CITATION: Cadieux et al. v. Cadieux et al., 2024 ONSC 1938
COURT FILE NO.: CV-12-54183
DATE: 2024/02/16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KALOB CADIEUX by his litigation guardian LUCIE SAINT-PHARD, and LUCIE SAINT-PHARD personally, and JAKIN CADIEUX by his litigation guardian LUCIE SAINT-PHARD.

Plaintiffs

AND:

PATRICK CADIEUX and SCOTT RAY and KENWORTH TORONTO LEASING LTD. and UNITED PETROLEUM TRANSPORT LTD. and CITY OF OTTAWA and INTACT INSURANCE COMPANY and FEDERATED INSURANCE COMPANY OF CANADA.

Defendants

BEFORE: A. Kaufman J.

COUNSEL: Darcy R. Merkur and Ava Williams, Counsel for the Plaintiffs

David A. Zuber, Counsel for the Defendants Scott Ray and Kenworth Toronto Leasing Ltd. and United Petroleum Transport Ltd.

Stephanie Doucet, Counsel for the Defendant, the City of Ottawa

W. Colin Empke, Counsel for the Defendant, Patrick Cadieux

HEARD: February 16, 2024

RULING

[1] The central issue on this motion is whether the court should approve a *Pierringer* agreement pursuant to which a non-settling defendant could potentially remain as the sole party with the financial means to satisfy a judgment rendered against all non-settling defendants.

[2] For several reasons, endorsing the *Pierringer* agreement is justified in this matter. First, the alleged prejudice to the solvent non-settling defendant may not occur. Second, the court was not provided with any case or other authority to support the proposition that a defendant can recover from another defendant any shortfall resulting from the insolvency of another jointly and severally liable defendant. Third, any potential alleged prejudice to

the non-settling defendants must be balanced against the overarching policy objective of promoting settlements.

[3] The *Pierringer* agreement is approved, and the plaintiffs are granted leave, in part, to amend the existing amended statement of claim ("the Pleading").

Factual Overview

The Action

[4] On April 25, 2010, Patrick Cadieux was transporting his two sons, Kalob and Jakin Cadieux, aged 4 and 6, respectively, to a park. Mr. Cadieux proceeded into the intersection of Fallowfield and Merivale Roads when faced with a red traffic light. Based on uncontested expert evidence, the light for Mr. Cadieux's direction of travel turned red eight seconds before his minivan entered the intersection.

[5] Upon entering the intersection, the minivan was struck by a tractor-trailer driven by Scott Ray, who is noted in the police report as "driving properly". United Petroleum Transport Ltd. leased the tractor-trailer from Kenworth Toronto Leasing Ltd. In these reasons, Scott Ray, Kenworth Toronto Leasing Ltd., and United Petroleum Transport Ltd. are referred to collectively as "United Petroleum".

[6] Kalob and Jakin each allege they sustained catastrophic injuries, including brain trauma. The plaintiffs' Cost of Care report assesses Kalob's future care expenses at over $14,000,000.

[7] The action was commenced on April 25, 2012. The plaintiffs seek damages totaling $17,000,000. In addition to the allegations of negligence against Mr. Cadieux and United Petroleum, the plaintiffs allege that the City of Ottawa ("the City") was negligent in the design of the subject intersection. The plaintiffs allege that the City's negligence caused or contributed to the collision.

[8] The claims against Intact Insurance Company and Federated Insurance Company of Canada have each been dismissed.

The Defendants' Third-Party Limits

[9] United Petroleum's insurance policy has third-party limits of $5,000,000. The third-party limits for Mr. Cadieux's motor vehicle insurance policy are $2,000,000. The City is self-insured, the practical effect of which is that the City is not subject to any third-party limits.

The Settlement

[10] On October 27, 2023, the plaintiffs reached a settlement with the City, the terms of which are reduced to writing in a *Pierringer* agreement ("the Agreement"). Except for the monetary amount of the settlement, the terms of the Agreement were communicated to all counsel on October 30, 2023.

[11] Pursuant to the Agreement, the claims against the City are extinguished while the claims against the non-settling defendants continue. The Agreement requires the plaintiffs to seek leave to amend their Pleading on the following terms:

> "[S]o that the claims advanced by the Plaintiffs against the Remaining Defendants will only be in respect of any collective joint and several liability of the Remaining Defendants and the Plaintiffs shall only seek recovery of damages as against the Remaining Defendants to the extent of the Remaining Defendants' degree of fault for any damages that may be adjudged to have been sustained by the Plaintiffs. [Emphasis added.]

The Issues

[12] This motion raises two primary issues. First, should the court withhold approval of the Agreement because of prejudice United Petroleum alleges it will suffer if the Agreement is approved? Second, are the plaintiffs entitled to leave to amend the Pleading and, if so, on what terms?

1. The Request for Approval of the Agreement

[13] For the following reasons, the Agreement is approved. First, the prejudice that United Petroleum alleges may never materialize. Second, refusing to approve the Agreement would undermine the policy objective of promoting settlements. Third, once the actual consequences of the Agreement are known, United Petroleum may be in a position to pursue remedies to minimize or eliminate the prejudice it alleges it will suffer.

Pierringer Agreements

[14] Relying on *Rains v. Molea*, the plaintiffs submit that it is not always necessary for a plaintiff to obtain court approval of a partial settlement; it may, however, be appropriate in certain circumstances.[1] United Petroleum argues that courts should decline to give effect to *Pierringer* agreements where an objecting party asserts prejudice, otherwise "the Court becomes merely the affixer of a rubber stamp."[2]

[15] The Agreement is explicitly subject to court approval.

[16] The existence and terms of a *Pierringer* agreements must be disclosed in a timely manner.[3] Invariably, the implementation of a *Pierringer* agreement requires plaintiffs to amend their pleading. On the plaintiff's motion for leave to amend, a non-settling defendant who alleges prejudice from such an agreement, is able to make their position known to the court.

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[1] 2012 ONSC 4906, at para. 15.
[2] *Murphy Canada Exploration Co. v. Novagas Canada Ltd.*, 2009 ABQB 455, 11 Alta. L.R. (5th) 148, at para. 61.
[3] *Singh v. Mann*, 2021 ONSC 8249.

[17] When considering a motion to approve a *Pierringer* agreement and the related pleading amendments, the court must assess prejudice to the objecting party.[4] The alleged prejudice may be procedural – for example, in the form of the loss of discovery rights. The alleged prejudice may also be substantive. On the motion before this court, United Petroleum submits that it will suffer substantive prejudice if (a) the Agreement is approved, and (b) the plaintiffs are granted leave to amend the Pleading.

Pierringer Agreements and Non-Settling Defendants

[18] Pursuant to a *Pierringer* agreement, a plaintiff settles with one or more of the named defendants, with the consequence that the settling defendants are no longer required to defend the action against them. The plaintiff proceeds to trial against only the non-settling defendants.[5] The settling defendants agree to pay a sum of money and they are no longer parties to the action. The plaintiff expressly waives their right to claim from the non-settling defendants any portion of the loss ultimately attributed at trial to the fault of the settling parties.

[19] The amendments which flow from a *Pierringer* agreement include that the plaintiff restricts their claims against the non-settling defendants to the losses the non-settling defendants have caused. With the plaintiffs limiting the balance of their claims in this manner, the settling defendants are shielded from any claims by the non-settling defendants for contribution and indemnity.[6]

[20] Pursuant to the Agreement, the plaintiffs agree to restrict their claims against the non-settling defendants (United Petroleum and Mr. Cadieux) to their "collective joint and several liability".

[21] United Petroleum's concern stems from the fact that, under s. 1 of the *Negligence Act*,[7] it may end up having to pay not only its several share of damages, but also a portion of Mr. Cadieux's.

Joint and Several Liability of the Non-Settling Defendants

[22] Section 1 of the *Negligence Act* states as follows:

> Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and

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[4] *Murphy*, at para. 36.
[5] *Pierringer v. Hoger* (1963), 124 N.W.2d 106 (U.S. Wis. S.C.).
[6] *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 23.
[7] R.S.O. 1990, c. N.1.

> indemnify each other in the degree in which they are respectively found to be at fault or negligent.

[23] This section allows plaintiffs to recover all damages from any one of multiple persons whose fault or negligence caused the damages. However, among the wrongdoers, each is required to contribute to the others based on their respective degree of fault.

[24] United Petroleum argues that in *Sable*, the Supreme Court did not hold that non-settling defendants are invariably jointly liable, but rather that they *may be* jointly liable: "There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other".[8]

[25] In para. 6, the Supreme Court describes the general implications of *Pierringer* agreements. Interpreted correctly, para. 6 indicates that in specific circumstances, such as when two defendants cause distinct injuries and the damages arising from the distinct injuries are divisible, each tortfeasor is liable for only the damages they directly caused.

[26] In *Athey v. Leonati*, the Supreme Court confirms that where two defendants cause distinct damages to a plaintiff, each defendant is only responsible for the damages which they caused: "Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule."[9]

[27] In *Tort Law*, Professor Klar explains that "contribution between tortfeasors is only a concern when the *same injury* has been caused by the various parties. Where each party caused different injuries, each is responsible in full for that injury, and contribution cannot be claimed."[10]

[28] The injuries to Kalob and Jakin Cadieux are neither distinct nor divisible. The collective negligence of the City, Patrick Cadieux, and United Petroleum may have contributed to the plaintiffs' injuries and losses. Pursuant to s. 1 of the *Negligence Act*, those defendants who caused or contributed to their losses by their fault or neglect are jointly and severally liable.

The Alleged Prejudice

[29] United Petroleum argues that the Agreement (a) potentially exposes it to liability for any portion of a judgment that Mr. Cadieux is unable to satisfy, and (b) precludes United Petroleum from being able to seek contribution and indemnity from the City.

[30] That form of alleged prejudice is grounded on the assumption that it is possible for one defendant to recover from another defendant any shortfall resulting from the insolvency of another jointly and severally liable defendant. United Petroleum has not, however,

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[8] *Sable*, at para. 6.
[9] [1996] 3 S.C.R. 458, at para. 24.
[10] Lewis N. Klar, K.C., *Tort Law*, 7th ed. (Toronto: Thomson Reuters, 2023), p. 699.

provided the court with any case or other authority in support of that argument, and such a remedy is not available under the *Negligence Act*.

[31] Section 1 of the *Negligence Act* allows a successful plaintiff to recover judgment for all damages resulting from negligence from any tortfeasor "even if the other tortfeasors were not sued or are impecunious" (emphasis added).[11] The Court of Appeal for Ontario recently stated the following:

> [W]here more than one wrongdoer has caused or contributed to the plaintiff's injury, they are each liable to compensate the plaintiff in full, subject only to the rule that the plaintiff cannot recover more than 100% of their damages… In practical terms, this means the plaintiff can recover 100% of their losses from any defendant who caused or contributed to the particular injury regardless of the degree of fault of that defendant, and regardless of whether others, parties or non-parties, were also at fault.[12]

[32] Moreover, the Court of Appeal is unequivocal when stating that compensating a plaintiff takes priority over the potential prejudice to a defendant who might bear the entire award:

> The entire risk that a wrongdoer, liable to pay 100% of the plaintiff's damages while not 100% at fault, will be able to actually recover indemnity from another wrongdoer, is on that first wrongdoer — not the plaintiff. If the second wrongdoer is not pursued by cross-claim, third party action or separate action, or if the second wrongdoer pursued is not creditworthy or insured, the first wrongdoer will still have to pay 100% of the plaintiff's damages and recover no indemnity.[13] [Emphasis added.]

[33] In *The Owners of Strata Plan KAS3204 v. Navigator Development Corporation*,[14] the British Columbia Supreme Court concluded that, under that province's *Negligence Act*,[15] a wrongdoer's claim for contribution from a second wrongdoer cannot exceed the second wrongdoer's proportionate fault.

[34] *Navigator* involved an application by Greyback, a defendant in a third party claim in a construction dispute. Three defendants in the main action commenced third party claims against Greyback for contribution and indemnity. The plaintiff entered into *Pierringer* agreements with certain other defendants.

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[11] *Chinook Group Ltd. v. Foamex International Inc*. (2004), 72 O.R. (3d) 381 (S.C.), at para. 6.
[12] *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181, 54 C.C.L.T. (4th) 183, at para. 47, citing *Athey*. See also *Endean*, at para. 72.
[13] *Endean*, at para. 49.
[14] 2020 BCSC 1954, 18 C.L.R. (5th) 96.
[15] R.S.B.C. 1996, c. 333.

[35] Greyback sought a declaration that the settlements extinguished the joint and several liability of the non-settling defendants, leaving each of the non-settling defendants liable only for the portion of the loss ultimately attributed to them. As does United Petroleum before this court, Greyback argued that it would be unjust if the *Pierringer* agreement did not extinguish the joint liability of the non-settling defendants because they will be "left holding the bag" for Navigator, a defendant assumed to be insolvent.

[36] The prejudice Greyback alleged was identical to that alleged by United Petroleum: "the extrication of the Settling Parties from the litigation prejudices the contribution rights of the remaining defendants by narrowing the pool of wrongdoers that could theoretically share the burden of the part of the Plaintiff's loss ultimately attributed to Navigator's fault".[16]

[37] The British Columbia Supreme Court concluded that Greyback misconceived the nature of a contribution claim. Citing s. 4(2) of that province's *Negligence Act* – the pertinent wording of which mirrors s. 1 of the Ontario *Negligence Act* – the court determined that when there are multiple wrongdoers, one of whom is insolvent, a wrongdoer who has paid more than its share of the damages is not entitled to seek contribution from another solvent wrongdoer for the insolvent wrongdoer's share. The liability of the solvent wrongdoer to contribute is restricted by s. 4(2)(b) to "the extent of [their] proportionate share of the fault".[17] In essence, if the plaintiff recovers the entirety of their loss from one wrongdoer and another is insolvent, the paying wrongdoer assumes the insolvent wrongdoer's share. The insolvent wrongdoer's share is not distributed amongst the other solvent wrongdoers.

[38] United Petroleum argues that principles of restitution may ground a claim for distribution, among solvent wrongdoers, of an insolvent wrongdoer's share of damages. The court will proceed under the assumption that there may be a mechanism allowing a tortfeasor who has paid more than its proportionate share of the plaintiff's loss to compel another tortfeasor to contribute more than its proportionate share. Whether such a remedy can be pursued should either be addressed through legislative action or brought before a court when the factual basis of United Petroleum's hypothetical scenario arises.

The Potential Outcomes at Trial

a) United Petroleum's Example

[39] The prejudice which United Petroleum alleges it may suffer arises in one possible scenario. There are, however, three other potential trial outcomes, none of which give rise to prejudice to United Petroleum. One of these alternate scenarios could even prove advantageous to it.

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[16] *Navigator*, at para. 18.
[17] *Navigator*, at para. 23.

[40] As an example of the prejudice it alleges it will suffer if the Agreement is approved, United Petroleum provided the following scenario:

- the plaintiffs' damages are assessed at $10,000,000;
- Mr. Cadieux is found to be 80 percent at fault. He has third party limits of $2,000,000 with no other assets; and
- the City and United Petroleum are each found to be 10 percent at fault.

[41] Based on United Petroleum's example, if the Agreement is not approved, then the plaintiffs will be in a position to collect $2,000,000 from Mr. Cadieux, and both the City and United Petroleum will be liable for their respective 10 percent shares ($1,000,000 each) of the $10,000,000 in damages awarded to the plaintiffs. Assuming the remaining $6,000,000 attributed to Mr. Cadieux could be evenly split between United Petroleum and the City, United Petroleum would be liable for a total of $4,000,000.

[42] In the same example, but with the Agreement approved, the plaintiffs would look to the non-settling defendants for their joint liability of $9,000,000 ($10,000,000 minus the City's several $1,000,000 share). Assume the plaintiffs recover $2,000,000 from Mr. Cadieux. They would look to United Petroleum for the $7,000,000 which remain owing. United Petroleum submits that, in this scenario, it would not be entitled to seek contribution from the City towards the $7,000,000 United Petroleum is called upon to pay in satisfaction of the judgment.

[43] Under its example, United Petroleum's prejudice corresponds to an additional liability of $3,000,000. However, pursuant to the principle against double recovery further elaborated below, that additional liability may be reduced by the amount the plaintiffs received from the City in the settlement that exceeds its proportional share of liability.[18]

b) Other Potential Outcomes

[44] United Petroleum correctly asserts that a potential outcome at trial is that all the defendants (Mr. Cadieux, United Petroleum, and the City) are found to share responsibility for the plaintiffs' injuries. There are three other potential outcomes at trial: (1) United Petroleum is not liable but the City and Mr. Cadieux are; (2) United Petroleum and the City are not liable and Mr. Cadieux is fully at fault; and (3) United Petroleum and Mr. Cadieux are liable and the City is not. Under the first two scenarios, the Agreement does not prejudice United Petroleum at all, and under the third, its existence benefits it.

[45] None of the defendants contests that Mr. Cadieux, as a driver who ran a red light, is likely to be found at trial to be primarily responsible for the collision. Leaving that point aside, I will address the three potential outcomes described in the preceding paragraph.

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[18] By way of example, if the City settled for $2,000,000 and its share of fault was 10 percent ($1,000,000), the non-settling defendants are entitled to a $1,000,000 credit to prevent the plaintiffs from being overcompensated.

[46] Under scenarios (1) and (2), United Petroleum would bear no liability for the accident; its liability is zero, and United Petroleum is not prejudiced in any way.

[47] Under scenario (3) United Petroleum is found to have some degree of fault (in addition to Mr. Cadieux) and there is no liability against the City. Under this scenario, United Petroleum benefits from the Agreement because, pursuant to the policy against double recovery, any risk associated with a *Pierringer* settlement falls on the plaintiffs. If the plaintiffs "under-recover" from the City, they cannot recoup that shortfall from the non-settling defendants. Conversely, if the plaintiffs "over-recover" from the City, they cannot retain the surplus.

[48] If the City of Ottawa is absolved of fault, United Petroleum can offset the settlement amount the plaintiffs received from the City of Ottawa against any damage award. By way of illustration, in *Laudon v Roberts*,[19] the plaintiff entered into a *Mary Carter* settlement with one defendant and received $365,000. The jury awarded him total damages of $312,000. The non-settling defendant was found to be responsible for $122,000, but since the plaintiff had already received over 100 percent of the jury award, the non-settling defendant was not required to make any payment.

[49] Using United Petroleum's scenario described at para. 40, above, assume the following:

- the City settled with the plaintiffs for $2,000,000;[20]
- the City was determined not to be at fault;
- Mr. Cadieux was 80 percent at fault, and United Petroleum bore the remaining 20 percent of fault.

[50] Without the Agreement, Mr. Cadieux and United Petroleum would be jointly and severally liable for the entire $10,000,000. The plaintiffs would receive Mr. Cadieux's $2,000,000 policy limits and $8,000,000 from United Petroleum. With the Agreement, United Petroleum could offset the $2,000,000 settlement, requiring it to pay only $6,000,000.

Proposed Middle Ground.

[51] United Petroleum submits that the court could endorse the Agreement with certain conditions. For example, United Petroleum proposes that if Mr. Cadieux fails to satisfy his share of any proven liability at trial, the plaintiffs would undertake not to seek from United Petroleum the portion of the unfunded damage award that the City would have contributed if it had remained in the action. The Saskatchewan Court of Queen's Bench approved a *Pierringer* agreement with a similar condition in *Pchelnyk et al v. Carson et al*.[21]

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[19] 2009 ONCA 383, 308 D.L.R. (4th) 422, leave to appeal refused, [2009] 3 S.C.R. viii (note).
[20] The settlement amount has not been disclosed to the court and the $2,000,000 figure is used as an example only.
[21] 2017 SKQB 181, at para. 28.

[52] The Saskatchewan *Contributory Negligence Act*[22] ("*CNA*") differs from Ontario's *Negligence Act* in a crucial respect. Section 3.1 of the *CNA*, titled "Apportionment of uncollectable contribution" expressly empowers the court to "make an order apportioning the contribution that cannot be collected among the other persons found at fault, proportionate to the degrees in which they have been respectively found to have been at fault." The effect of this section was to require the plaintiff to share the effect of any shortfall.

[53] The central issue in *Pchelnyk* was whether the court could make an order under s. 3.1 against a "non-party" as the settling defendant would be removed from the litigation. The court opined that s. 3.1 of the *CNA* likely permitted assessing liability against a non-party, and approved the *Pierringer* agreement by imposing a condition limiting the plaintiff's recovery against the non-settling defendants to an amount not exceeding what they would have to pay if the settling defendant had been a party at the trial of the action. The plaintiffs in *Pchelnyk* conceded that s. 3.1 of the *CNA* would have mandated that same result.[23] Moreover, s. 3.1 fully addressed the non-settling defendant's concerns,[24] which are identical to United Petroleum's in this case.

[54] Because Ontario lacks an equivalent to s. 3.1 of the *CNA*, I decline to approve the suggested middle ground, as doing so would essentially rewrite the Agreement. The middle ground would compel the plaintiffs to potentially forgo a significant portion of their damages, a situation not contemplated by the Agreement.

[55] In conclusion, I find that the form of prejudice alleged by United Petroleum is speculative. Neither the parties to the action nor the court are in a position to forecast the trial's outcome – specifically the apportionment of liability between defendants. Based on the limited evidence before the court, there are several potential outcomes at trial, and it is possible that the prejudice United Petroleum alleges will not arise. It is also possible that the outcome at trial is such that United Petroleum will benefit from approval of the Agreement. Against this potential prejudice, the court must weigh the countervailing policy of promoting settlement, which would be undermined if the court were to refuse to approve the Agreement in this case.

Pierringer Agreements and the Policy Objective of Promoting Settlement

[56] *Pierringer* agreements serve as a valuable instrument for fostering settlements, a principle upheld by courts across all levels on the basis that there is an overriding public interest in encouraging pre-trial settlement of civil cases. Settlements have been recognized as fundamental to the effective administration of civil justice.[25] They contribute to reducing

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[22] R.S.S. 1978, c. C-31.
[23] *Pchelnyk*, at para. 13.
[24] *Pchelnyk*, at para. 14.
[25] *M. (J.) v. B. (W.)* (2004), 71 O.R. (3d) 171 (C.A.), at para. 65.

"litigation's stubbornly endemic delays, expense and stress", thereby promoting access to justice.[26]

[57] The promotion of settlements holds particular significance in complex multi-party litigation. As articulated by Professor Knapp in his 1994 article "Keeping the Pierringer Promise: Fair Settlements and Fair Trials", the civil litigation system requires a mechanism that permits defendant-by-defendant "piecemeal" settlements:

> Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others. Consequently, our civil litigation system needs a mechanism that permits defendant-by-defendant, "piecemeal" settlement of multi-defendant civil lawsuits.[27]

[58] Complicated civil trials consume enormous judicial resources, which are already severely strained. In *Hameed* v. *Canada (Prime Minister)*, the Federal Court quoted from a letter from the Chief Justice of Canada and the Canadian Judicial Counsel to the Prime Minister highlighting the urgent need to promptly fill judicial vacancies.[28] The Chief Justice decried the current situation, which he characterized as "untenable". He wrote that, by prioritizing serious criminal matters over civil matters, the "justice system is consequently at risk of being perceived as useless for civil matters."

[59] For instance, in Ottawa, while ten trials may be slated to commence simultaneously, the available judicial resources suffice for only one. Historically, the court anticipates that nine of these cases will settle. The system's functionality hinges on consistent settlement rates, and any disruption to this delicate equilibrium could grind the civil justice system to a halt.

[60] Recognizing the pivotal role of settlements in justice administration, courts should not decline approval of *Pierringer* agreements absent just and substantive cause.[29] If the court were to reject a *Pierringer* agreement in the circumstances of this case, parties to civil actions would be discouraged from engaging in multi-party settlement negotiations. Negotiating settlements requires a significant investment of time and resources. Civil parties would be disincentivized from undertaking such efforts if the hard-earned settlement risked unraveling due to a non-settling defendant's attempts to forestall hypothetical prejudice that may never materialize.

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[26] *Sable*, at paras. 1, 11.
[27] Peter B. Knapp, (1994) 20:1 Wm Mitchell L Rev 1 at 5.
[28] 2024 FC 242, at para. 1.
[29] *M. (J.)*, at para. 67.

Potential Other Recourse

[61] In *M. (J.)*, a non-settling defendant named Dr. Kerr found himself in a situation similar to that of United Petroleum. Dr. Kerr expressed concern about the potential inability of the other non-settling defendants, excluding himself, to satisfy any judgment issued against them. He requested a court order to allocate the liability of the settling defendants at trial, contending that such an order was necessary to allow him to argue at trial that his exposure to any shortfall in the plaintiffs' damages recovery resulting from the insolvency of another non-settling defendant should be proportionally reduced based on the fault of the settling defendants.

[62] The Court of Appeal found Dr. Kerr's argument "compelling" and held that courts could apportion the liability of the settling defendants even if they were no longer parties to the action. The court did not decide whether the argument Dr. Kerr wished to advance was available under Ontario law, but it did not preclude its consideration either. I note that, despite Dr. Kerr being in the same position as United Petroleum, the Court of Appeal found that prejudice arising from the full implementation of the settlement had not been shown.[30]

[63] If there were a remedy available to litigants in United Petroleum's position, it would be preferable to address the prejudice at trial. The court would benefit from determinations regarding liability, fault apportionment, and damages, thereby enabling a comprehensive assessment of the asserted prejudice.

2. Amendment of the Pleading

[64] United Petroleum objects to the plaintiffs' proposed amendments to the Pleading. It contends that the City should remain in the style of cause and the allegations against it should not be removed. I concur with United Petroleum on this issue.

[65] Paragraph 7(c) of the *Agreement* provides that the court shall have full authority "to adjudicate upon the apportionment of liability, if any, between all defendants named in the Statement of Claim, whether or not the Settling Defendant remain a party."

[66] United Petroleum argues that retaining references to the City, and the allegations made against it, will enable the trial judge to appreciate the claim as it was originally framed.

[67] To apportion fault for the plaintiffs' injuries, the court should know what was alleged against each of the defendants. It is possible to give effect to the Agreement by removing the claims against the City, while at the same time retaining the allegations that were made against it.[31] Proceeding in this manner would give the trial judge a truer picture of the original claim.

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[30] *Ibid*.
[31] See e.g. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2010 NSSC 19, 287 N.S.R. (2d) 113, at para. 50.

Disposition

[68] The court approves the Agreement and grants leave to amend the Pleading in accordance with these reasons.

[69] As agreed by the parties, costs are awarded to the plaintiffs in the amount of $7,500 inclusive of disbursements, plus applicable tax thereon, payable by United Petroleum within 30 days.

Justice A. Kaufman

Date: April 2, 2024

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KALOB CADIEUX by his litigation guardian LUCIE SAINT-PHARD, and LUCIE SAINT-PHARD personally, and JAKIN CADIEUX by his litigation guardian LUCIE SAINT-PHARD

– and –

PATRICK CADIEUX and SCOTT RAY and KENWORTH TORONTO LEASING LTD. and UNITED PETROLIUM TRANSPORT LTD. and CITY OF OTTAWA and INTACT INSURANCE COMPANY and FEDERATED INSURANCE COMPANY OF CANADA.

RULING

Mr. Justice Alexandre Kaufman

Released: April 2, 2024