum of damages, except with leave of the court.

In these circumstances, is the agreement an abuse of process? I think not. The court has been fully informed, to all necessary extent, of the terms of the agreement and has been able to control the process of the trial accordingly. The moving parties submit that in given circumstances the agreement would usurp the function of the court. I return to the $6 million example above referred to. In that example, if the court awarded $6 million and apportioned the question of liability as above indicated, the plaintiff would be obliged by the agreement to pay $1.5 million to the contracting defendants, leaving a net recovery to the plaintiff of only $4.5 million. This is the effect of the agreement. I see nothing wrong with that. Any plaintiff faces success risks in an action. An actual recovery of only $4.5 million is the trade-off for a guaranteed recovery of $3 million, in the example. I fail to see why a plaintiff cannot achieve a guaranteed minimum result by such an agreement, preserving its ability to continue against the other defendants in an attempt to better that result. Nor can I see why a defendant who wishes to settle is prohibited from so doing unless it gives up its right to proceed against its co-defendants.

The moving parties also submit that the agreement usurps the function of the court in another respect. A given judgment would result in joint and several liability against the non-contracting defendants, whereas the agreement restricts the right of the plaintiff to recover against the non-contracting defendants on the basis of several liability only. In my view, this argument hardly illustrates a prejudice to the non-contracting defendants and is something the parties ought to be free to contract.

The moving parties submit that s. 2 of the Negligence Act, R.S.O. 1990, c. N.1, provides the proper, and only method of proceeding. It provides as follows:

> 2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

In my view, this submission is not valid for the reason that the agreement at bar constitutes only a partial settlement of the plaintiff's claims. Section 2 would be relevant only if the plaintiffs had accepted payment from the defendants Avis and Pettey in full settlement of all of their claims and then had assigned those claims to Avis and Pettey, so that the latter could seek contribution and indemnity from the remaining defendants. In my view, s. 2 of the Negligence Act does not impose an obligation on a plaintiff or defendant to settle claims in the manner contemplated by s. 2. It simply provides one method for so doing.

Champerty and maintenance

The moving parties assert that the agreement constitutes champerty and maintenance in two respects: first, the agreement makes the contracting defendants participants in the plaintiff's recovery; secondly, the indemnity for legal fees and disbursements for the balance of the proceeding is a financing by the contracting defendants of the plaintiffs pursuing their claims against the non-contracting defendants.

On the first point, on the questions of liability, the parties are in no different position following the agreement than they were prior to the agreement. The contracting defendants have sought contribution and indemnity from the non-contracting defendants. The contracting defendants have a legitimate interest in the pursuit of their claims against the non-contracting defendants. That has been the case from the commencement of the proceedings. The agreement does not alter that. If they are successful in their cross-claims, then that success enures to their benefit by potentially reducing the net exposure to the plaintiffs. There was no improper purpose. There was no "officious intermeddling with a law suit which in no way belongs to one, by assisting either party with money or otherwise to prosecute or defend a suit": see Langtry v. Dumoulin (1885), 7 O.R. 644 (Div. Ct.) at p. 661, affirmed (1886), 13 S.C.R. 258; Newswander v. Giegerich (1907), 39 S.C.R. 354, and Wiegand v. Huberman (1979), 108 D.L.R. (3d) 450 (B.C.S.C.).

In Goodman v. R., [1939] S.C.R. 446 at p. 449, [1939] 4 D.L.R. 361 at p. 364, Kerwin J. (as he then was) adopted the definition of maintenance given to it by Lord Avinger in Findon v. Parker (1843), 11 M. & W. 675 at p. 682, 152 E.R. 976 at p. 979:

> The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make.

Such is not the case here.

Champerty is a particular kind of maintenance in which the maintainer stipulates for a portion of the proceeds of the litigation as his reward for the maintenance: Re Trepca Mines Ltd., [1962] 3 All E.R. 351 (C.A.) at p. 359.

Such is not the case here.

In any event, champerty and maintenance are not defences to an action: see Pioneer Machine (Rentals) Ltd. v. El-Jay Inc. (1978), 93 D.L.R. (3d) 726, 8 C.P.C. 168 (Alta. T.D.); Woroniuk v. Woroniuk (1977), 17 O.R. (2d) 460 (Ont. Master), and Murphy v. Keating (1990), 108 N.B.R. (2d) 85, 269 A.P.R. 85 (Q.B.).

In reference to the second point, concerning the indemnity for the ongoing costs of the trial, I view that part of the agreement simply as one of the items of consideration paid by the contracting defendants in order to achieve an upper limit cap on their exposure to the plaintiffs. If such a provision were to be considered void or improper, then there would be a simple way around the problem. The contracting defendants would simply increase the amount of the recovery to be paid to the plaintiffs and include a provision that from that point forward the plaintiff was responsible for its own costs. The parties to the agreement here have not done that but rather have been forthright with the court in disclosing the full and accurate terms of their agreement.

Accordingly, as above noted, I dismissed the motion with the added proviso that the contracting defendants not cross-examine on the quantum of damages without leave of the court.

Order accordingly.