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Quantum of settlement: accounting at trial for settlement moneys

Contributed by **Fraser Milner Casgrain LLP**

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Authors

Norm Emblem

Ara Basmadjian

Introduction

The prohibitive cost of modern litigation has underscored the importance of fostering a concerted effort towards achieving the early settlement of disputes. In cases involving a small number of parties, the negotiation of a settlement agreement is relatively straightforward. However, the changing landscape of litigation involving the rise of multi-party disputes and class action proceedings has led to increasingly complex and contentious settlement arrangements.

In Canada, the lack of scholarly commentary on multi-party settlements has left a lacuna in the legal literature and raises interesting questions in the context of corporate, commercial and personal injury litigation. What are the rights and obligations of the settling and non-settling parties? How does the court reconcile the litigants' competing interests - namely, the privileged nature of communications in furtherance of settlement and the non-settling defendants' right to know the case against it?

This update examines the plaintiffs' duty to account at trial for settlement moneys recovered prior to trial from the settling defendants. It begins with an overview of partial settlement agreements and then surveys the case law and identifies the circumstances in which the duty to account for settlement moneys arises. Finally, it summarises the findings and discusses the implications.

Partial settlement agreements

The issue of whether and when the quantum of settlement must be disclosed to the remaining defendants typically occurs in the context of a partial settlement agreement.

The *Mary Carter*(1) agreement and the *Pierringer*(2) agreement are two common forms of partial settlement arrangement. The agreements originated in the United States and have since been adopted by litigants in multi-party proceedings throughout Canada.

The elements of a *Mary Carter* agreement are as follows:

- *The settling defendant settles with the plaintiff, but remains in the lawsuit and may pursue cross-claims against the non-settling defendant(s).*
- *The settling defendant guarantees the plaintiff a specified monetary recovery.*
- *The exposure of the settling defendant is "capped" at the specified amount.*
- *The settling defendant's liability is decreased in direct proportion to any monetary recovery above the specified amount.*
- *The non-settling defendant is exposed only to several liability and is no longer exposed to joint and several liability.*(3)

The elements of a *Pierringer* agreement are as follows:

- *The settling defendant settles with the plaintiff.*
- *The plaintiff discontinues its claim [against] the settling defendant.*
- *The plaintiff continues its action against the non-settling [defendants], but limits its claim to the non-settling defendant's several liability (a 'bar order').*
- *The settling defendant agrees to cooperate with the plaintiff by making documents and witnesses available for the action against the non-settling defendant.*

- *The settling defendant agrees not to seek contribution and indemnity from the non-settling defendant.*
- *The plaintiff agrees to indemnify the settling defendant against any claims over by the non-settling defendants.*(4)

Disclosure of settlement amounts: case law

In *British Columbia Children's Hospital v Air Products Canada Ltd./Prodair Canada Lte* (5) the plaintiff hospitals commenced proceedings against the corporate defendants for damages based on anti-competitive conduct in the sale of gas products. The plaintiffs entered into a settlement agreement with certain former defendants in the litigation. The action was discontinued against the settling defendants and the parties agreed to keep the settlement communications and the settlement agreement itself confidential. The non-settling defendants sought to compel production of the entire settlement agreement in order to ascertain the amount agreed to be paid by the settling defendants to the plaintiffs.

The British Columbia Court of Appeal reviewed the authorities and cited the decision of Chief Justice McEachern in *Middelkamp v Fraser Valley Real Estate Board*(6) for the proposition that "all settlement documents should have a 'blanket' privilege from production".(7) However, in *Middelkamp* McEachern acknowledged that there must be exceptions to the blanket privilege for settlement communications - for example, the proper disposition of litigation.(8)

Justice Hall, for the majority, held that:

> "*[i]n the present case, [the chambers judge] considered that disclosure of that portion of the settlement agreement relating to the amount of the settlement between the plaintiff and the [settling] defendants need not be produced because relevance had not been demonstrated. With that conclusion, I agree.*" (9)

The majority perceived no relationship between the sums that the plaintiffs were suing the non-settling defendants for and the sums agreed to be paid by the settling defendants to the plaintiffs. In other words, "the plaintiffs are suing the remaining defendants... only for damages arising from their dealings with those defendants".(10) The circumstances of the case simply did not create the risk that the plaintiffs would receive excessive or double recovery.

In a separate dissenting opinion, Justice Huddart adopted a case-by-case analysis of privilege in order to determine whether a settlement agreement, or any particular part thereof, should be disclosed.(11) For Huddart, the majority's "blanket or class privilege for all settlement agreements would swing the balance too much in favour of encouraging settlements".(12)

Dos Santos (Committee of) v Sun Life Assurance Co of Canada(13) involved the appeal of an order requiring the plaintiff to produce documents providing the details of a mediated settlement that the plaintiff entered into on his wife's behalf in another proceeding arising from a motor vehicle accident that rendered the wife seriously injured.

The plaintiff's cause of action against the defendant insurance company emerged under a policy of long-term disability coverage, which contained a subrogation clause. The defendant claimed that it was entitled to view the settlement agreement so that it could be informed of the amount that was paid with respect to lost income. The plaintiff argued that the terms of the mediated settlement were privileged in light of the decision in *Middelkamp*.

The British Columbia Court of Appeal determined that the settlement agreement had to be disclosed to the defendants in order to establish what compensation the plaintiff received. The main issue before the court was whether the facts provided an exception to the blanket privilege for settlement communications as recognised by *Middelkamp*.

According to Chief Justice Finch:

> "*To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both* relevant*, and* necessary in the circumstances of the case *to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice.*"(14)

Indeed, both the relevance and necessity of the mediated settlement at issue were sufficient to recognise an exception to settlement privilege:

- The settlement in the third-party proceeding was clearly relevant because the plaintiff contested the subrogation rights of the defendant under the insurance policy. Any

information about the quantification of the wife's future income loss was connected to the resolution of the current dispute.(15)

- The documents were necessary in the circumstances of the case as there was a relationship between the amount that the plaintiff claimed against the defendant and the amount that the plaintiff may have already acquired in settlement with the third-party's insurer.(16)

There is a lack of jurisprudence in Ontario as to whether the quantum of the settlement must be disclosed to the non-settling defendants before the verdict. In *Noonan v Alpha-Vico*(17) an eight-year-old boy was killed when a folding cafeteria table fell on him at school. The plaintiff family initiated proceedings against nine alleged tortfeasors, including the school board and the manufacturer of the table.

The plaintiffs entered into a *Pierringer*-type settlement agreement with three of the defendants. As a result, the proceedings against the settling defendants were discontinued. The non-settling defendants brought a motion to compel disclosure of the settlement agreement and the sum received by the plaintiffs.

In a carefully reasoned decision, Master MacLeod held that the minutes of settlement, which contained the amount to be paid to the plaintiffs, had to be disclosed to the non-settling defendants immediately. According to the master:

> "*The question of disclosure may be dealt with on the basis of first principles. Disclosure and withholding of information in civil proceedings is based on two competing principles of relevance and privilege. Under the first principle, all relevant evidence and information must be disclosed. Under the second principle, relevant information that is subject to a recognized claim of privilege may be withheld.*"(18)

There were several reasons why partial settlement amounts were relevant to the ongoing dispute. The non-settling defendants had a right to know what losses and damages the plaintiffs were claiming and what amounts had already been recovered.(19) Such knowledge works to prevent double recovery. Amounts received in partial settlement were also relevant in order to update the non-settling defendants' litigation strategy moving forward.(20) Finally, the proper operation of the adversarial system depended on the parties' knowledge of who was adverse in interest and whether the settling defendants retained a financial interest in the verdict.(21)

On the issue of privilege, MacLeod determined that the settling parties' notes, proposals, conference briefs and preliminary discussions were squarely covered by settlement privilege. However, privilege did not extend to the executed settlement agreement itself, which was a contract that was relevant to the remaining proceeding.(22) MacLeod did not rule out the possibility that in other situations there could be aspects of a settlement agreement that were discoverable and others that were properly privileged.(23)

In *Sable Offshore Energy Inc v Ameron International Corp*(24) the plaintiff, an owner of gas processing facilities, commenced an action asserting several causes of action against multiple defendants for damages related to the paint system used for corrosion protection on its structures.

The plaintiff entered into three *Pierringer*-style settlement agreements, which left the non-settling defendants, Ameron and Amercoat Canada, responsible only for their proportionate share of the loss they actually caused. Although the terms of the *Pierringer* agreement were disclosed to the two non-settling defendants, the amount of money paid by the settling defendants was withheld.

The chambers judge concluded that the settlement amounts were relevant, but refused to order disclosure prior to trial. Accordingly, the issue before the Nova Scotia Court of Appeal was the proper timing of the disclosure: before or after trial.(25)

Justice Farrar, for the court, held as follows: "The very narrow scope of this decision is whether the possibility that the settlement amounts may affect the amounts otherwise payable by Ameron is enough to order their disclosure. In my view it is."(26)

Indeed, both parties acknowledged that the settlement amount was relevant, and that it might reduce the sum payable to the plaintiff by the non-settling defendants.(27)

As a matter of fairness, the non-settling defendants are entitled to know the case against them. Farrar confirmed that "[k]nowing the potential value of the claim is necessary and forms an important part of pre-trial preparation, settlement positions and trial preparation".(28) Moreover, "[i]t seems axiomatic that if the settlement amounts are to be disclosed after trial to prevent double recovery, they must be relevant to the amount of the claim and, hence, the case to be met."(29) Therefore, on the facts, the settlement amounts ought to be disclosed prior to trial.

On June 28 2012 the Supreme Court of Canada granted leave to appeal from the judgment of the Nova Scotia Court of Appeal. *Sable* will provide the Supreme Court with

an opportunity to address whether and when a plaintiff who has settled with certain defendants in a multi-party proceeding is required to disclose the settlement amounts to the non-settling defendants.

Recently, in *Moore v Bertuzzi*(30) the Ontario Superior Court of Justice was asked to determine whether the defendant Todd Bertuzzi and the defendant Orca Bay had to disclose their settlement arrangement to the plaintiff Steve Moore. The underlying litigation is concerned with violence in the National Hockey League (NHL). The infamous event occurred in 2004 during a game between the Vancouver Canucks and the Colorado Avalanche. Late in the third period, Bertuzzi struck Moore in the back of the head and drove him face-first onto the ice. Moore suffered career-ending injuries, including a broken neck and concussion. Bertuzzi received a multi-game suspension from the NHL.

Moore and his family commenced a civil action against Bertuzzi and Orca Bay, the owners of the Vancouver Canucks. Bertuzzi and Orca Bay both filed statements of defence that included cross-claims against each other for contribution and indemnity. The defendants eventually entered into a proportional sharing agreement in which they settled issues of liability as between themselves. When Moore sought to compel disclosure of the settlement agreement, Bertuzzi and Orca Bay claimed that the agreement was strictly confidential and protected by settlement privilege.

Justice Perell held that the complete details of the defendants' settlement agreement had to be disclosed to the plaintiff. The court's analysis began with a general assumption that the settlement was a privileged communication. However, the case law has recognised exceptions to settlement privilege.

Perell cited *Noonan* and *Pettey v Avis Car Inc*(31) for the notion that:

> "*a settlement agreement needs to be disclosed because of its impact on the strategy of the party not involved in the settlement and so that the court can properly fulfill its role in controlling its process in the interests of fairness and justice to all parties.*"(32)

Perell was concerned primarily with the integrity of the adversarial system: "Under a *Mary Carter* agreement or a *Pierringer* agreement, the plaintiff and a defendant, apparently opponents, are in truth no longer opponents and disclosure of the agreement brings that situation to the attention of the court."(33)

Although not necessary to the disposition of the case, Perell considered settlement privilege to be a class privilege rather than a case-by-case privilege that is available in accordance with the Wigmore criteria.(34) Indeed, the decision in *Moore* is an indication that the courts will recognise an exception to settlement privilege and promptly order disclosure to the non-settling parties where the settlement agreement effectively changes the adversarial orientation of the litigation.(35)

Comment

Although communications leading up to a settlement are privileged, the case law indicates that privilege does not always extend to the executed agreement itself. The plaintiff must be prepared to disclose a partial settlement agreement, including the quantum of settlement, where the agreement is relevant and necessary to the proper resolution of the dispute between the remaining parties. In ordering production, the courts have also considered the practical effect of the partial settlement agreement and its reverberations on the integrity of the adversarial system.

If, for example, the partial settlement agreement serves to alter the landscape of the litigation or reduces the amount payable to the plaintiff by the non-settling defendants, a master or motions judge will likely compel disclosure to the remaining defendants. However, in light of the Supreme Court's decision to grant leave to appeal from the judgment in *Sable*, the timing of disclosure remains uncertain.

For further information on this topic please contact Norm Emblem or Ara Basmadjian at Fraser Milner Casgrain LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (norm.emblem@fmc-law.com or ara.basmadjian@fmc-law.com).

Endnotes

(1) *Booth v Mary Carter Paint Co*, 202 So (2d) 8 (1967).

(2) *Pierringer v Hoger*, 124 NW (2d) 106 (1963).

(3) *Moore v Bertuzzi*, 2012 ONSC 3248, 110 OR (3d) 611, 2012 CarswellOnt 6962 at para 67.

(4) *Ibid* at para 84.

(5) *British Columbia Children's Hospital v Air Products Canada Ltd./Prodair Canada Lte*, 2003 BCCA 177, 224 DLR (4th) 23, 2003 CarswellBC 614, leave to appeal to SCC

granted, (2004), 208 BCAC 159, 2004 CarswellBC 121.

(6) *Middelkamp v Fraser Valley Real Estate Board* (1992), 71 BCLR (2d) 276, 96 DLR (4th) 227, 1992 CarswellBC 267.

(7) *Air Products*, *supra* note 5 at para 32.

(8) *Middelkamp*, *supra* note 6 at para 19.

(9) *Air Products*, *supra* note 5 at para 34.

(10) *Ibid* at para 31.

(11) *Ibid* at para 83.

(12) *Ibid* at para 84.

(13) *Dos Santos (Committee of) v Sun Life Assurance Co of Canada*, 2005 BCCA 4, 249 DLR (4th) 416, 2005 CarswellBC 5.

(14) *Ibid* at para 20 (emphasis in original).

(15) *Ibid* at para 25.

(16) *Ibid* at para 33.

(17) *Noonan v Alpha-Vico*, 2010 ONSC 2720, 99 CPC (6th) 287, 2010 CarswellOnt 4813.

(18) *Ibid* at para 45.

(19) *Ibid* at para 46.

(20) *Ibid* at para 51.

(21) *Ibid* at para 52.

(22) *Ibid* at para 55.

(23) *Ibid* at para 56.

(24) *Sable Offshore Energy Inc v Ameron International Corp*, 2011 NSCA 121, 310 NSR (2d) 382, 2011 CarswellNS 893, leave to appeal to SCC granted, 2012 Carswell NS 457.

(25) *Ibid* at para 24.

(26) *Ibid* at para 27.

(27) *Ibid* at para 28.

(28) *Ibid* at para 30.

(29) *Ibid* at para 50.

(30) *Moore*, *supra* note 3.

(31) *Pettey v Avis Car Inc.* (1993), 13 OR (3d) 725, 103 DLR (4th) 298, 1993 CarswellOnt 425.

(32) *Moore*, *supra* note 3 at para 90.

(33) *Ibid*.

(34) *Ibid* at para 117. The Wigmore test was adopted by the Supreme Court of Canada in *Slavutych v Baker* ([1976] 1 SCR 254, 55 DLR (3d) 224, 1975 CarswellAlta 39 at para 15) in order to determine whether privilege should apply on a case-by-case basis. The elements of the test are as follows:

- The communications must originate in a confidence that they will not be disclosed.
- This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- The relation must be one which in the opinion of the community ought to be sedulously fostered.
- The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

(35) *Ibid* at para 101.

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