PIERRINGER SETTLEMENT AGREEMENTS—PROCEEDING WITH EYES WIDE OPEN

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Pierringer Agreements are a form of proportionate share settlement agreements. Under Pierringer Agreements plaintiffs settle with some defendants and continue the litigation against the non-settling defendants. The agreement severs joint liability between settling and non-settling defendants. Non-settling defendants are only liable for their proportionate share of the plaintiffs' loss. Under- or over-settlements may be inevitable. Under the current Canadian approach, plaintiffs bear the risk of under-settlement but the benefit of over-settlement accrues to non-settling defendants. This is unfair because non-settling defendants bear no risk for under-settlement. The potential under-compensation that is a detriment to plaintiffs justifies retaining excess settlements similar to the private insurance exception to the compensation principle. This avoids incentivizing non-settling defendants and furthers the public interest in promoting settlements.

Une entente de type Pierringer est un genre de convention de règlement proportionnalisé par laquelle le plaignant règle avec certains défendeurs mais non avec d'autres, ce qui casse la solidarité entre défendeurs et met fin à la responsabilité conjointe entre ceux qui règlent et ceux qui ne règlent pas. Les défendeurs non partis aux règlements signataires de l'entente ne sont responsables que de la proportion des dommages qui leur incombe. Or, il est presque inévitable qu'il y ait soit sous-indemnisation, soit surindemnisation. Selon la formule actuellement appliquée au Canada, c'est le plaignant qui risque la sous-indemnisation, alors qu'en cas de surindemnisation, ce sont les défendeurs non partis aux règlements qui sont avantagés – une situation injuste puisque ceux-ci ne risquent rien en cas de sous-indemnisation. Le préjudice que représente une sous-indemnisation pour le plaignant justifie donc que celui-ci conserve tout montant de règlement excessif, comparablement à ce qu'on observe en application de l'exception au principe d'indemnisation en assurance privée. On supprimerait ainsi l'incitatif pour les défendeurs à refuser l'entente et contribuerait à la promotion des règlements, ce qui est dans l'intérêt du public.

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1. Introduction

Concerns about delays and the financial and non-financial costs associated with the litigation process are well known.[1] Encouraging parties to settle their disputes in a timely manner and minimizing the personal and public costs is one solution to the problems plaguing the civil justice system.[2] In *Sable Offshore*, Justice Abella acknowledged the public interest in promoting settlements as a "sound judicial policy" that also "contributes to the effective administration of justice."[3] Settlements give parties agency

[1] See Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: November 2013), online (pdf): <www.cba.org>; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: October 2013), online (pdf): <www.cfcj-fcjc.org >.

[2] See *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at para 11 [*Sable Offshore Energy*]; *Amoco Canada Petroleum Co v Propak Systems Ltd*, 2001 ABCA 110 at paras 27–28, leave to appeal to SCC refused, 28708 (25 April 2002) [*Amoco Canada Petroleum*].

[3] See *Sable Offshore Energy*, *supra* note 2 at para 11. See also *Loewen, Ondaatje, McCutcheon & Co c Sparling*, [1992] 3 SCR 235 at 259, citing with approval: *Sparling v Southam Inc* (1988), 66 OR (2d) 225, 1988 CarswellOnt 121 (WL Can) at para 17 (Ont HC). See also *Amoco Canada Petroleum*, *supra* note 2 at paras 27–28; *Hryniak v Mauldin*, 2014 SCC 7 at paras 23–28; Ontario Law Reform Commission, *Report on Contribution among Wrongdoers and Contributory Negligence* (Toronto: Ministry of the Attorney General, 1988) at 97.

by allowing them to resolve disputes on their own terms and avoid uncertainties inherent in the litigation process.[4] Additionally, settlements may be important in preserving relationships between the parties, especially in the commercial context, while also shielding parties from negative publicity. Further, a settlement culture can promote behavioural modification by changing how parties approach their disputes with a greater interest in settlements and avoiding unnecessary litigation.

Notwithstanding the benefits of settlements, not all parties may be willing to settle. This may be particularly problematic in multi-party disputes, where multiple defendants are allegedly jointly and severally liable for the plaintiff's loss. In Canada, parties involved in multi-party disputes are increasingly using proportionate share agreements. Under these agreements, plaintiffs settle with some but not all defendants. This guarantees plaintiffs a minimum amount of recovery, reduces the number of parties and/or issues that proceed to trial, and decreases litigation costs. As Justice Ferrier notes in *Pettey v Avis Car Inc*, "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."[5] Notably, proportionate share agreements also sever joint and several liability of settling and non-settling defendants. Settling parties may make concessions towards settlements in exchange for certainty of outcome. Settlements may be based on incomplete evidence. Parties run the risk of over- or under-settlement. Meanwhile, settlement agreements are generally considered final to give the settling parties closure.

There are two main types of proportionate share settlement agreements currently in use in Canada to resolve a variety of claims: (1) Mary Carter Agreements and (2) Pierringer Agreements. Both types of agreements originated from the United States.[6] This paper focuses on Pierringer Agreements but will briefly outline the characteristics of Mary Carter Agreements.

Under Pierringer Agreements (also known as *BC Ferries* settlements),[7] a plaintiff settles their claim against some defendants in a multi-party dispute and discontinues the claim against the settling defendants. The plaintiff continues the action against the remaining defendants for their proportionate share of liability for the plaintiff's loss. The possibility

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4 See *Sable Offshore Energy*, *supra* note 2 at para 11.

5 *Pettey v Avis Car Inc*, 13 OR (3d) 725, 1993 CarswellOnt 425 (WL Can) at para 31 (Ct J (Gen Div)) [*Pettey*].

6 See *Booth v Mary Carter Paint Company*, 202 So 2d 8 (Fla Dist Ct App, 1967) [*Mary Carter*]; *Pierringer v Hoger*, 21 Wis 2d 182 (Wis Sup Ct, 1963) [*Pierringer*].

7 *British Columbia Ferry Corporation v T & N Plc*, 16 BCLR (3d) 115, 1995 CanLII 1810 (CA).

of over- or under-compensation may be inevitable under Pierringer Agreements. The question that arises is: as between the plaintiff and non-settling defendant, who should retain excess settlements? Under the current Canadian approach, the non-settling defendant receives credit of over-settlement amounts without the risk of being liable to the plaintiff beyond their several liability because the settling and non-settling defendants are no longer jointly and severally liable for the plaintiff's loss. This is allegedly to avoid plaintiffs obtaining a windfall by recovering more damages than their actual loss resulting from the wrong in question. This approach rewards non-settling defendants who force plaintiffs to trial while they are shielded from joint liability for the plaintiff's loss. Notwithstanding the benefits of proportionate share agreements for plaintiffs, it is unfair for them to bear the risk of under-compensation without also having the benefit of retaining over-settlement amounts. There is a further risk of unfairness to plaintiffs where they recover less at trial than the settlement amount and end up having to pay costs to the non-settling defendant.

The law recognizes exceptions to the compensation principle where it is appropriate in the interests of justice and fairness. This paper argues that as a matter of fairness and justice, plaintiffs rather than non-settling defendants should retain over-settlement amounts under Pierringer Agreements. The risk of under-settlement that plaintiffs assume under Pierringer Agreements should be considered analogous to "payment" for benefits to justify application of the private insurance exception to the rule against double recovery. Such a regime avoids rewarding non-settling defendants, encourages responsible behaviour by promoting settlements, and is consistent with the public interest in encouraging settlements.

The paper begins with an overview of the nature of proportionate share agreements and the current Canadian position of giving the non-settling defendant credit for over-settlement amounts. In Part 2, the paper discusses exceptions to the compensation principle that underlies the Canadian approach. In Part 3, the paper argues for a reconsideration of the applicability of the compensation principle to over-settlement amounts under Pierringer Agreements. In Part 4, the paper discusses the evolving Canadian jurisprudence on Pierringer Agreements by which plaintiffs retain over-settlement amounts in certain circumstances. The final Part of the paper reflects on the mechanisms to address dissatisfaction with the current scheme discussed in Part 4 and their effectiveness to remedy unfairness to plaintiffs under Pierringer Agreements.

2. The Nature of Proportionate Share Settlement Agreements

Proportionate share settlement agreements provide an effective mechanism to manage multi-party disputes where an agreement with all parties, and/or on all issues, is not feasible or desirable. Under these agreements, plaintiffs settle with one or more defendants and release those defendants from further liability without releasing the non-settling defendants from liability. They limit the settling defendants' exposure to liability while insulating them against indemnity and contribution claims by the non-settling defendants. Proportionate share settlement agreements, *inter alia*, facilitate settlements between plaintiffs and willing defendants. They also promote judicial efficiency, especially in complex litigations involving multiple parties and/or issues. In *Amoco Canada Petroleum,* the Court of Appeal of Alberta described the goals of proportionate settlement agreements:

> they aim to manage proactively the risk associated with litigation. In short, contracting litigants prefer the certainty of settlement to the uncertainty and expense of a trial and the possibility of an undesirable outcome.[8]

There are a number of advantages for parties to a multi-party action to enter into proportionate settlement agreements. They reduce the number of parties and counsel involved and narrow the issues that proceed to trial in complex litigations. Further, proportionate share agreements avoid costly and lengthy litigation and uncertainties inherent in litigation. The settling parties purchase peace for a pre-determined amount, which is fixed for the defendant. Proportionate share agreements guarantee plaintiffs a minimum recovery for their loss, in a timely manner, regardless of the outcome of the trial, and with a potential to increase their recovery in the claim against the non-settling defendants.[9] Plaintiffs may end up with a windfall where their entire claim fails at trial, but they could lose gains from settlement with a potential costs award in favour of the non-settling defendant.[10] Plaintiffs are also shielded from potential claims of

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8 *Amoco Canada Petroleum Co*, *supra* note 2 at para 13. See also *Osman v Cadbury Adams Canada Inc*, 2010 ONSC 2643, aff'd 2010 ONCA 841, leave to appeal to SCC refused, 34086 (07 July 2011).

9 See *Laudon v Roberts*, 2009 ONCA 383 at para 36, leave to appeal to SCC refused, 33264 (05 November 2009) [*Laudon*]. (This may be particularly important in personal and fatal injury cases where a significant amount of damages can go to fees and disbursements and, in some cases leaving plaintiffs with substantially less net recovery, including for future care costs. This could compromise catastrophically injured plaintiffs' ability to meet their future care needs).

10 This risk may be a reason for a plaintiff who has settled with some defendants to carefully consider their chances of success at trial before proceeding to trial against the

contributory fault that a settling defendant could have advanced against them. Settling defendants become allies and assist plaintiffs to advance the fault of non-settling defendants with the goal of exposing defendants to significant risk at trial. The agreements reduce the number of defendants that plaintiffs have to face at trial and shift the burden of proof to non-settling defendants to establish the fault of settling defendants. The agreements may also protect the plaintiff's damages award from significant erosion caused by delays and increased costs. Knowledge of the agreement could pressure non-settling defendants to settle based on narrower issues and with fewer parties. These defendants would obtain additional benefits of avoiding joint liability with the co-defendants while also limiting their exposure to liability.[11]

Notwithstanding these advantages, there is also a risk of the plaintiff being under-compensated for their loss. Proportionate share agreements sever joint and several liability between settling and non-settling defendants. A plaintiff will be under-compensated where the liability of the settling defendant as determined at trial is greater than what was assumed in determining the settlement amount. These risks justify the plaintiff retaining excess settlement amounts. It is unfair to give the non-settling defendant credit for that amount where that party bears no risk beyond their several liability for the plaintiff's loss. Proportionate share settlements often occur before all the evidence relating to liability becomes known; there is a real possibility of over- or under-settlement. Non-settling defendants receive credit for surplus settlement amounts to prevent over-compensating the plaintiff for the loss caused by the fault of the co-defendants. The possibility of getting credit for surplus settlement amounts where settling defendants enter into a Pierringer Agreement creates a perverse incentive for defendants to be the last holdouts and discourages settlement. Further, there is a possibility of the non-settling defendants being entitled to their costs against the plaintiff.[12] Yet, the non-settling defendant cannot be liable to the plaintiff beyond their several liability, making it unfair for the plaintiff who bears the risk of under-settlement.

A) Mary Carter Settlement Agreements

Under a Mary Carter Agreement ("MCA"), the settling defendant undertakes to pay a specified amount with the potential for that amount

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non-settling defendants. The security of recovery from a proportionate settlement agreement may be worth foregoing further action against seemingly uncooperative defendants.

11 See *Laudon*, *supra* note 9 at para 36.

12 See e.g. *Laudon*, *supra* note 9 (Further discussion *below*).

to decrease proportionate to the several liability of that defendant as determined at trial. The settlement amount represents the settling defendant's maximum exposure to liability for the plaintiff's loss, which may be reduced proportionate to their liability for the plaintiff's loss as determined at trial. This entitles the settling defendant to recover any over-settlement amount from the plaintiff.[13] The plaintiff agrees not to seek recovery from the non-settling defendants for any amount beyond the several liability for the loss apportioned to the non-settling defendant at trial. This avoids the possibility of a contribution and indemnity claim by the settling defendant against the plaintiff.

The settling defendants remain part of the plaintiff's action against the non-settling defendants, albeit in a limited role. The settling defendant's relationship with the plaintiff changes from being adversarial to an alliance. The possibility of the settling defendant reducing their liability for the plaintiff's loss in direct proportion to the non-settling defendant's liability creates an incentive for that party to shift liability for the plaintiff's loss to the non-settling defendant, and to assist the plaintiff in arguing for a higher proportion of the liability for the plaintiff's loss to be attributed to the fault of the non-settling defendants.[14]

Traditionally, MCAs were meant to be kept secret from the non-settling defendant.[15] The secretive nature of these agreements has been deemed unacceptable and an abuse of process in Canada and the United States where the agreement must now be immediately disclosed to the non-settling party. To minimize prejudice to non-settling defendants, the settling parties under both Mary Carter and Pierringer Agreements have an obligation to immediately disclose the existence and terms of the agreement to the court and the non-settling parties, save for the settlement amount that is not disclosed until after the trial and the assessment of the plaintiff's total damages.[16]

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13 See *ibid* at para 36; *Moore v Bertuzzi*, 2012 ONSC 3248 at para 67 [*Moore*].

14 See *Nadeau Poultry Farm Limited v Desjardins & Desjardins Consultants Inc*, 2014 NBQB 81 at paras 42–43 [*Nadeau Poultry Farm*].

15 See *Mary Carter*, *supra* note 6; *Pettey*, *supra* note 5 at para 17.

16 See *Sable Offshore Energy*, *supra* note 2 at para 24; *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc (IMV Projects Ins)*, 2018 ABCA 305, leave to appeal to SCC refused, 38396 (23 May 2019) [*Canadian Natural Resources Ltd*]; *Laudon*, *supra* note 9 at para 39; *Aecon Buildings v Stephenson Engineering Limited*, 2010 ONCA 898 at paras 13–16, leave to appeal to SCC refused, 34112 (30 June 2011); *Aecon Buildings v Stephenson Engineering Limited*, 2011 SCC 33 motion to adduce fresh evidence denied; *Nadeau Poultry Farm*, *supra* note 14 at paras 31–32; *Amoco Canada Petroleum*, *supra* note 2 at para 40; *Pettey*, *supra* note 5 at paras 32, 34; *Moore*, *supra* note 13. See also The Law Society of British Columbia, *Code of Professional Conduct for British Columbia,* Rule 5.1-2*;*

B) Pierringer Proportionate Share Settlement Agreements

In *Sable Offshore Energy*, Justice Abella described a Pierringer Agreement as allowing "one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other."[17] Unlike a Mary Carter Agreement by which the settlement amount is capped, under a Pierringer Agreement, the settlement amount is fixed and there is no incentive for the settling defendant to participate in the action against the non-settling defendants. The plaintiff releases the settling defendant from the action and further liability. The plaintiff continues the action against the non-settling defendant for their several liability for the plaintiff's loss.[18] Settling defendants agree to co-operate with the plaintiff by making documents and witnesses available for the plaintiff's action against the non-settling defendants, but cannot be held liable for any fault found beyond the settlement amount.[19]

A central feature of Pierringer Agreements is that they contractually depart from the principle of joint liability of multiple wrongdoers responsible for the same loss or damage.[20] The agreements sever joint liability among settling and non-settling defendants and limit the plaintiff's claim against the non-settling defendants' to their several liability, rather than joint and several liability.[21] As Justice Cronk notes in *M (J) v Bradley*, Pierringer Agreements "effectively represent a contractual 'opting-out'" by non-settling defendants of the joint liability that would otherwise have existed between all persons liable for the plaintiff's loss under apportionment legislation.[22] Pierringer Agreements limit the

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Law Society of Alberta, *Code of Conduct*, Rule 5.1-2, online (pdf): <documents.lawsociety.ab.ca>; The Law Society of Manitoba, *Code of Professional Conduct*, Rule 5.1-2, online (pdf): <lawsociety.mb.ca>; The Law Society of Ontario, *Rules of Professional Conduct*, Rule 5.1-2, online: <lso.ca>. A similar disclosure duty is now recognized by the majority of states in the United States where Mary Carter agreements continue to be recognized. See *Pettey*, *supra* note 5 at paras 18–19.

17 *Sable Offshore Energy*, *supra* note 2 at para 6.

18 See *ibid* at para 26.

19 See *ibid* at paras 7, 24.

20 The liability of multiple tortfeasors liable for the same damage (indivisible damage) is joint and several. See *Negligence Act*, RSBC 1996, c 333, s 4; *Contributory Negligence Act*, RSA 2000, c C-27, s 2; *The Tortfeasors and Contributory Negligence Act*, CCSM, c T90, s 5; *Negligence Act*, RSO 1990, c N.1, s 1.

21 Where there is more than one non-settling defendant, those defendants remain jointly liable for the proportionate share of liability attributable to the combined fault or blameworthiness apportioned to those defendants at trial.

22 *M (J) v Bradley*, (2004) 71 OR (3d) 171, 2004 CanLII 8541 at para 32 (CA).

plaintiff's right to make further claims against settling defendants or others irrespective of fault attributable to settling defendants at trial. To ensure the protection of settling defendants, the agreements include a covenant by the plaintiff to indemnify the settling defendant for any claims over against that party by the non-settling defendant pursuant to the principle of joint and several liability of joint wrongdoers.[23] Alternatively, the plaintiff covenants to limit the claim against the non-settling defendants to their several liability for the plaintiff's loss and cannot include damages attributable to the settling defendant's fault. Severing joint liability between settling and non-settling defendants avoids the need for non-settling defendants to seek contribution from settling defendants.[24] As the Court of Appeal of Alberta notes in *Bedard (Next Friend of) v Amin*,[25] a defining feature of *Pierringer* Agreements is that "the non-settling defendants would never be liable to pay more than their proportion of liability would warrant." This insulates settling defendants from further liability in the event of under-settlement relative to the extent of that defendant's liability as determined at trial. It also obviates the need for settling defendants to remain in the litigation. As Justice Perell states in *Moore v Bertuzzi*:[26]

> The practical effect of the [Pierringer] agreement is that there is little reason for the settling defendant to participate … he or she has settled with the plaintiff and obtained a release and since the plaintiff agrees to sue the non-settling defendant only for its several liability, the settling defendant need not fear for a claim for contribution and indemnity and if the non-settling defendant makes a claim for relief over, then the settling defendant is protected by the plaintiff's undertaking to indemnify.[27]

Having secured a minimum amount of recovery pursuant to a Pierringer Agreement, depending on the settlement amount relative to the plaintiff's overall claim, it may not be worth it for the plaintiff to continue the claim against the non-settling defendant and risk the uncertainties of litigation.

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[23] See *Sable Offshore Energy*, *supra* note 2 at para 23 (The agreement may also include a reservation of the plaintiff's right to sue the settling defendant and or third parties for losses in relation to matters that they are unaware of or have no reason to suspect at the time of settlement. This preserves the plaintiff's rights in relation to future claims or aspects of the current claim that had not yet come to light at the time of settlement. But, it does not allow parties to re-open an agreement because the attribution of liability at trial was different than the apportionment of fault assumed for the settlement). See Brian Samuels, "Mary Carter and Pierringer Agreements: Characteristics, Differences and Pitfalls" (2014) J Can College Construction Lawyers 43 at 58.

[24] See *Sable Offshore Energy*, *supra* note 2 at paras 6, 23–26; *Endean v St Joseph's General Hospital*, 2019 ONCA 181 at paras 52–53; *Conarroe v Tallack*, 2020 BCSC 626.

[25] *Bedard (Next Friend of) v Amin*, 2010 ABCA 3 at para 4 [*Bedard*].

[26] *Moore*, *supra* note 13.

[27] *Ibid* at para 85.

This would not only provide the plaintiff a timely resolution of their claim but also save costs for the parties and the judicial system.

Under a Pierringer Agreement, where the settlement amount exceeds damages for the plaintiff's loss apportioned to the settling defendants at trial, Canadian courts will reduce the damages recoverable from the non-settling defendant by the amount of over-payment.[28] In *Laudon v Roberts*,[29] the plaintiff was injured in a boating accident while he was a passenger in a boat operated by the defendant Sullivan and was hit by another boat operated by the defendant Roberts. The plaintiff sued the operators of the two boats involved in the accident. One operator, Roberts, settled with the plaintiff under what the parties characterized as a Mary Carter Agreement, although the terms of that agreement did not include an opportunity for Roberts to recover part of the settlement amount in the event of over-settlement for Roberts' several liability.[30] Roberts paid the plaintiff a settlement of $365,000. At trial, a jury assessed the plaintiff's total damages at $312,021. The jury apportioned liability for the plaintiff's loss at fifty percent against Roberts (settling defendant) and thirty-nine percent against Sullivan (non-settling defendant). The jury found the plaintiff eleven percent contributorily negligent for his loss. The trial judge refused to deduct the amount paid to the plaintiff under the Mary Carter Agreement and awarded judgement against Sullivan for the amount equaling thirty-nine percent of $312,021. Sullivan appealed, arguing that having received $365,000 from Roberts, the plaintiff was also compensated for the non-settling defendant's loss. Additionally, Sullivan argued that since the plaintiff did not recover more at trial than the settlement amount, costs should be awarded against the plaintiff.

The Court of Appeal for Ontario, per Justice MacFarland, set aside the trial decision, holding that the settlement amount should be deducted from the amount owing from the non-settling defendant to avoid over-

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[28] See *Bedard*, *supra* note 25. See also *Canadian Natural Resources Ltd*, *supra* note 16; *Laudon*, *supra* note 9; *Henry v British Columbia*, 2016 BCSC 2082 at paras 35, 38–39 [*Henry,* Supplementary Decision], aff'd 2017 BCCA 420 at paras 29–39, 73, leave to appeal to SCC refused, 37940 (25 October 2018); *Ashcroft v Dhaliwal*, 2008 BCCA 352 [*Ashcroft*], leave to appeal to SCC refused, 32889 (19 February 2009). This is in contrast to a Mary Carter Agreement where the settling defendant is entitled to recover the over-compensation and ends up paying less than settlement amount, which only constituted their maximum exposure to liability.

[29] *Laudon*, *supra* note 9.

[30] Justice MacFarland notes that a usual Mary Carter agreement would have included a term permitting the settling defendant to recover part of the settlement amount beyond their proportionate liability as determined at trial. See *Laudon*, *supra* note 9 at para 36. This makes the settlement agreement akin to a Pierringer agreement rather than a traditional Mary Carter agreement.

compensating the plaintiff for the same loss. Since the settlement amount exceeded the plaintiff's total damages assessed by the jury, the plaintiff was not entitled to recover any amount from the non-settling defendant. Thus, notwithstanding that the non-settling defendant was found partly liable for the plaintiff's injuries, he ended up paying no damages. The Court reasoned that this outcome avoids over-compensating the plaintiff and is consistent with the compensation principle. Justice MacFarland stated:

> the settlement monies received are on account of the same damage for which the plaintiff continued his proceeding against Sullivan, the non-contracting defendant … to permit the plaintiff to recover any amount from Sullivan would result in double-recovery to the plaintiff. I am satisfied that the law in this country is well-settled. Double recovery, save in a few narrow exceptions which have no application to the facts here, is not permitted.[31]

Justice MacFarland notes that a usual Mary Carter Agreement would have included a term permitting the settling defendant to recover part of the settlement amount beyond their proportionate liability as determined at trial.[32] This makes the substance of the settlement agreement akin to a Pierringer Agreement rather than a traditional Mary Carter Agreement.[33]

The unfairness to the plaintiff in *Laudon* was magnified with the Court of Appeal also awarding the non-settling defendant his costs of both the trial and appeal against the plaintiff. The non-settling defendant's costs were assessed at $763,000, an amount that vastly exceeded the settlement amount of $365,000. Consequently, the plaintiff ended up being out of pocket by a significant amount after paying the non-settling defendant's costs.[34] The outcome in *Laudon* rewarded the non-settling defendant, a co-tortfeasor, while punishing the settling defendant for paying more than his proportionate share of the plaintiff's loss. This may be rationalized as the cost of the settling defendant purchasing their peace by limiting their exposure to further liability for the plaintiff's loss and saving litigation costs. Meanwhile, the plaintiff was punished for settling with one defendant because they ended up with a net loss after paying for the

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31 *Laudon*, *supra* note 9 at para 55.

32 See *ibid* at para 36.

33 See *ibid* at footnote 1 (where Justice MacFarland notes that the agreement is technically not a Mary Carter agreement because there was no provision entitling the settling defendant to recover part of the settlement amount if the plaintiff recovers more damages at trial than he received under the settlement. Yet, the agreement required the settling defendant to participate in the plaintiff's action against the non-settling defendant). See also L Craig Brown, "Mary Carter—Friend or Foe", online (pdf): <www.thomsonrogers.com>.

34 See Michael Kennedy, "Mary Carter Agreements", online: <mccagueborlack.com>.

non-settling defendant's costs. This was in addition to the plaintiff's own costs after what was described as an "exceedingly long" and "exceedingly bitter" trial with over 56 days spent on various motions and the trial.[35] There is no justification for the plaintiff's situation other than a theoretical adherence to the compensation principle to avoid double compensation that left the plaintiff uncompensated for his loss. Meanwhile, this outcome rewarded the non-settling defendant who ended up paying nothing for his wrongdoing and yet received his costs from the plaintiff. This outcome incentivizes defendants to refuse to settle, and is contrary to the public interest in promoting settlements.

Further, under Pierringer Agreements, where the settling defendant is found not liable for the plaintiff's losses at trial, the non-settling defendants receive credit for the entire settlement amount.[36] This was the case in *Bedard (Next Friend of) v Amin*,[37] a medical malpractice case, where the plaintiff suffered a subdural hematoma during birth resulting in injuries that caused cerebral palsy, permanent brain damage, and seizures. An action was brought against the physicians who delivered Bedard and those who attended the delivery, as well as the Calgary Health Region and Foothills Medical Centre. The plaintiff's claim was discontinued against all defendants except two physicians and the Calgary Health Region ("CHR") and Foothills Medical Centre ("FMC"). CHR and FMC entered into a Pierringer Agreement with the plaintiff. The non-settling defendants were informed of the settlement agreement and that the settling defendants would no longer be parties to the plaintiff's claim. Thus, the claim that proceeded to trial was for the several liability of the non-settling defendants. The trial court found the non-settling defendants liable in negligence and assessed their responsibility at twenty-five percent of the plaintiff's injuries. Pursuant to the nature of Pierringer settlements, the Court also determined the liability of the settling defendant and found them not liable for the plaintiff's injuries. The non-settling defendant sought disclosure of the settlement amount and to have damages payable by them reduced by the amount of the settlement. The non-settling

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35 See *Laudon v Roberts*, 2008 CanLII 65772 at paras 4–5, 2008 CarswellOnt 7599 (WL Can) (Ont Sup Ct) (After the trial decision in the plaintiff's favour, the court assessed his partial indemnity fees at $400,000 (inclusive of GST) plus disbursements of $90,000 for a total of $490,000. Given the defendant's successful appeal and the Court of Appeal's decision to award him costs of the trial and appeal, the plaintiff was disentitled to the costs award, in addition to paying the defendants costs).

36 This situation is contrasted with Mary Carter agreements where the settling defendant recovers the surplus settlement amount rather than the non-settling defendant receiving credit for that amount under Pierringer agreements.

37 *Bedard*, *supra* note 25. See also *Gendron v Doug C Thompson Ltd (Thompson Fuels)*, 2019 ONCA 293, leave to appeal to SCC refused, 38698 (14 November 2019) [*Gendron*].

defendants argued that failure to deduct the settlement amount would lead to double recovery. The court ordered disclosure of the settlement amount, which was set off against damages payable by the non-settling defendants.

The Court of Appeal of Alberta affirmed the trial decision in *Bedard* that allowed a deduction of the settlement amount from the amount recoverable from the non-settling defendants. The Court rejected the appellant's argument that this discourages settlements and is contrary to the public interest in encouraging settlements. Instead, the Court emphasized that the primary goal of tort damages is to compensate plaintiffs for their loss and not for them to be over-compensated for the same loss. The Court of Appeal recognized the unfairness in such cases where a wrongdoer who fails to settle and requires the matter to proceed to trial ends up benefitting from the amount paid by the settling defendants. However, the Court concluded that giving the non-settling defendants credit for the settlement amount does not make the plaintiff worse off.[38]

C) Critique of the Canadian Position on Surplus Settlement Amounts under Pierringer Agreements

As noted, there is a risk of plaintiffs not being fully compensated for their losses where they under-settle. Proportionate share settlements may proceed based on incomplete evidence relating to liability. A plaintiff runs the risk of under-compensation where the percentage of the plaintiff's loss attributed to the settling defendant's fault at trial exceeds the settlement amount because, upon settlement, the settling defendant's liability is fixed. Plaintiffs bear the risk of under-settlement with no corresponding opportunity for retaining excess settlement. As Justice Slatter stated in *Canadian Natural Resources Ltd*:

> the risk of a *Pierringer* settlement falls on the plaintiff. If the plaintiff 'under-recovers' from the settling defendants, it will not be able to make up that shortfall from the non-settling defendants. On the other hand, if the plaintiff 'over-recovers' from the settling defendants … it will not be allowed to keep the surplus.[39]

Giving non-settling defendants credit for some or all of monies paid by settling defendants pursuant to a Pierringer Agreement is a one-sided protection for those defendants and potentially a perverse incentive to settle. Among other things, non-settling defendants are protected from

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38 *Bedard*, *supra* note 25 at para 16.

39 *Canadian Natural Resources Ltd*, *supra* note 16 at para 127. See also *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57 at para 144, leave to appeal to SCC refused, 35321 (04 July 2013).

damages beyond their proportionate share of liability for the plaintiff's losses. Non-settling defendants are not liable for any shortfall in the settlement amount where that amount turns out to be less than the settling defendant's proportionate share of liability for the plaintiff's loss as determined at trial. Thus, plaintiffs bear the risk of under-compensation without the opportunity to retain excess settlement amounts.

A plaintiff that has entered into a Pierringer Agreement would have no interest in establishing the settling defendant's liability for their loss and would try to minimize that liability as much as possible. On the other hand, the burden of establishing the settling defendant's liability and apportionment of fault rests with the non-settling defendants. To do otherwise would give the non-settling defendant an unfair advantage at the plaintiff's expense,[40] in addition to being the beneficiary of any over-settlement amount. In *MacNeil v Kajetanowicz*, Justice Fichaud stated:

> The non-settling defendant is protected in several respects that include access to the settling defendant's evidence. If, after the *Pierringer* Agreement, the plaintiff still had to prove the settling defendant's fault, the non-settling defendant would continue to enjoy the protection of the plaintiff's burden.[41]

In fact, the non-settling defendant has an incentive to advance a theory of liability that would lead the court to attribute as much of the fault to the settling defendant as possible, in order to minimize their own exposure to liability for the plaintiff's damages. This also constitutes a further incentive for non-settling defendants to not settle and undermines the public interest in favour of settlements.

In contrast to the detriments that plaintiffs face, settling defendants get the benefits of limiting their liability for the plaintiff's losses to the settlement amount, potential under-payment in cases where the settlement amount is less than their proportionate fault as determined at trial, and severance of joint liability with non-settling defendants. Although settling defendants run the risk of over-settlement, they can balance that risk against the other financial and non-financial benefits that likely outweigh any potential risk of over-payment.[42] Further, settlement amounts are negotiated, bearing in mind factors such as admissions of liability, offers and counter-offers, and compromises made by the parties.[43] The

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40 See *Henry v British Columbia*, 2016 BCSC 1038 at paras 317, 356 [*Henry*], aff'd 2017 BCCA 420, leave to appeal to SCC refused, 37940 (25 October 2018); *MacNeil v Kajetanowicz*, 2019 NSCA 35, leave to appeal to SCC refused, 38754 (28 November 2019) [*MacNeil*].

41 *MacNeil*, *supra* note 40 at para 63.

42 See *Gendron*, *supra* note 37 at para 108.

43 *Sable Offshore Energy*, *supra* note 2 at para 18.

negotiated amount reflects settling defendants' overall comfort level, and the settlement amount may be irrespective of the potential liability of other parties for the plaintiff's loss. Settling defendants save on litigation costs, including costs that could have been awarded against them at trial, and circumvent the attendant risk of financial losses through non-legal sanctions such as potential reputational harm. This may be important in a commercial context, where preserving and protecting business relationships and reputations may be more valuable when compared to a potential overpayment. Plaintiffs, especially in non-commercial cases, may have no such long-term interest in the preservation of relationships. While plaintiffs may benefit from partial settlements by also avoiding the expense, delay, uncertainty and stress of litigation, they may unknowingly expose themselves to other risks, specifically under-compensation and loss of joint liability, with no corresponding advantage.

The Canadian position on excess settlement amounts under Pierringer Agreements may be contrasted with the situation in the United States, where courts adopt a comparative fault approach that does not give the non-settling defendant the credit for surplus settlement amounts. In *Pierringer v Hoger*,[44] the Wisconsin Supreme Court held that the non-settling defendant does not get credit for the surplus settlement amount, referred to as the proportionate credit rule. The Court opined that the non-settling defendants' liability is determined by setting-off the percentage of negligence from other parties, not the value of the settlement. In *McDermott*,[45] the United States Supreme Court adopted the *Pierringer* approach as the standard in federal admiralty law. While legislation and jurisprudence on the set-off of surplus settlement amounts in partial settlement agreements and tort liability vary across states, the *Pierringer* or comparative credit approach seems to be a leading common law position regarding partial settlement agreements in the United States.[46]

Courts in states that adopt the *Pierringer* approach take the view that having had their liability limited to their proportionate share of fault for the plaintiff's loss, a non-settling defendant should not also benefit from a set-off that arises from an agreement between the settling parties. The

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44 *Pierringer*, *supra* note 6.

45 *McDermott Inc v AmClyde*, 511 US 202 (US Sup Ct, 1994) [*McDermott*].

46 See e.g. *Iowa Code Annotated*, § 668.3(2)(b); *Thomas v Solberg*, 442 NW 2d 73 (Iowa SC, 1989); *Colorado Revised Statutes Annotated*, § 13-50.5-105 (1) (Release or covenant not to sue); *Charles v Gian Eagle Markets*, 513 Pa 474 at 477–479 (PA Sup Ct, 1987); *Austin v Raymark Industries Inc*, 841 F 2d 1184 at 1190–91, 1195 (Cir 1st, 1988); *Neil v Kavena,* 176 Ariz 93 at 94 (Ariz Ct App, 1993) [*Neil*]; *Shantz v Richview Inc*, 311 NW 2d 155 (Minn Sup Ct, 1980) [*Shantz*]; *Rambaum v Swisher*, 435 NW 2d 19 at 22–23(Minn Sup Ct, 1989); *Fire Insurance Estate v Adamson Motors*, 514 NW 2d 807 at 809–810 (Minn Ct App, 1994).

settlement amount is a matter between the plaintiff and settling defendants; it represents the parties' rough estimate of fault for the plaintiff's loss. Settling parties are aware of the risk of over- or under-settlement, and the possibility of one party making a favourable settlement.[47] In *Neil v Kavena*,[48] the Court of Appeals of Arizona characterized the settlement amount as what the settling defendant is willing to pay to buy their peace based on their estimate of their liability for the plaintiff's loss. Thus, the amount includes "not only damages but also the value of avoiding the risk and expense of trial. Given these components of a settlement, '[t]here is no conceptual inconsistency in allowing a plaintiff to recover more from a settlement or partial settlement than he could receive as damages.'"[49] According to the comparative credit approach, as a stranger to the partial settlement agreement, the non-settling defendant takes neither the benefit nor burden of that arrangement, even if it results in the plaintiff recovering more than their loss. Thus, the non-settling defendant is not entitled to a set-off if it turns out that the agreement benefits the plaintiff in the same way that the non-contracting party is not liable for any shortfall in the settlement amount. In this regard, privity of contract and the plaintiff's assumption of the risk of under-settlement is a price for retaining excess settlements, thereby justifying an exception to the compensation principle.

D) Finality of Partial Settlement Agreements

In *Radhakrishnan v University of Calgary Faculty Association*, Justice Côté stated: "Each party to a settlement makes concessions and assumes some risk, in favour of bringing the dispute to an end." [50] The presumption of the finality of settlement agreements ensures that settling parties cannot resile from the agreement absent factors such as fraud, misrepresentation, undue influence, unconscionability, or mutual mistake. This promotes integrity of settlements and accords with the efficient administration of justice.

The general principle in favour of finality of settlements makes it less likely that a court will set aside an unfavourable proportionate share settlement agreement unless the plaintiff can prove that the settlement was problematic. For example, that the agreement was unfair based

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47 See *Shantz*, *supra* note 46 at para 2.

48 *Neil*, *supra* note 46 at 96–97. As noted, Pierringer Agreements also offer peace of mind for plaintiffs knowing they have secured a minimum recovery for their loss with the possibility of increasing that amount depending on the outcome of the trial. See *Laudon*, *supra* note 9 at para 36.

49 *Neil*, *supra* note 46 at 96. See also *Gouty v Schnepel*, 795 So 2d 959 (Fla Sup Ct, 2001); *McDonough v Van Eerden*, 650 F Supp 78 at 81 (US D, 1986).

50 *Radhakrishnan v University of Calgary Faculty Association*, 2002 ABCA 182 at para 43 [*Radhakrishnan*].

on factors such as fraud, duress, material misrepresentation, undue influence, unconscionability, or mistake.[51] The unfairness to plaintiffs may be exacerbated where settlement occurs in the context of unequal power relationships, as for example in personal or fatal injury cases. In such situations, settling defendants or their insurers tend to be the dominant parties in settlement negotiations. These parties may be repeat players with experience in litigation and settlements. Defendants or their insurers can exert pressure on plaintiffs resulting in an under settlement for their loss. Normally, court approval is not required for the terms of a settlement agreement unless the plaintiff is a person under a disability,[52] or the settlement is in a class action.[53] In the context of partial settlement agreements, it may be necessary for a court to approve the terms of the agreement as a condition for granting the motion to dismiss the plaintiff's claim against the settling defendant and to amend the claim accordingly.

Some cases allege a general requirement of court approval of proportionate settlement agreements to ensure fairness to all parties.[54] However, it is clear from the case law that the purpose of approval is to ensure the terms of the settlement agreement do not prejudice the interest

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[51] See *Mohammed v York Fire and Casualty Insurance Co*, 79 OR (3d) 354, 2006 CanLII 3954 at para 34 (CA), leave to appeal to SCC refused, 31540 (22 February 2007) [*Mohammed*]; *Deschenes v Lalonde*, 2020 ONCA 304 at paras 27–28, leave to appeal to SCC refused, 39288 (11 February 2021) [*Deschenes*]; *Radhakrishnan*, *supra* note 50 at para 30; *Robertson v Walwyn Stodgell Cochran Murray Ltd*, 24 BCLR (2d) 385, 1988 CarswellBC 120 (WL Can) at para 4 (CA); *Chatsikiriakos v Kilislian*, 2020 ONCA 378. See also *Tsaoussis (Litigation Guardian of) v Baetz*, 41 OR (3d) 257, 1998 CarswellOnt 3409 (WL Can) at paras 15–16 (CA), leave to appeal to SCC refused, 26945 (28 January 1999) [*Tsaoussis*]; *Robertson v Walwyn Stodgell Cochran Murray Ltd*, 24 BCLR (2d) 385, 1988 CarswellBC 120 (WL Can) at paras 6, 8–9 (CA).

[52] See BC *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 20-2(17); *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.19; Ontario *Rules of Civil Procedure,* RRO 1990, Reg 194, Rule 7.08(4); Nova Scotia *Civil Procedure Rules*, Rule 36.03(2); *Khokhar v Aviva Insurance Company*, 2020 ONSC 2464; *Jorisch v Toronto Catholic District School Board*, 2017 ONSC 784; *Martin v Listowel Memorial Hospital*, 51 OR (3d) 384, 2000 CanLII 16947 at paras 49–54 (CA) [*Martin*]; *Hall v Tehseen*, 2020 ONSC 3610; *Yusuf v Sara*, 2020 ONSC 4491.

[53] See *Class Proceedings Act*, RSBC 1996, c 50, s 35; *Class Proceedings Act*, SA 2003, c C-16.5, s 35; *Class Proceedings Act, 1992*, SO 1992, c 6, s 29; *Class Proceedings Act*, SNS 2007, c 28, s 38.

[54] See *Martin*, *supra* note 52; *Rains v Molea*, 2012 ONSC 4906 at paras 13–15 [*Rains*]; *Bioriginal Food & Science Corp v Sascopack Inc*, 2012 SKQB 469 at paras 19–21 [*Bioriginal Food*]; *Rosetown (Town of) v Bridge Road Construction Ltd*, 2020 SKQB 3 at paras 9–21 [*Rosetown*].

of the non-settling defendants.[55] In *Rains v Molea*,[56] the non-settling defendant opposed the plaintiff's motion to dismiss the action against the settling defendant because the plaintiff had not sought court approval of the agreement. Justice Macdonald stated that while the court retains jurisdiction to ensure fairness of the agreement to all parties, there is no requirement for formal court approval, adding that what is required is to consider the fairness of the settlement and its consequences for the non-settling defendant. Similarly, in *Rosetown (Town of) v Bridge Road Construction*,[57] Justice Hilderbrandt asserts that court approval is required for a proportionate settlement agreement, but also recognizes that it is intended to protect the non-settling defendant. She states: "While I accept that it is not the role of the court to parse the wording of the Pierringer agreement, evaluating its terms in order to ensure that procedural protections remain in place for non-settling parties is an appropriate approval function of this court."[58] In any event, disclosure of the terms of a proportionate share settlement agreement prior to the determination of liability is often limited to the non-financial terms of the settlement.[59]

Further, disclosure of the terms and court approval of the settlement, if required, could occur before the court hears all the evidence regarding the plaintiff's claim, determination of liability, and apportionment of fault at trial. Thus, a court may not have the necessary evidence at the time of approval of the partial settlement agreement to be able to determine the fairness of the settlement amount as it relates to the settling defendant's liability.

Generally, a court will not set aside a settlement agreement based on further evidence about the plaintiff's losses that comes to light after the settlement. Partial settlements would be considered final where the settling parties, based on the available evidence, acted in good faith but underestimated the extent of the settling defendant's liability for the plaintiff's losses. Partial settlements are often premised on rough estimates of the defendant's liability, which may diverge from the determination of fault at trial. Settling parties proceed with an implicit understanding of and a willingness to accept the risks and consequences of over- or under-

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55 See *Sable Offshore Energy Inc*, *supra* note 2 at para 24; *Nadeau Poultry Farm*, *supra* note 14 at paras 47–52; *Bioriginal Food*, *supra* note 54 at paras 20–21; *Rosetown*, *supra* note 54.

56 *Rains*, *supra* note 54 at paras 14–18, 22.

57 *Rosetown*, *supra* note 54.

58 *Ibid* at para 22.

59 See *Sable Offshore Energy*, *supra* note 2; *Amoco Canada Petroleum*, *supra* note 2 at para 41; *Rosetown*, *supra* note 54 at paras 19–24; *Bioriginal Food*, *supra* note 54 at paras 33–35.

settlement.[60] As Justice van Rensburg states in *Deschenes v Lalonde*, "[a] settlement agreement will not be rescinded on the basis of information that has come to light following the settlement that indicates that a party has entered into an improvident settlement."[61]

Further, a court will not set aside a settlement agreement as being unconscionable on the basis of inequality of bargaining power between the parties, including situations where the plaintiff was unrepresented.[62] An exception would be in situations where the settling defendant exploited the plaintiff's vulnerability in the settlement process resulting in an unfair settlement consistent with the general principle of unconscionability.[63] As already noted, the motivation for proportionate share settlement agreements may include the plaintiff's interest in timely resolution, minimizing litigation costs, access to funds, and non-financial considerations. Thus, under-settlement and the plaintiff's vulnerability *per se* will not necessarily make a settlement agreement unfair and unreasonable to justify a court setting it aside. There must be evidence

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60 See *Mohammed*, *supra* note 51 at para 34. See also *Martin*, *supra* note 52 at para 54.

61 *Deschenes*, *supra* note 51 at para 27. In *Tsaoussis*, *supra* note 51, the Court refused to set aside a personal injury settlement for a minor plaintiff based on a medical assessment done subsequent to the settlement that suggested the infant suffered serious injuries than anticipated and was consequently under-compensated for her injuries. See also *MuCullough v Hilton*, 63 BCLR (3d) 272, 1998 CanLII 4316 at paras 42–44 (CA) [*MuCullough*].

62 See *MuCullough*, *supra* note 61; *Gindis v Brisbourne*, 2000 BCCA 73, leave to appeal to SCC refused, 27827 (22 February 2001) [*Gindis*]; *Gawdun v Burkardt*, 2004 SKCA 128; *Huma et al v Mississauga Hospital and Queensway Health Centre (Trillium Health Partners) et al*, 2019 ONSC 5115.

63 For a discussion of the test for unconscionability, see *Uber Technologies Inc v Heller*, 2020 SCC 16 at paras 60–65 (per Justices Abella and Rowe for the majority); *Douez v Facebook Inc*, 2017 SCC 33; *Input Capital Corp v Gustafson*, 2019 SKCA 78; *Cain v Clarica Life Insurance Co*, 2005 ABCA 437 at para 32; *Downer v Pitcher*, 2017 NLCA 13 at para 54; *Gindis*, *supra* note 62; *Do v Nichols,* 2016 BCCA 128, leave to appeal to SCC refused, 37016 (6 October, 2016); *Williams v Condon*, 2007 CanLII 14925, 2007 CarswellOnt 2668 (WL Can) (Sup Ct) [*Williams* cited to CanLII]. In *Williams*, the plaintiff was struck by the defendant's vehicle. He was seriously injured and unable to work. Two months after the incident, the plaintiff met with the defendant's insurer, where he signed a release in exchange for $2,400. The court set aside the agreement as unconscionable. There was "marked inequality of barraging power" between the parties, and the agreement itself was clearly unfair to the plaintiff and highly favourably to the insurer. The plaintiff was in severe financial need at the time, he had not recovered from his injuries, plus the insurer had valued the claim low based on a flawed understanding of the plaintiff's injuries. See also *Williams v Boston*, 2001 ABQB 1105, aff'd 2003 ABCA 84; *Nery v Nery*, 2012 ABQB 484 at para 39; *Jones v Jenkins*, 2011 ONSC 1426.

the defendant unfairly exploited the plaintiff's vulnerability or engaged in conduct that constitutes valid grounds for rescission in contract law.[64]

In sum, given the nature of Pierringer Agreements, it is difficult for the plaintiff to avoid a proportionate share settlement agreement absent a serious risk of under-compensation. Since these agreements sever joint liability and protect non-settling defendants from exposure to liability beyond their several liability, plaintiffs, rather than non-settling defendants, should retain excess settlement amounts as a matter of fairness. A regime in which the plaintiff risks under-compensation due to under-settlement but with no corresponding benefits from potential to retain over-settlement amounts rewards non-settling defendants and is unfair to plaintiffs. The plaintiff should be entitled to recover from non-settling defendants the entire damages apportioned to their fault without a set-off for any excess settlement amount. Such a regime would also be a disincentive for defendants who refuse to settle while encouraging settlements whenever possible. Yet, the compensation principle is seen as presenting an obstacle to a system under which a plaintiff retains excess settlement amounts because that constitutes a windfall for plaintiffs contrary to the principle against double recovery.

3. Exceptions to the Compensation Principle

The Canadian position of giving the non-settling defendants credit for excess settlement amounts is premised on the rule against double recovery articulated in *Ratych v Bloomer*[65] and affirmed in subsequent decisions.[66] Recovery is based on evidence of loss suffered by the plaintiff due to the wrong in question and is limited to the extent of that loss, if any. There is no basis for recovery where third parties have satisfied the plaintiff's loss, subject to the private insurance (broadly defined) and charity exceptions. The status of the collateral source and the circumstances under which the payments were made to the claimant, are irrelevant. It will suffice that the plaintiff would not have received the benefits but for the defendants' wrong, and the payments were intended to offset losses caused by that wrongdoing.[67]

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64 See *The Trustees of the BC Transit Employees' Health and Benefit Trust v Enkelmann*, 2021 BCSC 11 at paras 113–114; *Kim v Choi*, 2020 BCCA 98 at paras 78–80; Gerald Henry Louis Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011), ch 9.

65 *Ratych v Bloomer*, [1990] 1 SCR 940, 69 DLR (4th) 25 [*Ratych* cited to SCR].

66 See *Sabean v Portage La Prairie Mutual Insurance Co*, 2017 SCC 7 at para 32; *Waterman v IBM Canada Ltd*, 2013 SCC 70 [*Waterman*].

67 See *MB v British Columbia*, 2003 SCC 53 at paras 25–28 [*MB*]; *Waterman*, *supra* note 66 at paras 15–16, 20–21. Defendants also benefit from legislative schemes in some jurisdictions that mandate recovery of net lost income in motor vehicle accidents where

Consistent with the principle against double recovery, where defendants are jointly liable for an indivisible loss, the settlement amount, together with the amount recovered or recoverable from the non-settling defendants, cannot exceed the plaintiff's entire losses as determined at trial.[68] This position is firmly grounded in Canadian law; it is applicable even in situations where the settling defendant is found not liable at trial and hence not jointly liable for the plaintiff's loss. In *Bedard*, where the settling defendant was found not liable for the plaintiff's loss, the non-settling defendants received credit for the entire settlement amount. The Court of Appeal of Alberta acknowledged that the issue of who gets credit for over-settlement between the settling parties "calls for a balancing of competing policy objectives: the public interest in encouraging settlement of multi-party litigation versus the rule against double recovery in tort claims."[69] However, the Court held that the principle against double recovery prevails. The Court maintained that since the "surplus" arose directly from the cause of action against all defendants for their joint liability, it should be applied to the damages attributable to the joint fault of the settling and non-settling defendants to ensure the plaintiff's total recovery did not exceed damages awarded at trial.[70] The Court reiterated the goal of full compensation, which it views as supportive to giving the non-settling defendant credit for the amount of over-settlement. The Court stated:

> the general principle is sound and in a broader sense is not unfair; no plaintiff will be left under-compensated through its application. Even if settlement proceeds are deducted from the plaintiff's ultimate award for damages, he will still receive

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the award is reduced by the amount the plaintiff would have paid in income tax: in Alberta and Saskatchewan damages for lost earnings are net of taxes: Alta: *Insurance Act*, RSA 2000, c I-3, s 570(2)(a); Sask: *Automobile Accident Insurance Act*, RSS 1978, c A-35, s 103(3)(b)(i); and in British Columbia, damages for past income loss is net of taxes that the claimant would have paid: *Insurance (Vehicle) Act*, RSBC 1996, c 23, s 98. However, the plaintiff does not assume any risk for the defendant to obtain that advantage.

[68] See *Sable Offshore Energy Inc*, *supra* note 2 at para 25; *Canadian Natural Resources Limited*, *supra* note 16; *Abt Estate v Cold Lake Industrial Park GP Ltd*, 2019 ABCA 16 at paras 23–24; *Laudon*, *supra* note 9; *Bedard*, *supra* note 25; *Dos Santos (Committee of) v Sun Life Assurance of Canada*, 2005 BCCA 4; *Bennis v Santos-Marchant*, 2019 BCSC 749 at paras 4, 85–86; *Henry*, Supplemental Decision, *supra* note 28; *Ashcroft*, *supra* note 28.

[69] *Bedard*, *supra* note 25 at para 2.

[70] But see *Anunti v Payette*, 268 NW 2d 52 (Minn Sup Ct, 1978), where the court held that where the settling defendant was found not liable and therefore not jointly liable with the non-settling defendant for the plaintiff's loss, the latter is not entitled to a set-off by having their liability for the plaintiff's loss reduced by the settlement amount. See also *Shantz*, *supra* note 46 at para 2; *D'Angelo v Fitzmaurice*, 863 So 2d 311 (Fla Sup Ct, 2003).

> full compensation for his injuries as assessed by the trial judge. The primary goal of tort damages, compensation of the plaintiff, is fulfilled.[71]

Similarly, in *Canadian National Resources Limited*,[72] the Court justified application of the settlement amount to the plaintiff's total losses because the settlement amount was intended to indemnify the plaintiff for the loss caused by the settling and non-settling defendants' joint fault. The Court declined to create an exception to the principle against double recovery for Pierringer Agreements similar to the private insurance exception to the deductibility of collateral benefits.

In *Waterman*, Justice Cromwell stated: "the compensation principle cannot be, and is not, applied strictly or inflexibly in a manner that is divorced from other considerations."[73] The law has long recognized that there are certain situations in which a strict application of the compensation principle focusing solely on the plaintiff's loss as the measure of compensation would be unfair. In such cases, justice demands that the compensation principle must yield to other considerations. For example, the normal measure of contract damages restores plaintiffs to their expected position had the contract been performed according to its terms (expectation damages) and not the defendant's gain due to the breach.[74] However, the common law is pragmatic and recognizes that the defendant's gain may be an appropriate measure of the plaintiff's damages where a strict application of the compensation principle would be unjust as between the parties.[75] In *Atlantic Lottery Corp Inc v Babcock*,[76] the Supreme Court of Canada, per Justice Brown, affirmed the use of disgorgement as an exceptional remedy exceeding the plaintiff's expectation damages for breach of contract where other remedies are inadequate and the circumstances warrant such an award.

Further, a long-recognized exception to the compensation principle is the private insurance exception first recognized in *Bradburn v Great Western Railway*.[77] Private insurance benefits that a plaintiff receives for loss caused by the defendant's wrongdoing are ignored in assessing damages recoverable from the defendant. The rationale for the exception

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71 *Bedard*, *supra* note 25 at para 16.

72 *Canadian Natural Resources Limited*, *supra* note 16 at para 135.

73 *Waterman*, *supra* note 66 at para 35.

74 See *Attorney General v Blake*, [2000] UKHL 45, [2000] 1 AC 268 at 278; *Bank of America Canada v Mutual Trust*, 2002 SCC 43 at para 25*; Waterman*, *supra* note 66 at para 36.

75 *Ibid.*

76 *Atlantic Lottery Corp Inc v Babcoc*k, 2020 SCC 19 at paras 50–53. See also Justice Karakatsanis (dissenting in part), at paras 108–110.

77 *Bradburn v Great Western Railway*, [1874-80] All ER Rep 195 (Eng Exch).

is to avoid giving the defendant the benefit of the plaintiff's foresight and thrift.[78] Over time, courts have construed the private insurance exception broadly to include benefits the plaintiff directly or indirectly paid for such as pension[79] and employment benefits.[80] In *Waterman*, Justice Cromwell acknowledged the broad scope of the private insurance exception, stating: "the so-called private insurance exception has been applied by analogy to a variety of payments that do not originate in a contract of insurance."[81]

The private insurance exception does not apply where the benefit was intended to indemnify the plaintiff for the loss in question and the plaintiff did not provide consideration for it.[82] In *Ratych v Bloomer*, the plaintiff, an on-duty police officer, continued to receive his full salary during the period of disability pursuant to his collective agreement with his employer and did not lose any sick-day credits. The Supreme Court of Canada favoured deductibility of the plaintiff's sick pay from the damages awarded at trial because the plaintiff did not pay for the benefit. Further, the plaintiff did not lose any benefit, as for example sick days. The Court reasoned that failure to deduct the plaintiff's pay during the period of incapacity caused by the accident would constitute a windfall contrary to the compensation principle. The Court favoured deductibility because the plaintiff failed to demonstrate he provided any consideration for the benefit.

Subsequent decisions have adopted a liberal interpretation of what constitutes "payment" for benefits for purposes of the private insurance exception. In *Cunningham v Wheeler*,[83] the Court of Appeal for British Columbia, following *Ratych*, allowed deductibility of non-contributory disability payments obtained pursuant to the plaintiff's collective agreement because there were no direct payroll deductions for the benefit. The Supreme Court of Canada reversed the Court of Appeal decision. While remaining faithful to the general principle of deductibility of benefits

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78 See K D Cooper, "A Collateral Benefits Principle" (1971) 49:4 Can Bar Rev 501; Beverly M McLachlin, "What Price Disability? A Perspective on the Law of Damages for Personal Injury" (1981) 59:1 Can Bar Rev 1 at 44–46; John G Fleming, "The Collateral Source Rule and Loss Allocation in Tort Law" (1966) 54:4 Cal L Rev 1478.

79 *Guy v Trizec Equities Ltd*, [1979] 2 SCR 756, 99 DLR (3d) 243; *Waterman*, *supra* note 66 (pension benefits held not deductible from damages for wrongful dismissal).

80 *Cooper v Miller*, [1994] 1 SCR 359 at 403, 88 BCLR (2d) 273 (*sub nom. Cunningham v Wheeler*) [*Cunningham* cited to SCR].

81 *Waterman*, *supra* note 66 at para 42.

82 See *Ratych*, *supra* note 65. See also *Sylvester v British Columbia*, [1997] 2 SCR 315, 146 DLR (4th) 207 [*Sylvester* cited to SCR] (involving non-contributory disability benefits that the plaintiff received. The Court determined that the benefit did not fall within the private insurance exception, and was therefore deductible from the plaintiff's wrongful dismissal damages).

83 *Cooper v Miller*, 64 BCLR (2d) 62, 1991 CanLII 1444 (CA).

unless the plaintiff paid for them, the majority of the Court expanded what constitutes "payment" to include direct and indirect payments for benefits.[84] Further, the Court lowered the evidential burden on the plaintiff to establish direct or indirect payment for benefits, holding that evidence that the benefits were obtained through the collective bargaining process or more generally, through an employment contract, whether unionized or not, will suffice.[85] Justice Cory articulated that to limit the private insurance exception to employee-funded benefits was too narrow and unfair.[86] This interpretation promotes social equality by protecting the interests of vulnerable workers who rely on their employers to provide disability benefits, compared to the privileged who are often able to obtain such benefits privately.

According to Justice Cory, the relevant consideration for non-deductibility is the existence of a right of subrogation or repayment. It is irrelevant whether the third party will in fact exercise that right or indicates an intention to do so.[87] Where the benefit was pursuant to an indemnity insurance contract, the insurer retains a right of subrogation.[88] It is generally assumed the third party will exercise the right of reimbursement from the plaintiff's damages award to justify non-deductibility.[89] The exception is where there is unequivocal evidence that the third party has waived that right to justify deductibility.[90] Moreover, recoverability of benefits is an issue between the plaintiff and the collateral source and does not affect the tortfeasor's liability for damages. Whether that right is exercised, and to what extent, may be influenced by a number of practical considerations, including the nature of the relationship between the plaintiff and third party, the cost of recovering the benefits, and whether the plaintiff has received full compensation for their losses. Based on *Cunningham*, effectively all employment benefits may be non-deductible.[91]

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84 *Cunningham*, *supra* note 80 at 405–407.

85 *Ibid* at 407–408.

86 *Ibid* at 403.

87 *Ibid* at 415–16. See also *Prevost v Bolton*, 2018 BCSC 1090 at para 61; *Tomas v Sticha*, 2019 BCSC 1204.

88 See *Glynn v Scottish Union & National Insurance*, [1963] 2 OR 705, 1963 CanLII 112 (CA); *Insurance Act*, RSBC 2012, c 1, s 36; *Insurance Act*, RSA 2000, c I-3, s 546; *The Insurance Act*, SS 2015, c I-9.11, s 8-33; *Insurance Act*, RSO 1990, c I.8, s 152.

89 See *Waterman*, *supra* note 66 at para 41 (per Justice Cromwell).

90 See *X v Y*, 2011 BCSC 944 at paras 223–229. Similarly, courts have declined to enforce a plaintiff's obligation to reimburse her employer for the value of accumulated sick bank credits that the plaintiff used to obtain salary continuation after her injuries: see *Sahota v Slupskyy*, 2019 BCSC 2215 at para 133.

91 See *Waterman*, *supra* note 66. Although *Ratych* and *Cunningham* seem to be premised on the principle against double recovery, *Ratych* would likely have been decided differently post-*Cunningham*. See SW Waddams, *The Law of Damages* (loose-leaf updated 2019, release 28) ch 3 at para 3.1635.

Another exception to the principle against double recovery is the charity exception. This may include benefits-in-kind, voluntary services by friends and family, and monies received from individuals towards the payment of particular expenses or simply to relieve hardship. The principal rationale for the charity exception is that deductibility is likely to prevent acts of charity towards persons afflicted by misfortune.[92] It is also consistent with the liberal philosophy underlying Justice Cory's decision in *Cunningham* by which a defendant should not benefit from the generosity of those who provide charitable benefits to a plaintiff.[93]

Courts have also recognized an exception to the compensation principle in relation to non-indemnity benefits where the plaintiff "paid" for the benefit. In *Waterman*, the plaintiff could not have received both his pension benefits and employment income during the notice period. Yet, Justice Cromwell, for the majority of the Supreme Court of Canada, held that the pension benefits were non-deductible because they were not intended as indemnification for the plaintiff's wrongful dismissal damages. Additionally, the Court held that although there were no payroll deductions for the pension benefits, and the employer fully funded the pension plan, the plaintiff nevertheless earned the benefit as deferred compensation for his years of service resulting in a proprietary right to the benefit to justify non-deductibility. Justice Cromwell viewed the pension benefit as analogous to private insurance benefits. Hence, it fell within the private insurance exception.[94]

In *Sylvester v British Columbia*,[95] the plaintiff was wrongfully dismissed while disabled from working and receiving disability benefits pursuant to his employment contract. Although there was no "but for" causal connection between receipt of disability benefits and entitlement to wrongful dismissal damages, the Supreme Court of Canada nevertheless allowed deductibility of the disability benefits from the plaintiff's wrongful dismissal damages. Justice Major reasoned that the disability benefits were intended to be a substitute for the plaintiff's regular salary because an employee cannot simultaneously receive disability benefits under their plan and their regular salary under the employment contract.[96] In *Waterman*, Justice Cromwell distinguished the Court's earlier decision

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92 *Cunningham*, *supra* note 80 at 369–70 (per Justice McLachlin (as she then was) dissenting); *MB*, *supra* note 67 at para 30; *Waterman*, *supra* note 66 at para 39.

93 See *Waterman*, *supra* note 66 at para 39; K Cooper-Stephenson & E Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Thomson Reuters, 2018) at 885; J Cassels & E Adjin-Tettey, *Remedies: The Law of Damages*, 3rd ed (Toronto: Irwin Law, 2014) at 484–85.

94 See *Waterman*, *supra* note 66 at para 16.

95 *Sylvester*, *supra* note 82.

96 *Ibid* at 321–24.

in *Sylvester* because it involved a non-contributory income replacement benefit that indemnified the plaintiff for his wrongful dismissal damages. As well, Justice Cromwell justified non-deductibility of the indemnity benefit in *Cunningham* because the plaintiffs paid for the benefits. Given the liberal construction of what constitutes payment to encompass almost all employment benefits, the deductibility of benefits in *Sylvester* is difficult to justify. However, the lesson from *Sylvester*, and as reflected in Justice Cromwell's review of the jurisprudence in *Waterman*, appears to favour non-deductibility where the plaintiff "paid" for an indemnity benefit.[97]

Thus, non-deductibility of collateral benefits creates a compensation advantage for plaintiffs only where they have not "paid" for the benefit.[98] A court may avoid double recovery by ordering a trust in favour of the collateral source,[99] or require an undertaking from the plaintiff to repay the third party where it "is necessary and appropriate in the interests of justice."[100] However, similar to the right of subrogation, emphasis is on the theoretical obligation to repay the collateral source and not whether repayment would in fact occur. Thus, as between plaintiffs and defendants, the current state of the law generally permits non-deductibility of indemnity benefits in so far as the plaintiff "paid" for the benefit. The potential compensation advantage from receipt of the benefit is ignored to avoid giving the defendant credit for the plaintiff's sacrifice, however liberally construed. In light of the current jurisprudence on collateral benefits, reliance on the compensation principle to justify giving the non-settling defendant credit for over-settlement amounts under Pierringer Agreements becomes less compelling and patently unfair to plaintiffs who bear the risk of under-settlement.

4. Rethinking Applicability of the Compensation Principle to Partial Settlement Agreements

The logic of the full compensation thesis becomes less cogent where a plaintiff under-settles, and at the same time loses the right to joint liability between settling and non-settling defendants pursuant to the

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97 See *Waterman*, *supra* note 66 at para 56.

98 See *Sylvester*, *supra* note 82; *Waterman*, *supra* note 66 at para 47.

99 See *Thornton v Prince George School District No 57*, [1978] 2 SCR 267 at 285, 83 DLR (3d) 480; *Arnold v Teno*, [1978] 2 SCR 287 at 309, 83 DLR (3d) 609.

100 *Ratych*, *supra* note 65 at 982–83. This may arise where there is a legal or moral obligation for the plaintiff to repay the third party that provided the benefits. Examples include where the collateral source is entitled to be reimbursed for the benefit pursuant to a legislative scheme or a third-party claim. See *Crown's Right of Recovery Act*, SA 2009, c C-35, ss 2, 38; *Health Care Costs Recovery Act*, SBC 2008, c 27, s 3; *Health Insurance Act*, RSO 1990, c H.6, ss 31, 33; *Jones v Trudel*, 2000 BCCA 298*; Lavaute v The Attorney General of Canada*, 2004 NSSC 171; *Bove v Wilson*, 2016 BCSC 1620 at paras 48–51.

proportionate settlement agreement. There is an even stronger case to be made for plaintiffs who bear the risks of under-settlement to also retain the benefit of excess settlement amounts. Plaintiffs who receive contributory indemnity benefits are guaranteed full compensation even if their damages awards are reduced by the benefit amount. Meanwhile, plaintiffs under Pierringer Agreements face a risk of under-compensation given that the non-settling defendant is liable only for their several liability and can also end up with cost awards against plaintiff as was the case in *Laudon*.[101]

There is a myriad of factors that influence settlements, including rough estimates of fault and anticipated cost savings.[102] In *Amoco Canada Petroleum v Propak Systems Ltd*, Justice Fruman noted: "Settlement, after all, is nothing more than a compromise, in which parties gamble by trading prospective rights for certainty. Nor does prejudice run in only one direction."[103] Similarly, in *McDermott Inc v AmClyde*,[104] Justice Stevens of the United States Supreme Court commented on the realities regarding settlement amounts, stating: "settlements seldom reflect an entirely accurate prediction of the outcome of a trial. Moreover, the settlement figure is likely to be significantly less than the settling defendant's equitable share of the loss, because settlement reflects the uncertainty of trial."[105] As has been noted throughout this paper, giving non-settling defendants credit for excess settlement amounts is unfair because they bear no risk of under-settlement.

The potential unfairness to plaintiffs justifies creating an exception to the compensation principle to allow plaintiffs to retain over-settlement amounts. In *Waterman*, Justice Cromwell affirmed the principle against double recovery but also acknowledged the need for a pragmatic approach in appropriate cases. Specifically, that it may be appropriate to depart from a strict application of the compensation rule where it is necessary as a matter of justice and fairness between the parties.[106] Further, Justice Cromwell notes that the issue of deductibility should be informed by broader policy considerations, including providing incentives that promote socially desirable conduct and having "clear rules that are easy to apply."[107] In keeping with this policy objective, the compensation principle should not

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101 See *Laudon*, *supra* note 9.

102 See generally Heather Heavin & Michaela Keet, "The Path of Lawyers: Enhancing Predictive Ability through Risk Assessment Methods" (Paper delivered at the CIAJ 2016 Annual Conference, 5-7 October 2016) online: <www-deslibris-ca>.

103 *Amoco Canada Petroleum*, *supra* note 2 at para 25.

104 *McDermott*, *supra* note 45.

105 *Ibid* at 213.

106 *Waterman*, *supra* note 66 at paras 36–38.

107 *Ibid* at para 76.

be strictly applied in relation to Pierringer Agreements given the desirability of encouraging settlements and the potential of exposing plaintiffs to the risk of under-compensation. This risk could be a disincentive for plaintiffs entering into Pierringer Agreements while incentivizing some defendants not to settle. It is important to keep in mind that the goals of tort law are not limited to compensating the injured plaintiff but also include encouraging behaviour modification.[108] The law should encourage all parties to make good faith efforts to settle and should not reward uncooperative parties. Such a regime provides incentives for socially desirable behaviour by promoting settlements without prejudicing the plaintiff's interests. It is also consistent with the public interest in settlements.

A further reason for not giving non-settling defendants credit for over-settlement amounts is because settling and non-settling defendants are no longer jointly liable for the plaintiff's loss. The rule against double recovery from co-tortfeasors is premised on the defendants' joint and several liability for the plaintiff's indivisible loss and the right of defendants that satisfy the plaintiff's loss to seek contribution or indemnity from co-tortfeasors.[109] Meanwhile, the relationship between settling and non-settling defendants is no longer joint pursuant to the proportionate share agreement. Rather, the relationship is analogous to that between defendants liable for distinct or divisible losses with each defendant's liability limited to damages attributable to their wrongdoing. No concerns regarding overcompensation from one defendant arise where the plaintiff's losses are divisible and one defendant settles. The same principle should prevail by way of an exception to the rule against double recovery where a Pierringer Agreement has severed joint liability between the settling and non-settling defendants. Having opted out of joint liability, non-settling defendants should not be able to reap the benefits of the contract between the settling parties while avoiding the burdens of joint liability with settling defendants. As a matter of fairness and consistency, the risks and benefits of proportionate share agreements should accrue to plaintiffs. Additionally, an exception to the compensation principle in the context of Pierringer Agreements would be consistent with other areas of law where courts have created similar exceptions as a matter of policy and fairness even if plaintiffs receive a windfall.

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[108] See Craig E Jones, "Deterrence and Behaviour Modification" in *Theory of Class Actions* (Toronto, Irwin Law, 2012) ch 3. See also Allen M Linden & Bruce Feldthusen, Canadian Tort Law, 11th ed (Toronto: LexisNexis, 2018) ch 1.

[109] See BC *Negligence Act*, RSBC 1996, c 333, s 4(2); Alberta *Contributory Negligence Act*, RSA 2000, c C-27, s 2(2); Manitoba *Tortfeasors and Contributory Negligence Act*, CCSM, c T90, s 5; Ontario *Negligence Act*, RSO 1990, c N.1, s 1; *The Contributory Negligence Act*, RSS 1978, c C-31, s 3(2); *Contributory Negligence Act*, RSNB 2011, c 131, s 3; *Ashcroft*, *supra* note 28.

5. Chipping away at the Compensation Principle

Unlike courts in the US, Canadian courts have been reluctant to permit plaintiffs to retain excess settlement amounts under Pierringer Agreements to avoid double recovery. However, recent Canadian appellate case law suggests that what constitutes overcompensation can and should be interpreted narrowly. These developments limit situations where non-settling defendants can receive credit for over-settlement amounts and accords with the risks that plaintiffs assume in Pierringer Agreements. However, courts have achieved this result within the confines of the compensation principle with the possibility that non-settling defendants could still benefit from excess settlements. It would be preferable to have a regime that does not reward non-settling defendants under any circumstance and simply permits plaintiffs to retain surplus settlements without attempting to narrowly construe what constitutes over-compensation for purposes of the principle against double recovery.

In *Gendron*,[110] the Court of Appeal for Ontario acknowledged the appeal of the US comparative fault approach that protects the settling parties' bargain and the unfairness of the Canadian approach. The Court recognized the tension between the two competing public policies of encouraging settlements and avoiding over-compensation. The Court emphasized that subject to the principle against double recovery, as strangers to a contract between the settling parties, non-settling defendants are not entitled to the benefits of that agreement beyond the guarantee that their liability will be limited to their proportionate share of the plaintiff's loss.[111]

In *Canadian Natural Resources Ltd*, the issue on appeal turned on whether CNRL was over-compensated by the settling defendants. While not disputing the compensation principle, CNRL argued that the over-compensation principle, by which the credit of excess settlement is considered to reduce the non-settling party's liability, should not be applicable to Pierringer Agreements. The Court of Appeal of Alberta rejected CNRL's argument. However, the unfairness of the current Canadian approach was not lost on the Court. Justice Slatter acknowledged that the risk of under settlement that plaintiffs assume under Pierringer Agreements also constitutes consideration for retaining any over-

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110 *Gendron*, *supra* note 37.

111 *Ibid* at para 115. See also British Columbia Law Institute, *Report on Contribution after Settlement under the Negligence Act, 2013*, online (pdf): <www.bcli.org>. The BCLI favours the option of plaintiffs taking the risks and benefits of under- or over-settlements: see at 35–36, "Option 2".

settlement rather than passing it on to the non-settling defendant. He stated:

> in a *Pierringer* agreement the plaintiff accepts the risk of 'under settling' with the settling defendants, and gives up the cause of action against them. In return for that, the plaintiff achieves certainty with respect to at least part of its recovery, but the price it pays is that it gives up the opportunity to recover any more from the settling defendants. Any 'windfall' that the plaintiff recovers is a product of the settlement negotiations, and the accord and satisfaction reached with the settling defendants, not the original cause of action.[112]

Given that proportionate share agreements proceed on the basis of assumed fault, the possibility of the settlement amount overcompensating the plaintiff relative to the loss apportioned to the settling defendant at trial in some cases is inevitable. Thus, the question arises: as between the plaintiff and non-settling defendant who should retain the windfall? Justice Slatter addressed this concern in *Canadian Natural Resources Ltd,* stating:

> there are arguments both for and against the existing rule that a settling plaintiff must account to the non-settling defendant for any recovery in excess of its actual damages … 'The law as it stands represents a curious balancing of preventing overcompensation and encouraging settlement.' Reversing the rule requiring a plaintiff to account for over-settlements would eliminate any balancing, and allow the encouragement of settlement to predominate over the rule against overcompensation.[113]

Further, Justice Slatter supported a liberal construction of the compensation principle in the settling plaintiff's favour, noting "that there is in fact no overcompensation until the plaintiff is fully indemnified … and it has recovered its costs of pursuing the settling defendants."[114]

In *Gendron*, the Court of Appeal for Ontario adopted the Court of Appeal of Alberta's reasoning from *Canadian Natural Resources Ltd* that supports a liberal construction of when a plaintiff is fully indemnified to prevent or at least limit the set-off amount for the benefit of the non-settling defendant. The Court noted in *Gendron* that the concept of over-compensation itself should be carefully and liberally construed in the plaintiff's favour. Given the myriad of factors that influence settlements, including financial and non-financial costs, it is not always easy to determine whether a plaintiff has been overcompensated by a partial

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112 *Canadian Natural Resources Ltd*, *supra* note 16 at para 137.

113 *Ibid* at para 147.

114 *Ibid* at para 148 (per Justice Slatter).

settlement amount.[115] The Court concluded that given the public policy of promoting settlements, plaintiffs who settle should not be penalized for settling in an amount exceeding damages that the court awards at trial.

Referring to the law in some US jurisdictions, the Court of Appeal for Ontario in *Gendron*[116] acknowledged that limiting the non-settling defendant's liability to its proportionate share pursuant to a Pierringer Agreement is itself an advantage for that party, and they do not deserve to enjoy a further benefit of set-off against the amount of over-settlement. While noting that this is not the current Canadian law relating to Pierringer Agreements, the Court nevertheless recognized the merit of some of the underlying policy considerations in addressing the issue of the plaintiff's full indemnification. Specifically, that the settling parties assume the risks and benefits of under or over-settlement whereas the non-settling defendants does not bear any risk beyond their several liability as determined at trial.[117] In addition, it is important to protect the bargain of the settling parties in order to further the public policy of promoting settlements. The settlement amount is a matter between the plaintiff and settling defendant, and it should be of no concern to the non-settling defendants. As such, absent double compensation, a set-off in favour of the non-settling defendant, a stranger to that contract, is unfair.

In *Canadian Natural Resources Ltd*, Justice Slatter for the Court of Appeal of Alberta reiterated the established principle that courts should not lightly overturn established decisions, in this case the compensation principle requiring damages recoverable from a non-settling defendant to be reduced by the amount of over-settlement. Any departure from the established rule should be determined by the Supreme Court of Canada.[118] In the meantime, Justice Slatter made two significant inroads into the compensation principle in relation to Pierringer Agreements, first, on the issue of costs, and second, on the issue of contributory negligence. These developments are intended to minimize the unfairness to plaintiffs regarding excess settlements under Pierringer Agreements. However,

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115 See *Gendron*, *supra* note 37 at para 108. See also *McDermott*, *supra* note 45 at 215 (per Justice Stevens).

116 *Gendron*, *supra* note 37 at paras 111–115.

117 Admittedly, the cooperation between the plaintiff and settling defendants and the resulting burden of proof on the non-settling defendant to establish the settling defendant's liability and the plaintiff's potential contributory fault can expose the non-settling defendant to a larger share of the liability for the plaintiff's loss. However, this may also exert pressure on the non-settling defendant to settle and avoid such risks.

118 So far, the Supreme Court of Canada has refused leave in all the cases that have raised the issue of the compensation principle and proportionate settlement agreements, including *Canadian Natural Resources Ltd*, *supra* note 16. It is also open to legislatures to adopt laws to this effect but there has been no indication of interest in this issue.

these are ill-fitted avenues to achieve those goals and are inconsistent with principles relating to costs and contributory negligence. A system that gives plaintiffs excess settlement amounts because they have "paid" for such a benefit falls within established exceptions to the compensation principle and is predictable. It also makes clear the intention to not reward defendants who fail to settle and force plaintiffs to proceed to trial.

A) Costs Deduction

In *Bedard (Next Friend of) v Amin*, the Court held that the settlement amount that must be accounted for in determining whether a plaintiff has been fully compensated for their loss must be net of legal costs incurred to obtain the settlement. The Court stated: "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 damage award at trial."[119] It was unclear from *Bedard* the extent of the plaintiff's costs that must be considered when determining whether the plaintiff has been overcompensated.

In *Canadian Natural Resources Ltd*, the Court of Appeal of Alberta went further, making it clear that a plaintiff is entitled to deduct its solicitor-client fees and not just costs on a party-party basis in determining whether the plaintiff has been fully indemnified before giving the non-settling defendant credit for the surplus settlement. Specifically, all the plaintiff's costs in litigation and settlement with the settling defendant must be fully considered before determining whether there is any surplus recovery that the court should consider to reduce the plaintiff's recovery from the non-settling defendants. Justice Slatter stated:

> The law requires the plaintiff to account for any 'windfall' or 'surplus' to prevent double recovery … As a matter of policy, there is no justification for requiring the plaintiff to account for any 'surplus' until it has been fully compensated for the expenses incurred in recovering the settlement amounts. Until the plaintiff is fully indemnified for its costs, there is no 'surplus', no double compensation, and no basis on which to confer any benefit on the non-settling defendant. As a general rule, in accounting for any 'windfall' or 'surplus' arising under a *Pierringer* agreement, the plaintiff should be entitled to deduct its reasonable solicitor and client costs incurred in pursuing the settling defendants.[120]

In some cases, the plaintiff may recover legal fees and disbursements in addition to the settlement amount.[121] If the cost awarded is party-

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119 *Bedard*, *supra* note 25 at para 18.

120 *Canadian Natural Resources Ltd*, *supra* note 16 at para 157.

121 This was the case in *Laudon*, *supra* note 9.

party, the plaintiff will be entitled to deduct their remaining costs from the settlement amount before applying any remainder towards damages payable by the non-settling defendant.

Although still operating within the principle against double recovery, allowing the plaintiff to fully recover their costs before determining the surplus settlement amount that should go to the non-settling defendant's credit protects plaintiffs. It does so by minimizing their potential detriment where the settlement amount exceeds the settling defendant's liability for the plaintiff's loss. The plaintiff is entitled to allocate more of the settlement amount to costs to eliminate or at least minimize the size of the windfall and hence the amount that could reduce the non-settling defendant's liability. While this may seem unfavourable to the non-settling defendant, Justice Slatter was clear in *Canadian Natural Resources Ltd* that it is not unreasonable or unfair because that party's liability cannot exceed its proportionate share of damages as determined at trial. Additionally, the Court noted that this approach is consistent with the rule against double recovery because the rule cannot be construed as requiring a plaintiff to give a non-settling defendant credit for part of the settlement amount before they themselves are fully indemnified.[122]

The liberal approach to the goal of full compensation protects plaintiffs in Pierringer Agreements. While it is still possible for non-settling defendants to receive credit for over-settlement amounts, this may be significantly diminished, and likely eliminated altogether where the plaintiff incurred high solicitor-client costs. However, the use of the law of costs in this way may be problematic, *inter alia,* because full indemnity or solicitor-client costs are generally awarded only in exceptional cases where a party's conduct was reprehensible, scandalous or outrageous.[123] This may be achieved by awarding such costs directly against the defendant that refused to settle and forced the plaintiff to trial where a court determines that behaviour to be unreasonable or abusive and warranting condemnation.[124] However, the approach adopted by appellate courts

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122 *Canadian Natural Resources Ltd*, *supra* note 16 at paras 156–161.

123 See *Young v Young*, [1993] 4 SCR 3 at 17, 108 DLR (4th) 193; *Net Connect v Mobile Zone*, 2017 ONSC 1097 at paras 14–16, 26 [*Net Connect*], aff'd 2017 ONCA at paras 8–9; *Pinder Estate v Farmers Mutual Insurance Company*, 2020 ONCA 413 at paras 146, 149; *Davies v Clarington (Municipality of) et al*, 2009 ONCA 722; *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 20.06; Mark M Orkin, *The Law of Costs* (Toronto: Thomson Reuters, loose leaf updates 2018 release 76) at §219.

124 See *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 49.10, Rule 57.01(1)(e), (f)(i); *Courts of Justice Act,* RSO 1990, c C.43, s 137.1(7); *Alberta Rules of Court*, Alta Reg 124/2010, Rule 10.33(2)(a); BC *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 14(3)(v); *Nova Scotia Civil Procedure Rules*, Rule 77.07(1), (2)(e), (f); *Churchill et al v Churchill*, 2019 ONSC 5137 at paras 14–16; *Net Connect*, *supra* note 123.

effectively means the settling party could end up paying the increased costs. While this approach is intended to be a disincentive for the last holdouts, it still indirectly benefits such defendants, and in any event, is likely not worth the resources for the necessary accounting to achieve that goal. A regime that gives plaintiffs credit for excess settlement amounts in consideration for the risk of under-settlement that they assume under Pierringer Agreements is predictable, consistent, and easy to apply.

B) Contributory Negligence

Another way that courts are trying to address the unfairness to plaintiffs who enter into Pierringer Agreements is to liberally interpret the compensation principle where a court finds the plaintiff contributorily negligent. In such situations, full compensation for purposes of avoiding double recovery does not arise until the plaintiff fully recovers for all their losses, including those attributable to their own fault, before the non-settling defendant receives credit for any surplus settlement amount. This approach attempts to protect plaintiffs' interest by giving them the benefit of an arrangement as a trade-off for assuming the risk of under recovery from the settling defendants, but doing so within the constraints of the compensation principle. It would be preferable to recognize a plaintiff's retention of over-settlement amounts from Pierringer Agreements as an exception to the compensation principle.

In *Canadian Natural Resources Ltd*, Justice Slatter, speaking for the Court of Appeal of Alberta, gave an expansive and common-sense construction of when a plaintiff may be over-compensated, requiring them to pass on the "windfall" to non-settling defendants pursuant to the compensation principle. The Court construed overcompensation or double recovery liberally where a court finds a plaintiff partly responsible for their loss, resulting in a finding of contributory fault. In such cases, overcompensation arises only where damages recoverable exceed the plaintiff's actual loss. In other words, priority is given to the plaintiff offsetting damages attributed to their own fault at trial before giving the non-settling defendant the benefit of excess recovery. In *Canadian Natural Resources Ltd*, where the plaintiff was found to be fifty percent liable for the damage to its pipeline, the Court held there was no over-compensation until the plaintiff was fully indemnified for its loss. Since the amount recoverable from the non-settling defendant and the settlement amount did not exceed the cost of replacing the pipeline, there was no overcompensation. Hence, there was no reduction in the amount recoverable from the non-settling defendant. The Court rationalized this position by stating, *inter alia*, that it would be ironic to give the non-settling defendant credit for the over-settlement amount but not the

contributorily negligent plaintiff when the loss in question was caused by their combined fault.[125] The Court of Appeal for Ontario adopted this reasoning in *Gendron*.[126]

A finding of contributory negligence recognizes the plaintiff's lack of due care for their own interest and severs joint liability with other wrongdoers.[127] Giving the plaintiff priority for excess settlement amounts is akin to making the settling parties jointly liable for the losses attributable to their fault, at least to the extent of the over-compensation by the settling defendant. While the effect of the liberal construction of over-compensation where the plaintiff is contributorily negligent is laudable, it seems inconsistent with the theoretical underpinning of contributory negligence.

6. Moving Forward

Mechanisms that Canadian appellate courts have adopted to circumvent the compensation principle and to ensure fairness to plaintiffs who enter into partial settlement agreements reflect dissatisfaction with the traditional approach. However, those strategies themselves are also unsatisfactory. The accounting process required by these strategies to determine whether there is a "surplus" settlement amount may be unnecessary and could wipe out some of the savings of time and money achieved through partial settlements. As well, there will often hardly be any "surplus" given the liberal interpretation of what constitutes full indemnification and when over-compensation arises. An exception aimed at protecting plaintiffs who settle with some—but not all—defendants liable for the same loss, will promote certainty and further the public policy of encouraging settlements.

Additionally, respect for negotiated agreements runs deep in our legal system and justifies a party retaining an advantage even where it may disadvantage third parties to that agreement, absent an overriding interest of justice or public policy consideration. The comments made by

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125 *Canadian Natural Resources Ltd*, *supra* note 16 at paras 149–151.

126 *Gendron*, *supra* note 37.

127 Statutory reform of the common law contributory negligence bar did not create a regime of joint liability between wrongdoers and plaintiffs who contribute to their loss. Rather, it preserves joint liability among the tortfeasors, who together with the plaintiff, are liable for the plaintiff's loss. See *Ingles v Tutkaluk Construction Ltd*, 2000 SCC 12 at paras 58–59. In fact, in British Columbia and Nova Scotia, plaintiffs who are partly responsible for their loss are limited to several liability of multiple wrongdoers: see BC *Negligence Act*, RSBC 1996, c 333, s 1(1)*; Contributory Negligence Act*, RSNS 1989, c 95, s 3(1); *Huang v Canadian National Railway*, 2018 BCSC 1235 at para 322; *Khudabux v McClary,* 2018 BCCA 234 at para 35.

Justice Bryson for the Court of Appeal for Nova Scotia in *Brown v Cape Breton (Regional Municipality of)*,[128] while made in relation to settlement privilege, is apposite in respect of negotiated agreements generally. The Court stated: "If indeed settling parties … enjoy an advantage over non-settling parties, it is one for which they have bargained. The court should hesitate to expropriate that advantage."[129] Based on the detriment thesis underlying the exceptions to the principle against double recovery, the *sine qua non* for non-deductibility is not the character of the benefit but rather that it was at a cost to the plaintiff.[130] In the context of Pierringer Agreements, the benefit (that is, excess settlement) arises from a transaction between the plaintiff and settling defendants in which the parties allocated the benefits and risks *inter se* as they deem appropriate in the circumstances. Within this transaction, settling defendants enjoy the benefit of limiting their exposure to liability. Meanwhile, the plaintiff risks under-settlement and as such, should also obtain benefits derived from the agreement. A system that allows plaintiffs to retain excess settlement amounts is straightforward, predictable, and easier to apply than attempting to achieve the same through other, and sometimes convoluted, means.

As already noted, parties may enter into proportionate settlement agreements before all the evidence regarding liability becomes known and the determination of liability for the plaintiff's loss. Should the exception advocated for in this paper be recognized, plaintiffs' counsel will have to be vigilant of settling defendants deliberately underestimating the extent of their liability for the plaintiff's loss because of the potential for over-recovery should their proportionate share of liability determined at trial turn out to be less than the settlement amount. This could undermine the potential benefit of proportionate share agreements from plaintiffs' perspective, given the heightened burden that plaintiffs might have to bear in cases of gross under-estimation of the settling defendant's liability, while also abandoning their right to joint liability of all defendants for their loss. This is unlikely to be an issue in the commercial context where ongoing relationships and reputation may be more important to the parties than a deliberate under-estimation of liability. However, there may be a real risk outside the commercial context where cost savings may be a major motivation for settlements, and the settling defendant has no need for goodwill in the circumstances. In particular, unrepresented litigants run a greater risk of under-estimation of liability, with a corresponding under-compensation, because they are more likely to settle.

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128 *Brown v Cape Breton (Regional Municipality of)*, 2011 NSCA 32.

129 *Ibid* at para 67. See also *Churchill Falls (Labrador) Corp v Hydro-Québec*, 2018 SCC 46.

130 See *Waterman*, *supra* note 66 at para 56.

7. Conclusion

Proportionate share agreements are an effective tool for managing multi-party disputes and efficient administration of justice. They sever joint liability between settling and non-settling defendants. The liability of non-settling defendants is limited to their proportionate share of the plaintiff's loss. Under the current Canadian approach to Pierringer Agreements non-settling defendants get credit for over-settlement amounts to reduce, and in some cases, eliminate their proportionate share of liability for the plaintiff's loss. However, non-settling defendants bear no risk for the plaintiff's under settlement. Settling defendants benefit in cases of under-settlement, as there is no risk of a contribution claim by non-settling defendants. Plaintiffs assume the risk of under-settlement with no corresponding benefit of retaining over-settlement amounts. This paper argues that the detriment to settling plaintiffs justifies an exception to the compensation principle similar to the private insurance exception to the rule against double recovery.

Some Canadian appellate courts have sought to minimize the detriment to settling plaintiffs through liberal interpretations of the compensation principle in relation to cost deductions and in situations where the plaintiff is found contributorily negligent for their loss. These mechanisms are laudable and would likely avoid or at least minimize surplus settlement amounts in many cases. However, it is a piecemeal approach and can be unpredictable. It would be preferable to avoid the time and expense to engage in the accounting required to determine surplus settlement amounts under this approach. Instead, Canadian law should adopt a position of not bringing the settlement amount into the trial given that the liability of non-settling defendants is limited to their several liability as determined at trial. This approach would be fair to plaintiffs and settling defendants who would not have to subsidize non-settling defendants for their liability for the plaintiff's loss. It also disincentives uncooperative defendants, promotes the public interest in settlements, and accords with principles and purposes of private law.