Mary Carter – Friend or Foe?

By L. Craig Brown

For the past 15 years in Ontario, Mary Carter Agreements (MCA's) have been used infrequently but effectively in complex litigation as a risk management tool. For the plaintiff, they represent an opportunity to insure against an unfavourable result at trial through an alliance with a 'settling defendant' who participates in the trial in hope of reducing the amount that he has contributed to the settlement. For the settling defendant, the agreement caps exposure in damages (often a significant consideration where policy limits are at risk) and provides an opportunity to reduce the ultimate payout in the litigation by co-operating with the plaintiff against a non-settling or recalcitrant defendant.

In fact, MCA's are not very different from the hedge contracts which many Canadian businesses use to manage the risk of their commercial enterprise.

In addition to managing risk, MCA's have a proven track record of promoting global settlement of cases by realigning the forces at play in the litigation through the creation of an alliance between the plaintiff and one defendant.

The courts in Ontario, beginning with Justice Lee Ferrier in *Petty v. Avis Car Inc.* (1993), 13 O.R. (3rd) 725, accept the useful role of these unconventional settlement agreements in part because of the overarching need to promote settlement among litigants. Potential distortions of the trial process have been addressed repeatedly by trial judges, including Justice David Stinson in *Evans v. Jenkins [2003] O.J. 5796,* where a number of trial process issues arising from the existence of an MCA were satisfactorily resolved. For the administration of justice, MCA's have also proven a valuable tool. Judges have long acknowledged a vested interest in promoting settlement and shortening trials. MCA's have proven effective in achieving both these objectives.

This spring, the Ontario Court of Appeal, in *Laudon v. Roberts, 2009 ONCA 383,* (leave to appeal to the Supreme Court of Canada being sought) laid down some principles with respect to double recovery of damages that may have an effect on MCA's in the future. This is notwithstanding the fact that the agreement considered by the Court in *Laudon* was not an MCA at all. Justice Jean MacFarland noted that it lacked the essential ingredient of a Mary Carter-type contract, which is that the settling defendant shares in the plaintiff's recovery from the non-settling defendant on a basis determined by the terms of the agreement. The application of the *Laudon* decision to future MCA's is further confused by the unusual terms of the agreement in *Laudon*. Lacking any reimbursement provision, it nevertheless required the settling defendant to participate in the trial with the remaining or non-settling defendant. The basis for this participation was unclear since there was no dispute or 'lis' remaining between the settling and non-settling defendants as a consequence of the agreement. The contract in *Laudon* is really a Pierringer Agreement.

In *Laudon* the issue for the court was only the several liability of the non-settling defendant. Surprisingly, as a consequence of the deal struck between the plaintiff and the settling defendant, the non-settling defendant was relieved of the obligation of paying for his wrongdoing. Even more surprisingly, the plaintiff was held responsible for the non-settling defendant's costs.

Justice MacFarland began her analysis with the decision of the Supreme Court of Canada in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940. At paragraph 30 of the *Laudon* decision, Justice MacFarland identified the key issue in the double recovery debate as being whether the plaintiff "had established a loss or compensable damages". *Ratych* was a decision which narrowed a century old exception to the rule against double recovery. Where a plaintiff had the foresight to insure against future wage loss, the Courts have refused to give the benefit of that foresight to the tortfeasor who caused the loss. The majority in *Ratych*

limited that exception to private insurance schemes for which the plaintiff could prove he had paid a premium or to which he has made some contribution. In *Ratych*, since the wage replacement plan was a collective benefit which benefited all employees, the plaintiff could not show that he had 'given something up' in return for the benefit. In those circumstances, the majority found that a recovery of the wages from the tortfeasor would be a windfall to the plaintiff.

Justice MacFarland went on to consider a number of Canadian decisions in which settlements with one torteasor have been taken into account and, in effect, credited to the liability of the remaining tortfeason. In each case, the desire to avoid a double recovery or windfall to the plaintiff was given as a reason for permitting a tortfeasor to pay less than his share of the plaintiff's damages.

By taking this approach, the Court simply transfers the windfall from the victim to the tortfeasor. Unhappily for the plaintiff, Justice MacFarland applied this reasoning to the facts in *Laudon*.

The effect of the Laudon decision is that true MCA's between the parties may not qualify as an exception to the rule against double recovery – even when the result is to reward a recalcitrant defendant at the expense of the plaintiff. Although the decision in *Laudon* deals with a Perreinger Agreement, the rationale for the decision will clearly be used again when the issue of double recovery arises as the result of the application of an MCA.

In future cases, plaintiffs will argue a distinction between the double recovery cases cited in *Laudon* and cases involving a true MCA. When she contracts to limit her right of recovery with one defendant, the plaintiff does 'give up something'. She is securing the settling defendant's co-operation and contribution to her damages in return for a commitment to restrict her potential for recovery against that defendant and an agreement not to seek to recover from the non-settling defendant any sum that the non-settling defendant is entitled to

recover from the settling defendant by way of crossclaim. This feature of MCA's is analogous to the premium that is paid for a wage replacement plan and may serve to distinguish MCA cases from the restrictive reasoning in *Ratych* and *Laudon.*

At best, however, the future of MCA's in Ontario is less secure that it was before the *Laudon* decision (subject, of course, to the result of the plaintiff's application for leave to appeal to the Supreme Court). In order to avoid the application of the *Laudon* reasoning to an MCA, a number of features will have to be clear and obvious in the contract wording:

- the agreement must maintain the settling defendant's interest in the litigation – with a provision for the settling defendant to recover some or all of its contribution from the non-settling defendant;
- the parties should base the pay-back provision on a realistic assessment of the potential recovery in the case and, in particular, the damages likely to be assessed by the Court;
- the participation provision, which reimburses the settling defendant, may need to defer any recovery by the plaintiff until some or all of the settling defendant's contribution has been reimbursed;
- the wording of the Agreement should make it clear that the plaintiff is giving up a potential recovery against the settling defendant in order to control the risk of proceeding to trial, rather than emphasizing the prospect of recovering from the non-settling defendant some part of damages that might already have been paid by the settling defendant;
- greater emphasis should be placed on those parts of the agreement which call for co-operation at trial between the plaintiff and the settling defendant.

While it is true that under the traditional MCA plaintiffs enjoyed the possibility of a recovery exceeding the damages assessed at trial, there are many factors which

justify that result despite the concern about double recovery expressed in Laudon. Firstly, double recovery is only a possibility. In an MCA the plaintiff assumes a risk of under compensation. The motivation for assuming that risk includes some certainty of recovery, a shorter less expensive trial, and the advantage of facing one fewer defence counsel. In the event that the settling defendant is found to be more liable than contemplated in the MCA the plaintiff may be under compensated. Should that occur, the non-settling defendant is not called upon to pay more than its several liability. Yet in Laudon the non-settling defendant received a windfall from the deal struck between the other parties. Without some potential reward in consideration for the risk taken by the plaintiff, the value of MCA's is significantly diminished.

Secondly, as between a tortfeasor and an innocent plaintiff, equity favours bestowing any benefit accruing from the MCA on the plaintiff rather than the wrongdoer. The courts must encourage settlement and should not promote incentives that reward that most stubborn defendant.

Unhappily the focus on double recovery in Laudon appears to have occurred without discussion of the policy issues associated with the use of MCA's and without considering the important strengths of MCA's - strengths which may well outweigh any negative aspect associated with the potential for windfall to the plaintiff.

Until *Laudon*, MCA's were seen as an opportunity for a plaintiff and a co-operating defendant to increase the risk of the litigation to a non-co-operative defendant and share the proceeds of a successful prosecution of the plaintiff's claim. It is likely that MCA's in the future will emphasize co-operation between the contracting parties in order to bring pressure to bear on the recalcitrant party. They will be most valuable to the contracting parties where co-operation with one defendant will result in a substantial increase in the damages likely to be awarded at trial. The potential for reimbursement of the settling defendant will still

be an appealing feature of MCA's, but the plaintiff may have lost the possibility of reward beyond his global provable damages.

Mary Carter Agreements have played a small but important role in encouraging settlement and in levelling the playing field between plaintiffs and defendants in complex litigation. Anything that can be done to encourage their use in appropriate cases will ultimately benefit all litigants and reduce the burden placed by complex trials on the limited resources of the Courts.