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MARY CARTER MEETS THE JURY

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Defining Characteristics of a Mary Carter Agreement

1. Usually between the Plaintiff and the less liable defendant
2. Involves payment of a sum certain to the Plaintiff
3. Caps liability of the settling defendant
4. Requires that the Plaintiff treat the non-settling defendant as severally liable
5. Provides for sharing of Plaintiff's recovery against non-settling defendant
6. Requires that the settling defendant participate in the trial

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Public Policy

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

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

FERRIER J. IN PETTEY v. AVIS CAR INC. 130.R. (3rd) 725

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The Problem

“...where a plaintiff and one defendant enter into a Mary Carter agreement, there is a serious risk of distorting the judicial process. Former adversaries who had theretofore resisted allegations of fault and damage, now become allies in asserting those propositions to the detriment of another defendant. The normal dynamic of the adversarial process is, to some extent, skewed.”

(Stinson J. in Evans v. Jenkins)

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The Players

The Partners

- i. Should have common goals and strategies
- ii. Remember: It's a Partnership!
- iii. You must be able to trust your Partner
- iv. Your partner needs to be a skilled advocate
 - *don't let bad counsel disappear*

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The Players

The Target Defendant

- i. Will view itself as the victim of a conspiracy
- ii. Will try to persuade the judge and the jury that it is a victim of conspiracy

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The Players

The Judge

- i. Will be looking for ways to restore 'balance' and 'fairness' to the process
- ii. Will usually err on the side of the non-settling defendant

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The Agreement

Format

- i. Is usually and necessarily complex
- ii. Is usually and necessarily long
- iii. Requires mathematical matrix analysis

Pre-ambule and Other Narrative Bits

- i. Should be as neutral and fair minded as possible
- ii. Should avoid phrases such as: "...cooperate to establish liability against defendant X."

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Disclosure Obligations

To the Target Defendant

- i. “In my view, subject to redacting to delete particular amounts, the (entire) Mary Carter Agreement must be disclosed to counsel for the non-settling defendant and to the court. Only in this fashion can counsel and the court properly assess and understand the new dynamic of the litigation and ensure that the trial proceeds in a fair fashion.”

(Stinson J. in Evans v. Jenkins)

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Disclosure Obligations

To the Judge

- i. Same as to the non-settling defendant
- ii. This may change after the trial when costs are being argued

To the Jury

- i. Range of possibilities – Resch at one end and Hope at the other
- ii. Practice in Toronto is to provide a Summary of the Agreement

Redacted Copies

- i. Should be prepared immediately for distribution to the non-settling defendant and the Court
- ii. Should only remove numbers (quantities and percentages)

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The Summary

- a) Level of Detail
 - *see example in material*
- b) Language
- c) Numbers
- d) Costs

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The Explanation

- a) By the Judge
 - *see example in material*
- b) By the Partners
- c) By the Target Defendant

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Trial Dynamics

- a) Communication between Partners
- b) Conduct of your Partner
- c) Calling and Cross-examining witnesses

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"I'm going to ask the jury to hold its applause until all the evidence has been introduced."