NOVA SCOTIA COURT OF APPEAL
Citation: *MacNeil v. Kajetanowicz*, 2019 NSCA 35

Date: 20190509
Docket: CA 474319
Registry: Halifax

Between:

Alexander MacNeil, by his litigation guardian Tania Bond-MacNeil

Appellant

v.

Andrzej Kajetanowicz

Respondent

Judge: The Honourable Justice Joel E. Fichaud
The Honourable Justice J. Edward (Ted) Scanlan (dissenting)

Appeal Heard: December 5, 2018, in Halifax, Nova Scotia

Subject: Jury trials – burden of proof – *Pierringer* Agreements

Summary: The child Plaintiff (the Appellant) suffers from congenital hypothyroidism. Early treatment would have minimized the neurological damage. Immediately after birth, a blood screen detected an abnormality. But for over a year, nothing was done to diagnose or treat the condition.

The child sued two hospitals and the Respondent, a neonatologist at the birth hospital. Shortly before the scheduled jury trial, the Plaintiff settled with the two hospitals. The settlement was formalized in a *Pierringer* Agreement, which extinguishes the Plaintiff's claim against the settling Defendants and leaves the remaining Defendant responsible only for that Defendant's share, if any, of the Plaintiff's loss. If the remaining Defendant is found to be negligent, the trier of fact must apportion responsibility among the settling and remaining Defendants. The settlement

left the Respondent as the only remaining Defendant facing trial.

The judge charged the jury that the Plaintiff had the burden to prove that each settling Defendant was negligent. The charge included further statements that the Plaintiff submitted the settling Defendants were negligent and that the neonatologist took no position on the settling Defendants' fault. The jury found that the neonatologist was not negligent, and the judge dismissed the action.

The Plaintiff appealed to the Court of Appeal.

Issues: *Issue # 1*: For liability or apportionment, did the Plaintiff have the burden to prove negligence by the settling Defendants?

Issue # 2: If not, did the misdirection, viewed reasonably in the context of the whole charge, cause a substantial wrong or miscarriage of justice, meaning there should be a new trial?

Result: The Court of Appeal allowed the appeal, overturned the dismissal of the action, and ordered a new trial.

Issue # 1: Both parties had equal access to evidence from the settling Defendants. Consequently, the burden was on the party who made the assertion.

As to liability: The Plaintiff's claims against the settling Defendants were extinguished by the settlement. The Plaintiff's theory of the Defendant neonatologist's liability did not rest on any allegation of failures or fault by the settling Defendants. The Defendant neonatologist's theory of defence to liability, on the other hand, rested squarely on his allegations of failures by a settling Defendant. The Defendant neonatologist had the burden to establish his allegations.

As to *Pierringer* apportionment: Under the authorities, if the Defendant neonatologist was liable, the burden to show that the settling Defendants were at fault, and their degree of fault,

was with the Defendant neonatologist.

Consequently, for both liability and apportionment, the judge erred in law by charging the jury that the burden rested with the Plaintiff.

Issue #2: The misdirection on burden impacted the issue of liability, and there is a reasonable prospect that the outcome was affected. Consequently, there was a substantial wrong or miscarriage of justice, meaning there should be a new trial.

Scanlan J.A, dissenting: Although the trial judge did err when instructing the jury as to the burden of proof in relation to the *Pierringer* Agreement, I am not satisfied that the error could have reasonably resulted in a miscarriage of justice. The Respondent's defence stood alone, and was based on his evidence as to what he did, and why he did it. It was not necessary for his defence that he prove the 'settling parties' were negligent as part of his defence.

I would have dismissed the appeal.

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Andrzej Kajetanowicz
Respondent

Judges:	Farrar, Fichaud and Scanlan JJ.A.
Appeal Heard:	December 5, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed and new trial ordered, decision on costs reserved, per reasons for judgment of Fichaud J.A., Farrar J.A. concurring, Scanlan J.A. dissenting
Counsel:	Raymond Wagner, Q.C., Kate Boyle, Lyndsay Jardine and Nick Hooper (articled clerk) for the Appellant Brian Downie, Q.C. and Andrea Pierce for the Respondent

Reasons for Judgment

[1] The child Plaintiff suffers from congenital hypothyroidism. Early treatment would have minimized the neurological damage. Immediately after birth, a blood screen detected an abnormality. But for over a year nothing was done to diagnose and treat the condition. By then it was too late.

[2] The child, by his litigation guardian, sued two hospitals and the Respondent, a neonatologist at the birth hospital. A month before the scheduled jury trial, the Plaintiff settled with the hospitals. The settlement was formalized by a *Pierringer*

Agreement. A *Pierringer* Agreement extinguishes the plaintiff's claim against the settling defendant and leaves the remaining defendant responsible only for its proportionate share, if any, of the plaintiff's loss. This means, if the remaining defendant is negligent, the trier of fact must apportion any fault between the remaining and settling defendants.

[3] Here, the settlement left the neonatologist as the sole Defendant facing trial. Throughout the trial, the presiding judge voiced discomfort at how to approach apportionment of fault involving non-parties. The Plaintiff's theory against the neonatologist did not depend on fault by the settling hospitals. In contrast, the neonatologist's theory of defence squarely relied on failures by a settling Defendant. Over the Plaintiff's objections, the judge charged the jury that "the burden remains upon the Plaintiff to prove that each of these [settling] hospitals is negligent". The charge assigned no burden to the Defendant. The jury found that the neonatologist was not negligent, after which the judge dismissed the claim.

[4] The Plaintiff appeals. The main questions are whether the Plaintiff had the burden, for liability or apportionment, to prove negligence by the settling Defendants and, if not, whether the judge's misdirection, viewed reasonably, caused a substantial wrong or miscarriage of justice, meaning there should be a new trial. I would answer the first question No and the second Yes.

Background

[5] On April 9, 2008, Ms. Tania Bond-MacNeil gave birth to the Appellant Alexander MacNeil. The birth was at the Cape Breton Regional Hospital ("Regional Hospital") in Sydney.

[6] The Regional Hospital's staff, following routine neonatal practice, drew blood from the newborn and sent it for testing to the Izaak Walton Killam Health Centre ("IWK") in Halifax. The IWK's tests may detect, among other things, congenital hypothyroidism. If identified promptly, congenital hypothyroidism can be successfully treated with synthetic hormones but, if treatment is delayed, the condition may lead to cognitive disability. The degree of neurological damage can be proportional to the length of the delay. The screening and test are in common use for early detection.

[7] At the IWK, Alexander's test showed an abnormal level of the thyroid stimulating hormone. The IWK sent the result to the Regional Hospital's laboratory. But neither the IWK nor the Regional Hospital took further steps to

diagnose or treat Alexander's condition. Neither Alexander's family nor his treating physician was told of the abnormal outcome.

[8] The Respondent Dr. Andrzej Kajetanowicz was the Regional Hospital's only neonatologist. Before 2008, he had developed a practice of reviewing all newborn screen results for births at the Regional Hospital, and he had asked the Regional Hospital's laboratory to provide him with the screen reports. He explained why. On direct examination, he testified that he had identified a point of possible error at the IWK:

> As I mentioned, after working, you know, in Cape Breton I noticed two possible points that there could be a human error that may cause a problem. … But the second one was at the level of IWK. I thought that if they ran the test and see – and the report is abnormal, but the person that is responsible for doing the recording and noticing this abnormal test, as a human being, can just miss this. So – and it happens, and it happened in this unfortunate case what we are here.

On cross-examination, he agreed that his purpose was "to check whether IWK missed the report or not" and "to add another layer of safety".

[9] Following that practice, the Regional Hospital's laboratory gave Alexander's report to Dr. Kajetanowicz. He was the only physician to see Alexander's abnormal result.

[10] Dr. Kajetanowicz read Alexander's screen report and placed an asterisk beside the abnormal TSH result. The words "ABNORMAL screen result" and "[r]ecall has been initiated by IWK Health Centre" were on the report. He underlined those words and signed the document.

[11] Dr. Kajetanowicz did not have the abnormal result communicated to Alexander's family or to his treating physician. Relying on the words "[r]ecall has been initiated by IWK Health Centre", he assumed the IWK's Newborn Screening Program would do what was necessary. As it happened, nothing was done.

[12] This left Alexander's congenital hypothyroidism undiagnosed and untreated until he was 14 months of age. As a result, he suffers from cognitive and behavioural difficulties.

[13] On May 31, 2013, Alexander, by his litigation guardian Ms. Bond-MacNeil, sued the IWK, Dr. Kajetanowicz, and two other physicians. Amendments in 2014 and 2016 added as Defendants another physician and the Cape Breton District

Health Authority ("Health Authority"), which operates the Regional Hospital. The pleaded causes of action included negligence leading to delayed diagnosis and treatment of Alexander's congenital hypothyroidism.

[14] The Plaintiff later discontinued his claims against the three other physicians.

[15] The trial was scheduled to begin on Monday, January 8, 2018 before a jury in the Supreme Court of Nova Scotia, with Justice Robin Gogan to preside.

[16] On December 20, 2017, the Plaintiff settled with the IWK and Health Authority ("Settling Defendants"). The settlement was formalized in a *Pierringer* Agreement. The name comes from the Wisconsin Supreme Court's decision in *Pierringer v. Hoger*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). A *Pierringer* Agreement extinguishes the plaintiff's claim against the settling defendant in a multi-defendant proceeding, leaving the non-settling defendant responsible only for its several and proportionate share of the loss to be determined at the trial. Consequently, the non-settling defendant has no claim for contribution against the settling defendant. The Supreme Court of Canada has endorsed *Pierringer* Agreements as promoting settlement and minimizing litigation expense: *Sable Offshore Energy Inc. v. Ameron International Corp.* [2013] 2 S.C.R. 623.

[17] Here, the settlement agreement said the Settling Defendants would pay to the Plaintiff a "global amount". The number was redacted from the documents that were produced to Dr. Kajetanowicz and are contained in the record for this appeal. In return, the Plaintiff agreed (1) the action against the Settling Defendants would be dismissed by consent order, (2) to indemnify the Settling Defendants for any claim respecting the allegations in the lawsuit, (3) to restrict the action against the non-settling Defendant to his several liability only, meaning the non-settling Defendant would have no basis to seek contribution from the Settling Defendants and (4) counsel and the judge at the upcoming trial would be notified of the terms of the Agreement, except for the monetary amount of the settlement, subject to the judge's discretion to direct disclosure of the settlement amount.

[18] The settlement left Dr. Kajetanowicz as the only remaining Defendant.

[19] At a pre-trial conference on January 3, 2018, Justice Gogan and counsel discussed the impact of the settlement agreement. The judge directed that there be an Order to remove the Settling Defendants from the action. On January 7, 2018, the Plaintiff's counsel sent to the judge, copied to Dr. Kajetanowicz's counsel, a draft Order attaching a draft Amended Notice of Action and Statement of Claim

that would delete the claims against the Settling Defendants. After some discussion, the eventual Amended Notice of Action and Amended Statement of Claim were filed on January 26, 2018. This meant the Plaintiff's only surviving claim was against Dr. Kajetanowicz.

[20] Counsel for Dr. Kajetanowicz expressed concern that the Settling Defendants' absence altered the dynamics of trial. The judge shared the concern. In the defence counsel's view, the Plaintiff retained the burden to prove the Settling Defendants' negligence. The Plaintiff's counsel disagreed and pointed out that (1) Alexander had no further claim against the Settling Defendants, (2) the Plaintiff's theory of Dr. Kajetanowicz's liability was independent of any fault by the Settling Defendants and (3) Dr. Kajetanowicz's defence theory relied on allegations of failures by the IWK. The matter was the subject of correspondence and discussion between the judge and counsel during the trial. Later I will relate these exchanges.

[21] The trial began on January 8, 2018, and proceeded over 14 days in January. The Plaintiff called seven lay witnesses and nine experts. Dr. Kajetanowicz testified and led evidence of three experts. There was no witness from either Settling Defendant who had personal knowledge of the critical events in 2008.

[22] On January 29, after counsel's closing addresses, the trial judge charged the jury that "each of these hospitals is a party to the settlement agreement with the Plaintiff, but the burden remains upon the Plaintiff to prove that each of these hospitals is negligent". Earlier, the charge said "[t]he burden of proof is what a party must prove to succeed in his action, or defence". The judge assigned no burden to the Defendant.

[23] After a brief deliberation on January 29, the jury found that Dr. Kajetanowicz was not negligent. On February 13, 2018, the judge issued an Order dismissing the claim against Dr. Kajetanowicz with costs.

[24] On March 15, 2018, Ms. Bond-MacNeil as Alexander's litigation guardian filed a Notice of Appeal to this Court. I will refer to them jointly as "the MacNeils".

Issues

[25] The MacNeils cite three grounds of appeal. It is necessary to address only one:

> Did the trial judge err in law by instructing the jury that the MacNeils had the burden to prove negligence by the Settling Defendants?

[26] If the answer is Yes, then:

> Did the misdirection, viewed reasonably, cause a substantial wrong or miscarriage of justice, meaning there should be a new trial?

Standard of Review

[27] In *Horne v. Queen Elizabeth II Health Sciences Centre*, 2018 NSCA 20, this Court summarized the appellate standards of review applicable to the presiding judge's rulings and jury charge:

> [60] Correctness governs the presiding judge's rulings on issues of law. …
>
> [61] … Unless there is a severable error of law, which is assessed for correctness, the appeal court reviews the judge's findings for palpable and overriding error, meaning a clear error that affected the outcome.
>
> [62] … The jury charge need not be perfect, but must be proper. Briefly, this means:
>
> 1. The appeal court assesses whether the jury was given a proper explanation of its role and of the case before them, and was equipped to understand fully the claims and defences advanced.
>
> 2. In particular, the jury should be left with a clear and unconfused appreciation of the factual issues to be decided by them, along with the legal principles, positions of the parties and key evidence related to those issues.
>
> 3. In undertaking its task, the appeal court reviews the entire charge, not just piecemeal passages, to appraise the charge's general effect. The court focuses on substance. The mere failure to recite formulaic phraseology is not fatal to the charge.
>
> 4. The appeal court's approach is functional, meaning the court considers how the actual instructions responded to the trial's course of events. Those events include the theories and evidence presented to the jury and the positions stated by counsel to the judge. The appeal court does not simply impose idealized standard instructions.
>
> 5. The appeal will be allowed only if the misdirection, viewed reasonably, was capable of affecting the jury's verdict or, put another way, potentially caused a substantial wrong or miscarriage of justice. This standard originated in a former rule of court in Nova Scotia, and continues as an appellate principle of review.

[28] In *Horne*, the Court cited the passages from the leading decisions of the Supreme Court of Canada and this Court that support these principles. Later (paras. 72-75) I will refer to authorities that expand on "substantial wrong or miscarriage of justice" in point no. 5.

The Course of Trial

[29] The judge did not issue written reasons for her ruling that the Plaintiff bore the onus to prove the Settling Defendants' negligence. However, the exchanges between the judge and counsel help to show how the treatment of the Settling Defendants' fault, and its burden of proof, crystallized and affected the course of events during the trial.

[30] From the start, the judge was uncomfortable with the apportionment of fault to a non-party – *i.e.*, the signature feature of a *Pierringer* Agreement.

[31] On the opening day, January 8, before the jury was chosen, the judge spoke with counsel:

> **THE COURT:** … In fact, I believe you were on the phone call that we had in the pre-trial conference, and my immediate reaction to all of this was it felt strange to me to be talking about apportionment while we wouldn't have participating Defendants who were a part of – in theory, part of that apportionment process. Quite honestly, I'm still struggling with that. …
>
> …
>
> **THE COURT:** … And I'm struggling. I'm not hiding this from anybody that I'm struggling at trying to ensure that this is fair in light of the fact that we have some Defendants who are not participating but are important nonetheless.
>
> …

[32] Later on the opening day, the judge discussed with counsel – Mr. Wagner for the MacNeils and Mr. Downie for Dr. Kajetanowicz – a "remedy" for the problem of apportionment to an absent party:

> **THE COURT:** ... Mr. Wagner says that you can call her [an IWK witness] – I mean call her as a witness, not call her on the phone. Does that assist you in any way, or what's your comment with respect to that as some sort of remedy?
>
> **MR. DOWNIE:** That's not my job. It's not my job. My job here is to defend my physician, and part of that – part of that, on a proper trial with respect to negligence or liability, as I would define it, was the physician negligent in his discharge of responsibility. And if you get beyond that, is there a loss, and what

> flows from it. It is not bringing in an IWK witness completely extraneous to that and putting her on the stand and making her my witness, and even – even trying to make some argument to Your Ladyship that I be given permission to cross-examine my witness. So, I haven't – I hadn't gone there, hadn't thought about it, hadn't considered it. What I had, up until about five minutes ago, was [the IWK's] Ms. Campbell being on the witness list. It's just surprise after surprise.
>
> **THE COURT:** Okay. Okay, I don't know who wants to answer that, but I have – this is right in the wheelhouse of my concerns about how this is unfolding. …
>
> …
>
> **THE COURT:** No, but I think we have to think about whose responsibility it is to do these things. You know, fundamentally, it's still the Plaintiffs' case to prove. You've got –
>
> **MR. WAGNER:** Right.
>
> **THE COURT:** – resolutions with some Defendants. But you have a case to prove against a remaining Defendant, and I'm here to make sure that, as you do that, it's fair. And I'm – so, these are my thoughts going around my head in light of this agreement.
>
> …

[33] The jury heard little evidence about the conduct of the Settling Defendants. The key IWK witnesses from 2008 did not testify. The Plaintiff called as a witness the Cape Breton District Health Authority's Administrative Director of Laboratory Services from 2014 to 2016. She explained the procedures for newborn screening, but could not speak from personal knowledge to the processing of Alexander's screen in 2008. Her predecessor in 2008 was not a witness. No IWK or Regional Hospital witness testified from personal knowledge what was intended, or foreseen, in 2008 by: the screening report's words "[r]ecall has been initiated by IWK Health Centre", or the IWK's remittal of that report to the Regional Hospital, or the Regional Hospital's further remittal of it to Dr. Kajetanowicz.

[34] The testimony concluded on Wednesday, January 24, 2018. The jury was instructed to return on Monday, January 29 to hear the closing addresses of counsel and the judge's charge.

[35] Meanwhile, on January 25, in the jury's absence, the judge and counsel discussed the contents of the prospective jury charge. The judge reiterated her unease with *Pierringer* apportionment and again inquired about a "remedy" for that problem:

THE COURT: … So that leaves us with, I think, the ongoing discussion of the apportionment issue, and I honestly think that I've said all I can say about my discomfort with it. …

…

THE COURT: … I want to be clear about that, but having watched this, and heard this all unfold, I have ongoing discomfort with the concept of apportionment.

So, Mr. Downie, I mean, I guess that's no surprise to you, but the – you know, I'm interested if there is anything that I can do about that. That's – I've looked at all your submissions. I've read the case – cases. I'm not really comfortable with any particular remedy.

MR. DOWNIE: No. I think it's difficult. I –

THE COURT: Yeah.

MR. DOWNIE: I think it's very difficult, and you know, when the trier of fact, My Lady, is asked to apportion, they're necessarily required to do a relative, or a comparative analysis.

THE COURT: Um-hmm.

MR. DOWNIE: It seems necessarily implicit in that kind of task. And to do that, and to do justice to the non-settling party, the trier of fact should have a complete, or sufficient evidentiary foundation to do that. And we don't think that's here, and we've tried to set out some of the problems with that in our January 21 letter to you. So that –

THE COURT: So –

MR. DOWNIE: That's where we are.

THE COURT: Yeah, that's where we are. That – and so, you know, I may be there, too, but what can we do? And one of your suggestions, at one point in the evolution of this, why – that I don't leave the question to the Jury, but, then, if I'm to do it, you know, in theory, if that were the answer, but I've heard the same evidence as the Jury. So I'm in the same position that they would have been in.

You know, I don't think that's a comfortable answer for –

MR. DOWNIE: You just become a trier of fact, if you will.

THE COURT: It's no solution is what I'm saying.

…

THE COURT: I will do my best. It's – you know, but subject to any other remedy, I – well, unless there is a remedy, I think we've got to just do it, but I do acknowledge – I'm saying for the record – this is on the record repeatedly that I have a significant degree of discomfort with that. …

[36] Later on January 25, the Plaintiffs' co-counsel, Ms. Jardine, reminded the judge that, according to the Plaintiff's theory, Dr. Kajetanowicz's fault was independent of any fault by the Settling Defendants, while Dr. Kajetanowicz's theory relied on the IWK's failure:

> **MS. JARDINE:** … And, again, don't lose sight of the fact here that Dr. Kajetanowicz's evidence was that he had identified a risk with what he understood to the IWK system. And so, then, he stepped in, independent of the IWK system, and so I don't think our position is inconsistent with Mr. Downie's earlier comments.
>
> The IWK failure, independent of Dr. Kajetanowicz, they're two separate things. But Dr. Kajetanowicz identified a risk, and then decided that he was going to try to plug that hole with his own. And so, the issue becomes – you know, our position is that he assumed a burden once he did that, and then he didn't act appropriately when he got that abnormal test result.
>
> …
>
> And so, in our submission there's a standard of care there. …
>
> …
>
> **THE COURT:** … And I thought, okay, well, what would have happened if the IWK were a participating party, and they advanced that sort of position that, you know – we know – all we know, we've reviewed our documents. We don't know what this person did, and we can't find this person, whatever, or they would know whether they fired them, or they left, or there'd be some evidence about what this newborn screening – what the process was around the investigation.
>
> And if they didn't produce that evidence, there might be some sort of an adverse inference that could be applied to the whole situation. But we can't do that here.
>
> **MR. DOWNIE:** Um-hmm.
>
> **MS. JARDINE:** No, My Lady, because they settled, and that's okay, so –
>
> **THE COURT:** Oh, it's okay.
>
> **MS. JARDINE:** – that is also very difficult for us to kind of get over, and so, it is open to this Jury to accept Dr. Kajetanowicz's defence, that the IWK was the only party that was responsible here.
>
> **THE COURT:** It's not his defence, though.
>
> **MS. JARDINE:** Oh, in our view it is, that his reliance is on the IWK. They were the only –
>
> **THE COURT:** Oh, oh, oh, sorry.

> **MS. JARDINE:** – party that should have had any role to play. Dr. Blaney's [*sic*] [Dr. Marc Blayney, one of the experts called by Dr. Kajetanowicz] evidence is very clear that he felt they were the only party that had a role to play here. So, you know, our exposure is that the Jury connects with that wholeheartedly.
>
> **THE COURT:** Yeah.
>
> **MS. JARDINE:** And decide that he didn't have a role in this –
>
> **THE COURT:** That's right, yeah.

[37] On Sunday, January 28, the judge emailed counsel with her draft jury instructions. The draft included the following:

> **(g) Burden of proof**
>
> During the course of this charge I will be referring to the burden of proof. The burden of proof is what a party must prove to succeed in her action or defence.
>
> …
>
> **2(a) Negligence of the Hospitals**
>
> … I remind you that each of these hospitals is a party to the settlement agreement with the plaintiff. The burden remains upon the plaintiff to prove that each of these hospitals is negligent. …

[38] On January 28, the Plaintiff's counsel wrote to the judge, copied to Dr. Kajetanowicz's counsel, objecting to the judge's characterization of the burden. The letter reiterated that the Plaintiff's theory against Dr. Kajetanowicz involved no assertion of fault by the Settling Hospitals:

> The Plaintiff has no case to prove as against the IWK and CBRH hospitals. All claims brought against them were resolved by settlement agreement. As a consequence, and consistent with all available case law on Pierringer Agreements, the pleadings have been amended to remove the settling hospitals as parties to this litigation. We have treated the negligence of each hospital as a fact in evidence, and will continue to do so. We disagree with any characterization or representation to the jury that the Plaintiff carries any burden of proof in relation to either of the settling hospitals. This matter proceeds against Dr. Kajetanowicz alone, on the basis of his several liability only. That is the only case to be proven by the Plaintiff.

[39] On January 29, before the closing addresses, and in the jury's absence, the judge and counsel returned to the topic:

> **THE COURT:** … The – let's talk, for a minute, about the burden of proof. So we've had this debate back and forth throughout about whether, in the wake of the

> Pierringer Agreement, there is a burden on the Plaintiffs to prove their case against the Defendant hospitals. So that's repeating itself in your letter. So I understand what you're saying about that.
>
> Mr. Downie, I'm –
>
> **MR. DOWNIE:** How could it be otherwise, My Lady? That's my comment.
>
> **THE COURT:** Okay. Okay. So that's sort of where I am at with it, as you can see, and I've tried to be – and, to some degree, I regret being a bit cute about this until now – in order to keep this going, and in order to try to be fair about it, I guess, we haven't hit this head-on, but I don't have an admission of liability to give to the jury.
>
> So that leaves me with a case where somebody's got to prove this, and this is the kind of case where the burden is on the Plaintiff to prove the case. I can – you know, in the universe, I could concede that, in the circumstances, perhaps – I'd have to be convinced – some evidential burden might have shifted, but the legal burden would have to remain with the Plaintiff. Anybody want to speak to that?

The Plaintiff's co-counsel, Ms. Jardine, then responded, and the exchange concluded:

> **MS. JARDINE:** My Lady, if I might, when you review the cases on Pierringer Agreements, it is clear that when the Pleadings are amended, the settling Defendants are removed from the action. And, so, it is difficult to conceive of a situation where you have a burden of proof against Plaintiffs, or Defendants that are no longer part of the action. And, so, on our reading of the Pierringer case law, it's not consistent to say that we continue to have a burden of proof.
>
> … They're no longer parties. Their documentary evidence, and their witnesses are made available, and there has to be consideration of the sort of contextual fact, particularly, with apportionment, but there's no discussion of continuing the burden of proof.
>
> …
>
> … they're no longer parties. And, so, it is difficult for us to conceive how that translates into a burden of proof. And I guess that's where our difficulty lies.
>
> **THE COURT:** Hmm. We'll just have to agree to disagree. Okay. All right. Well, I can take a look at some of this after the closings. …

[40] Then counsel addressed the jury.

[41] The defence levelled its sights on the IWK. The defence theory was that the IWK's "basic failures" had "grossly", "brutally" and "badly" misled Dr. Kajetanowicz, which excused Dr. Kajetanowicz of any liability:

So, consistent with the responsibility of the IWK, Alexander's newborn screen report stated, very clearly, "Recall has been initiated by the IWK Health Centre." The report was sent to the laboratory at the Cape Breton Regional Hospital, and received there on April 22, 2008. Now, honestly, or is it just me, maybe, but there really isn't much evidence from the Cape Breton Regional Hospital on what the lab actually did.

… It seems the lab did not receive any request from the IWK to participate, or assist in the recall process.

It's really hard to know what their process was, because we've not heard from any Cape Breton Regional Hospital witnesses who were there, at the relevant time. …

…

… He [Dr. Kajetanowicz] was content that, although the baby's screen was showing a thyroid abnormality, the IWK clearly stated that they knew this, appreciated it, understood it, and in accordance with long-standing and reliable practice, they were on the matter, and had initiated recall of the baby; that follow-up was underway. …

After our doctor signed his copy of the report, he sent it to Medical Records. He understood that the IWK was doing its job.

…

There's also, no doubt, that the newborn screening problem at the IWK had problems in this case. Had the IWK not resolved this action against it, and had they appeared here at Trial, I don't know what in the blazes they would have said. None of us like finger-pointing, but the IWK hired people to run at Dr. Kajetanowicz. It was quite a way for a hospital to respond to a lawsuit.

Again, the IWK, and the Cape Breton Regional Hospital resolved the matter. Then the IWK turned over some experts to the Plaintiffs to have a further go at our client. It was kind of unbelievable.

…

Testing, or lab analysis of newborn blood blotters for babies born in Nova Scotia was, and for that matter, still is done at the IWK in Halifax. The responsibility for recall of babies with abnormal screen results also rested with the IWK. …

…

In this case, there turned out to be, at least, two basic failures by the IWK. The first, the Newborn Screening Co-ordinator at the IWK did not do what he or she was supposed to do, and what was reported to have been done; that is to say initiation of recall. What had always been done, in true and reliable fashion, didn't happen here. …

> I think I would say, secondly, according to a review of the matter by a person originally retained by the IWK, Dr. Latchman, a statement that recall had been initiated appeared in the report, even though no human action had taken place to justify that statement. So this statement was, apparently, getting printed on abnormal screen results automatically.
>
> In our view, this was grossly misleading to physicians, and in this case, Dr. Kajetanowicz was brutally misled. How could the IWK have allowed that to happen? …
>
> …
>
> The essence of Dr. Kajetanowicz's defence is his reliance on the newborn screening report in this case. He was misled, and it's not his fault.
>
> …
>
> … Dr. Kajetanowicz had no reason to doubt that what the IWK said it had done, that is, initiation of recall was underway. Had the statement not appeared, then he would have taken further steps.
>
> Was Dr. Kajetanowicz badly misled? Yes. Was it his fault? I respectfully say, no, it was not his fault.

[42] The Plaintiff's closing address expressed the theory that, whether or not the Settling Hospitals were at fault, Dr. Kajetanowicz's standard of care included an independent responsibility to notify Alexander's attending physician or parents of the abnormality. According to the Plaintiff, Dr. Kajetanowicz's standard derived from his awareness that, in the past, the IWK's screening process had lapsed. Consequently, the duties of the Settling Hospitals and Dr. Kajetanowicz were not mutually exclusive, but coexisted, and a breach by the IWK would not excuse Dr. Kajetanowicz. The jury address of the Plaintiff's counsel included:

> Approximately 30 to 40 minutes after birth, Dr. Kajetanowicz performed a very thorough initial exam on Alexander, and you can refer to Exhibit 1, at Page 3. He assessed tone, activity, colour, nutritional status, skull shape, eyes, ears, nose, throat, palate. He examined respiratory system, his heart, his pulse, his abdomen. Among other things, he examined Alexander's neurological status, and performed a skeletal examination.
>
> Dr. Kajetanowicz found no abnormalities, and he signed and dated the bottom of the Physician/Newborn Examination form. At that time, Dr. Kajetanowicz was providing care to Alexander. His testimony was that, had he found an abnormality, he would have acted on it. At this moment in time, it is our submission to you there is a direct patient – doctor/patient relationship. …
>
> …

> ... In detecting an abnormal result by not contacting the documented requesting physician, nor Alexander's family, the IWK breached the duty of care.
>
> Many systems, though, have fail-safes, layers built in to ensure any failure in one part can be rectified by another. In this case, the abnormal report was sent to the Cape Breton Regional lab, who was also responsible for letting the physician know. Cape Breton Regional Hospital did not provide the report to Dr. Danuta Kajetanowicz [the Defendant's spouse], the physician named in the report. We don't know why the abnormal report was not sent, or not provided to her.
>
> The Cape Breton Regional Hospital did, however, provide it to Dr. Andrzej Kajetanowicz. In not ensuring the abnormal screen was distributed to the documented requesting physician, the Cape Breton Regional Hospital breached the duty of care.
>
> …
>
> Dr. Kajetanowicz's evidence was that he had identified a gap in the system, a hole in the Swiss cheese. He identified a risk that abnormal results would be missed, a risk that needed human intervention. The risk was that the baby born in the hospital maybe not [*sic* ? "may not be"] be followed by the baby doctor, after the baby was discharged.
>
> …
>
> The fact is that Alexander's abnormal screen report did get to a treating, or assessing physician. It got to Dr. Kajetanowicz. He provided medical care to Alexander while in the hospital. There was a patient/physician relationship. If it was not ongoing, at the very least, it started, and stopped. …
>
> …
>
> He states he was entitled to rely on the phrase, "Recall has been initiated by the IWK Health Centre", as indicating the baby has been re-tested, yet there's no confirmation, on the abnormal screen, or otherwise, that recall had been successful, or completed, that the named requesting physician, or family having contacted, that the patient was successfully brought in to have a re-test.
>
> He did not close the loop. …
>
> …
>
> … Dr. Kajetanowicz breached the standard of care owed to Alexander. He chose not to inform Alexander's family, or another doctor of a critical abnormal screening. …
>
> In our respectful view, he breached the standard of care by assuming, in the face of critical, life-altering results, that someone else was taking care of it, without any confirmation that the patient had been notified. …

[43] The judge then charged the jury. Her directions included:

During the course of this Charge, I will be referring to the burden of proof. The burden of proof is what a party must prove to succeed in his action, or defence. In this case, your verdict will be given in the form of answers to questions, which I will review with you in some detail later. When I discuss these questions with you, I will indicate on whom the burden of proof lies in respect of each question.

When I say that a party has a burden of proof of satisfying you of such and such, this means that she must prove the proposition by a preponderance of evidence. The term "preponderance of evidence" means such evidence as, when considered and compared with that opposed, to persuade you on a balance of probability, if the evidence is evenly balance [*sic* balanced], so that you are unable to say that the evidence of either side of an issue prepondering, then your finding upon that issue must be against the party who has the burden of proving it.

…

… I note the questions are as follows:

Question No. 1: Has the Plaintiff established that the Defendant, Dr. Andrzej Kajetanowicz was negligent? To answer this question, you must simply answer yes, or no. If your answer is no, you do not answer any further questions. If yes, you proceed to the next question.

Question No. 2: If the answer to Question 1 is yes, how was Dr. Kajetanowicz negligent? To answer this question, you must provide a written answer of the way, or ways you decide he was negligent. Only answer this question if the answer to the first question was yes.

Question 3: Was the IWK Health Centre negligent? To answer this question, you must simply answer yes or no. If you answer yes, proceed to answer the next question. If the answer is no, you will proceed to Question 5.

Question No. 4: If the answer to Question 3 is yes, how was the IWK Centre – Health Centre negligent? To answer this question, you must provide a written answer of the way or ways that you decide the IWK was negligent. Only answer this question if your answer to Question 3 was yes.

Question 5: Was the Cape Breton District Health Authority negligent? To answer this question, you must simply answer yes, or no. If the answer is yes, you proceed to answer the next question. If the answer is no, you proceed to Question 7.

[Question 6:] If the answer to Question 5 is yes, how was the Cape Breton District Health Centre negligent? Pardon me. How was the Cape Breton District Health Authority negligent? To answer this question, you must provide a written answer of the way or ways that you decide that the Cape Breton District Health Authority was negligent. Only answer this question if your answer [to] Question 5 was yes.

Then you would move to Question 7. If you found Dr. Kajetanowicz, and at least one other negligent, provide the degree of fault for each party you found negligent for a total of 100-percent. To answer this question, you must have found Dr. Kajetanowicz, and at least one other negligent. If so, you must apportion fault between, or among those you found negligent. Your apportionment must total 100-percent. When you finish this question, you proceed to Question 8.

[Question 8:] Has the Plaintiff established that Alexander MacNeil suffered injuries that would not have occurred, but for the delayed diagnosis and treatment of congenital hypothyroidism? To answer this question, all that is required is yes, or no. If your answer is yes, proceed to the next question. If no, you need not answer any further questions.

Question 9: If the answer to Question 8 is yes, what are those injuries? To answer this question, you must provide a written answer of the injuries you find resulted from the delayed diagnosis and treatment. Only answer this question, if your answer to Question 8 was yes.

Then you proceed to Question 10. Disregarding the apportionment of liability, if any, you made a [*sic* in?] response to Question 7, in what amounts you assess damages suffered by Alexander MacNeil, under the following headings:

(a) damages for pain, suffering, and loss of amenities of life he has endured, and will endure into the future;

(b) loss of earnings, earning capacity;

(c) future care costs and valuable services.

If you are required to answer this last question, you will need to provide a numerical amount as an answer.

…

… I remind you now, however, that you did begin with the issue of whether the Plaintiff has established that Dr. Kajetanowicz was negligent. To answer this question, I want to tell you about the law of negligence as it involves doctors.

With respect to this issue, that is the negligence of Dr. Kajetanowicz, the onus is on the Plaintiff to prove, on the balance of probabilities, that he was negligent. …

…

I repeat that a doctor is only expected to act reasonably in the – in practicing his field of medicine. He does not ensure the patient's health. The expectation is not perfection. He is entitled to reasonably rely on hospital systems to work as intended, and hospital staff to carry out their responsibilities competently. …

…

> So, only if you've answered yes to Question 1, and answered Question 2, you must go on to answer Questions 3, 4, 5 and 6. These questions ask you whether the IWK Health Centre, and the Cape Breton Health Authority were negligent. It is my intention to review the law that applies to both hospitals, then review the positions of the parties, followed by a review of the relevant evidence for each hospital.
>
> I remind you that each of these hospitals is a party to the settlement agreement with the Plaintiff, but the burden remains upon the Plaintiff to prove that each of these hospitals is negligent. The hospitals, however, chose not to participate and contest these claims at Trial.
>
> …
>
> … The Plaintiff submits that the IWK Health Centre did not meet the standard of care in this case. …
>
> …
>
> With respect to the position of the Defendant, the Defendant, Dr. Kajetanowicz, takes no position on the negligence of either the IWK Health Centre, or the Cape Breton Regional Health – the Cape Breton Regional Hospital, at least, formally, anyway. I think you can refer to the comments of the Defendant in his closing address, and recall the position he took there.
>
> …

[44] After a brief deliberation, the jury returned and answered No to Question No. 1 – *i.e.*, Dr. Kajetanowicz was not negligent. It was unnecessary to answer the other questions.

Who Had the Burden to Prove the Settling Defendants' Fault?

[45] From the opening day of trial, the judge held the view that the Settling Defendants' fault belonged in the Plaintiff's "case to prove" (above, para. 32). She maintained that view to the end. On January 29, to the Plaintiff's counsel's protest, she replied – "We'll just have to agree to disagree" (above, para. 39).

[46] In my respectful view, the judge was mistaken.

[47] In *Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 321, Justice Sopinka for the Court stated two principles for assigning the legal burden of proof:

> ... The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": 9 *Wigmore on Evidence*, # 2486, at p. 292. In a civil case, the two broad principles are:

> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
>
> 2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

This remains the test: *e.g.*, see *Braile v. Calgary Police Service*, 2018 ABCA 109, para. 23.

[48] I will start with Sopinka J.'s second principle. The evidence respecting the acts or omissions of the Settling Hospitals was not "particularly within the knowledge" of either the Plaintiff or Dr. Kajetanowicz. It was with the IWK and Regional Hospital. The document production and any discovery transcripts from those Settling Defendants were available to the counsel for both the Plaintiff and Dr. Kajetanowicz. Each had the same opportunity to arrange for the attendance of witnesses currently or formerly employed by the IWK and Regional Hospital.

[49] Here the assignment of the burden turns on Sopinka J.'s first principle. Who asserted the proposition? The fault of the Settling Defendants, particularly the IWK, was in play from two perspectives. The first related to Dr. Kajetanowicz's liability, before any consideration of *Pierringer* apportionment. The second, if he was liable, involved the apportionment of responsibility given the *Pierringer* Agreement. I will discuss them separately.

[50] **Liability:** Before the settlement, the Plaintiff, of course, had pleaded claims against the Settling Defendants. But those claims settled. The Court approved the settlement. On January 26, 2018, the MacNeils filed the Amended Notice of Action and Amended Statement of Claim that deleted those claims. This "extinguished" the MacNeils' claims against the Settling Defendants: *Sable v. Ameron*, *supra*, para. 23, per Abella J. for the Court. From then on, the MacNeils' only "case to prove" was the several liability of Dr. Kajetanowicz.

[51] The Plaintiff acknowledged that the Settling Defendants had been negligent. But, as stated in counsel's letter of January 28 (above, para. 38), this was just recognition of "a fact in evidence". It was neither a submission nor the adoption of a burden of proof.

[52] The Plaintiff's theory of Dr. Kajetanowicz's liability did not rely on an assertion of fault or failure by either Settling Defendant. Rather, the Plaintiff asserted that Dr. Kajetanowicz's standard of care and its breach were independent of, and coexisted with, any negligence by the Settling Defendants. The theory was:

- Dr. Kajetanowicz acknowledged that he had become aware of a flaw in the IWK's procedure for newborn screening;
- he said that, as a safeguard, he had implemented his own process of reviewing screening outcomes;
- he acknowledged being aware of the serious risk of inaction for a child with an abnormality;
- a reasonable neonatologist, aware of such a flaw and risk, would have seen that Alexander's abnormal result was notified to the child's treating physician (who happened to be Dr. Kajetanowicz's spouse) or parents;
- whether or not the IWK or Health Authority was negligent was irrelevant to whether Dr. Kajetanowicz should have taken that step.

See the extracts from the Plaintiff's closing address quoted above (para. 42).

[53] Dr. Kajetanowicz, on the other hand, predicated his defence to liability squarely on his assertion of the IWK's misconduct. This is apparent from the defence's closing address to the jury (above, para. 41). His counsel told the jury that the IWK had committed "two basic failures", the IWK's newborn screening report had "grossly", "brutally" and "badly" misled Dr. Kajetanowicz, and consequently:

> The essence of Dr. Kajetanowicz's defence is his reliance on the newborn screening report in this case. He was misled, and it's not his fault.

[54] *Snell*'s first principle is "the onus is on the party who asserts a proposition". For the IWK's alleged failures, insofar as they supported Dr. Kajetanowicz's defence to liability, the asserting party was Dr. Kajetanowicz.

[55] That was not the message in the jury charge. The charge contained the following:

- "The burden of proof is what a party must prove to succeed in his action, or defence."
- "With respect to this issue, that is the negligence of Dr. Kajetanowicz, the onus is on the Plaintiff to prove, on the balance of probabilities, that he was negligent."

- "I remind you that each of these hospitals is a party to the settlement agreement with the Plaintiff, but the burden remains on the Plaintiff to prove that each of these hospitals is negligent."

- "The Plaintiff submits that the IWK Health Centre did not meet the standard of care in this case."

- "With respect to the position of the Defendant, the Defendant, Dr. Kajetanowicz takes no position on the negligence of either the IWK Health Centre, or the Cape Breton Regional Health – the Cape Breton Regional Hospital, at least formally anyway. I think you can refer to the comments of the Defendant in his closing address, and recall the position he took there."

- The charge did not direct that Dr. Kajetanowicz bore any burden to establish the IWK's failures that underpinned his defence on liability. The only explicit instruction on the point was "the burden remains on the Plaintiff to prove that each of these hospitals is negligent". As a result, the jury was left with the impression that the Plaintiff "submits" the IWK was negligent toward the Plaintiff's burden.

[56] The Plaintiff had the burden to prove Dr. Kajetanowicz's negligence. But, the Plaintiff's theory of his negligence did not rely on fault of the Settling Defendants. The charge misdirected the jury on the burden to prove the IWK's failures that were central to the Defendant's theory on liability.

[57] **Apportionment:** There is another perspective to the application of Sopinka J.'s first principle. If Dr. Kajetanowicz was found to be negligent, then how should his responsibility be apportioned with that of the Settling Defendants in the aftermath of the *Pierringer* Agreement?

[58] In *Henry v. British Columbia (Attorney General)*, 2016 BCSC 1038, Mr. Henry sued for *Charter* damages against the City of Vancouver, the Federal Crown and the Province of British Columbia. He settled with the City and the Federal Crown, then went to trial against the Province. Chief Justice Hinkson said that, (1) before the settlement, Mr. Henry had the burden against the City and Federal Crown, but (2) after the settlement, the burden of apportionment to the settling defendants shifted to the Province – *i.e.*, the non-settling defendant:

> 315 In the event that the Province had no liability, it would be unnecessary to consider the fault of the other defendants, but as I have found the Province is liable to Mr. Henry, the Province correctly submits in the alternative that any

> portion of his damages which may be attributable to any fault of past or present members of the City defendants and Federal Crown cannot be recovered against the Province.
>
> …
>
> 317 The plaintiff had asserted that the City defendants and the Federal Crown were at fault, but his assertions are not enough to establish liability against these former Defendants. It was for Mr. Henry to establish the liability of the City defendants and the Federal Crown, **and as a result of the settlement between these parties, for the Province to do so before any apportionment of fault and consequent liability must be undertaken by this Court.**
>
> …
>
> 343 The Province contends that although the Federal Crown bears less liability than the City defendants and the Province, it is liable for its failure to meaningfully review Mr. Henry's appeals and applications for mercy under what was then s. 690 and is now s. 696.1 of the *Criminal Code*.
>
> 344 Mr. Henry contends that there is no evidentiary basis for any finding of negligence on the part of the Attorney General for Canada, relying on *Wells v. McBrine*, [1998] B.C.J. No. 2366 (C.A.).
>
> …
>
> 356 **The Province bears the burden of establishing liability on the part of the Federal Crown. I find that the Province has not discharged this burden**.
>
> [emphasis added]

[59] From the global damages award against the Province, Chief Justice Hinkson deducted amounts received by Mr. Henry from the settling defendants (the City and federal Crown): 2016 BCSC 2082, affirmed 2017 BCCA 420, leave to appeal to SCC refused [2018] S.C.C.A. No. 53. This was to prevent double recovery. In the end, notwithstanding that the Province had failed to establish fault by a settling defendant (the Federal Crown), the plaintiff's total recovery from settling and non-settling defendants, including the Federal Crown, was capped at the proven compensable value of Mr. Henry's injury.

[60] Also helpful, though not involving a *Pierringer* agreement, is *Taylor v. Canada (Health)*, 2009 ONCA 487. Ms. Taylor sued the Federal Crown, representing Health Canada, for injuries resulting from the surgical implantation of a device in her jaw. She limited her claim to the proportion of fault attributable to Health Canada. The Federal Crown, represented by the Attorney General, applied to add as third parties, the surgeon and hospital where the surgery had occurred.

The judge of the Superior Court dismissed the Crown's application. The Court of Appeal dismissed the Crown's appeal. Laskin J.A. for the Court of Appeal said:

> [22] Similarly, because Ms. Taylor has limited her claim to those damages attributable to Health Canada's fault, Health Canada can have no claim over against the doctor or the hospital for the damages claimed by Ms. Taylor and the other class members. To ensure that Health Canada's exposure is limited to the damages attributable to its fault, the court may have to apportion fault among three potential tortfeasors: Health Canada, the doctor and the hospital. The next question is whether the court is entitled to do so if neither the doctor nor the hospital is a party to the action.
>
> …
>
> [29] In my view, this is an appropriate case for the court to determine whether to apportion fault against the doctor or the hospital, though neither is a party to the action. Permitting apportionment without insisting that they be parties will mean fewer parties at trial, a shorter trial and reduced costs. The remaining question is whether the **Attorney General is entitled to procedural relief so he can pursue his claim to apportionment.**
>
> …
>
> [30] The Attorney General submits he cannot pursue his right to apportionment against the doctor and the hospital in a vacuum. If neither is a party to then action, then, he argues, he is at least entitled to production of documents from each of them and to examine each of them for discovery. …
>
> [emphasis added]

[61] In *Taylor,* the parties were positioned equivalently to the MacNeils and Dr. Kajetanowicz. Ms. Taylor's claim for damages was limited to the share of the defendant, meaning the trier of fact would have to apportion responsibility to non-parties. Laskin J.A. (para. 32) said the remaining defendant's request for document production "seems to have merit", though he left the matter for determination by the trial judge. There was no suggestion that the defendant's "procedural relief" meant the plaintiff had the burden to prove either the existence or degree of the non-parties' fault.

[62] Justice Laskin's approach in *Taylor* resembled that endorsed by the Supreme Court of Canada in *Sable v. Ameron,* the leading authority on *Pierringer* Agreements. Justice Abella said:

> [21] The particular settlements negotiated in this case are known as Pierringer Agreements. Pierringer Agreements were developed in the United States to address obstacles to settlement that arose in multi-party litigation. Professor Peter

B. Knapp summarized the value – and complexity – of trying to settle multi-party litigation as follows:

> 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.
>
> "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *Wm. Mitchell L. Rev.* 1, at p, 5.

…

[23] In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial.

[24] Pierringer Agreements in Canada built on these American foundations and routinely included additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence. …

[25] The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability has been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right of set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.

[26] As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

…

[29] Someone has to go first, and encouraging that first settlement in multi-party litigation is palpably worthy of more protection than the speculative assumption that others will only follow if they know the amount. …

[63] In *Sable*, Abella J. did not address the apportionment burden at a trial following a *Pierringer* Agreement, but the pattern she described resembles that in *Henry* and *Taylor*, where Hinkson C.J. and Laskin J.A. spoke of the non-settling defendant's burden. The plaintiff's claim is "extinguished" against the settling defendant, so nothing remains for a plaintiff's burden to bite. 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. Had the Supreme Court intended that outcome, one might expect that point would have appeared in the list of protections cited by Abella J.

[64] As for the protections in this case, during the exchanges between counsel and the judge in January 2018, the Plaintiff proposed: (1) the jury would be provided with the post-*Pierringer* Amended Statement of Claim, and with the pleadings against the Settling Defendants that were removed by that amendment, so the jury could identify the pre-settlement allegations respecting the Settling Defendants; (2) Dr. Kajetanowicz's counsel could have contact information, call the Settling Defendants' witnesses, and cross-examine those witnesses; (3) the entire Affidavit of Documents of the Settling Defendants could be entered so the jury would have their pertinent evidence; (4) there would be careful instruction to the jury respecting the *Pierringer* Agreement; (5) after the jury's determination of any damages against Dr. Kajetanowicz, the *Pierringer* settlement amount would be provided to the judge to protect against concerns about double recovery. Though not all these measures were exercised by Dr. Kajetanowicz, they were available.

[65] In *J.M. v. Bradley* (2004), 71 O.R. (3d) 171 (C.A.), at para. 64, Cronk J.A. for the Court said that, by a *Pierringer* settlement, the settling defendants "voluntarily elected to terminate their involvement in the litigation on terms that contemplate that **the Non-Settling Defendants will continue to have the right to seek a trial apportionment** of the Settling Defendants' degree of contributory responsibility, if any, despite the absence of the Settling Defendants at trial" [emphasis added]. To like effect: *Miller Group Inc. v. James*, 2014 ONCA 335, at para. 8.

[66] In *Sable*, Abella J. noted that the Canadian approach to *Pierringer* Agreements rests on American "foundations", and cited as authority Professor Knapp's article, "Keeping the *Pierringer* Promise: Fair Settlements and Fair

Trials" (1994) 20 Wm. Mitchell L. Rev. 1. Professor Knapp's article, pp. 44-45, says:

> Following a Pierringer settlement, a plaintiff no longer has any incentive to prove the settling defendant's fault. Recalling our hypothetical with the bowling plaintiff, assume that the plaintiff settles with the ball-return manufacturer. The jury will consider the manufacturer's fault in its special verdict, and the plaintiff has an interest in seeing that the percentage of fault allocated to the manufacturer is as small as possible. …
>
> Following the Pierringer settlement between the plaintiff and the ball return manufacturer, the bowling alley [the remaining defendant] has an incentive to prove the manufacturer's fault, the bowling alley wants the jury to allocate as large a share of fault as possible to the manufacturer because this will work to reduce the bowling alley's own share of fault. …
>
> In other words, a Pierringer release does more than simply give the bowling alley owner the incentive to prove the fault of the manufacturer. **The Pierringer settlement transfers to the remaining defendant the burden to prove the settling defendant's fault.** If the remaining defendant fails to meet that burden, the trial court can direct a verdict against the settling defendant and **strike that defendant's name from the special verdict list** of parties to whom the jury will allocate fault.
>
> [emphasis added]

Similarly, at p. 77, note 246:

> Of course, if the remaining parties fail to present sufficient evidence of the settling defendant's fault, then the judge can direct a verdict in favor of the settling defendant and **strike its name from the apportionment question**.
>
> [emphasis added]

[67] In *Johnson v. Rogers*, 621 F. (2d) 300 (8th Cir 1980), at p. 303, Circuit Court of Appeals discussed the Wisconsin Supreme Court's ruling in *Pierringer*, then added:

> Since the *Pierringer* decision, in fact, the Wisconsin Supreme Court has continued to hold that **the burden is on a non-settling defendant** to establish his entitlement to a credit, and that where no evidence [relevant] to the settling defendant's liability is introduced at trial, a non-settling defendant may not receive credit for a settlement entered into between the plaintiff and the settling defendant. *Stanhope v. Brown County*, 90 Wis. 2d 823, 855, 280 N.W. 2d 711, 725 (1979).
>
> [emphasis added]

As the non-settling defendant (Rogers) had not established liability by the settling defendant, the Court of Appeals held that Rogers was not entitled to a credit for the amount paid to the plaintiff by the settling defendant (p. 303-04).

[68] From these authorities, the theme emerges that the plaintiff and defendant each are entitled to advance a theory that promotes its interest. This principle is a basic tenet of trial practice. To burden a party with a theory that thwarts its interest is a counter-intuitive distraction for everyone involved. After a *Pierringer* settlement, the plaintiff's interest is to minimize the fault apportioned to the settling parties. What is important is that there be a safeguard against over-recovery. This is achieved by the disclosure to the judge, after the apportionment, of the settlement amount. Then, as occurred in *Henry*, the judge can reduce an award against the non-settling defendant to ensure that the plaintiff's total recovery from all sources is capped at the plaintiff's proven loss. As occurred in *Henry*, this outcome may obtain even when the non-settling defendant failed to prove the settling defendant's negligence at the trial.

[69] **Summary:** For liability, the burden to show the IWK's failures, upon which the Defendant's theory relied but the Plaintiff's theory did not, was on Dr. Kajetanowicz. For apportionment, the burden to show the Settling Defendants' fault, and its degree, rested with Dr. Kajetanowicz. To be clear, the apportionment burden would rest with the remaining Defendant even if that Defendant's theory of defence to liability did not rely on the failures or fault of a Settling Defendant.

[70] With respect, the judge erred in law by directing the jury that the burden rested with the Plaintiff.

Should There be a New Trial?

[71] Not every misdirection leads to a new trial. It is necessary that the misdirection, viewed reasonably, be capable of affecting the verdict or, as it is sometimes put, of causing a substantial wrong or miscarriage of justice. See the authorities cited in *Horne v. Queen Elizabeth II Health Centre*, *supra*, para. 62.

[72] Dr. Kajetanowicz's factum cites *Branco v. Ephstein*, [2006] O.J. No. 2391 (Ont. Sup. Ct. J. (Div. Ct.)) as reciting a useful summary of the approach.

[73] In *Branco*, there was a jury trial on a claim for personal injuries arising from a motor vehicle accident. The trial judge's charge to the jury inadequately explained the defendant's burden to prove that the plaintiff had failed to mitigate.

In the Divisional Court, the majority concluded that there should be a new trial on damages. Wilson J., for the majority, held that the misdirection on burden of proof led to a substantial wrong or miscarriage of justice. Her comments concisely summarized the principles that have been stated by the Ontario Court of Appeal:

> 26 … In *Caza* [*Caza v. Kirkland & District Hospital*, [2003] O.J. No. 2438 (C.A.)], O'Connor. A.C.J.O. confirmed the relevant test for appellate intervention (at para. 34):
>
> > … The question is whether the errors, which may include omissions, deprived the party of a fair trial. In determining whether the trial has been fair, an appeal court should look at the charge in the context of the entire trial and ask if the jury would have understood the issues of fact, the relevant legal principles, how the facts related to the law and the positions of the parties. A new trial will only be ordered when the appeal court is satisfied that the trial judge's errors have caused a substantial wrong or miscarriage of justice.
>
> 27 O'Connor A.C.J.O. found that on the circumstances of that case, any factual misstatements were minor, and with respect to the misstatement of a legal issue that "read as a whole, the charge fairly set out the law on causation".
>
> 28 The test for appellate intervention has also been stated by the Court of Appeal as a double negative in *Fink v. McMaster* (1987), 58 O.R. (2d) 401 (C.A.), at 404: "We are satisfied the trial judge was in error in this part of his charge and we are not satisfied that the error did not occasion any substantial wrong or miscarriage of justice."
>
> 29 Most recently, in *Pereira* [*Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.*, [2006] O.J. No. 1508 (C.A.)], the Court of Appeal reviewed what circumstances justify a new trial if there are errors in the charge. The reviewing court will not hold the jury instructions to a standard of perfection: "The reviewing court is concerned less with whether the law was perfectly stated and more with whether the jury would have properly understood the law at the end of the charge" (at para. 51).
>
> 30 The Court went on, at paras. 75-76, to explain that a substantial wrong may include a misapprehension of the applicable law, that the charge was materially deficient, or that the law was not clearly outlined on a crucial issue:
>
> > To obtain a new trial, it will generally not be sufficient for an appellant to demonstrate simply that it was open to the jury on the evidence to reach a different result. Something more than that is required. An appellant may demonstrate that the case was not fairly put to the jury, as, for example, where the charge leaves the jury with a misapprehension as to the applicable legal principles: *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.).

> An appellant may also show that the charge was "materially deficient" (*Brochu*, *supra*, at para. 68) or that the law was not clearly stated on a critical issue: see *Mizzi v. Hopkins* (2003), 64 O.R. (3d) 365 at para. 42 (C.A.). This follows from the trial judge's duty to provide the jury with a clear and complete explanation of the law sufficient to allow the jury to discharge its responsibility as judge of the facts.
>
> …
>
> 81 Once an error is established, in accordance with the principles enunciated in the two recent Court of Appeal decisions in *Caza*, *supra*, and *Pereira*, *supra*, the seriousness of the error identified must be reviewed in the context of the trial as a whole, and the charge as a whole. We must ask whether the jury would have understood the issues of fact that they were to determine, the relevant legal principles, how the facts related to the law and the positions of the parties.
>
> [Wilson J.'s underlining]

[74] In *Branco*, Wilson J. then applied these principles to the trial judge's misdirection on the burden of proof. She began by citing authority for the proposition that "a new trial has often been ordered on errors with respect to onus of proof in a jury charge":

> 92 In several personal injury cases involving a jury trial, courts have recognized the importance of properly explaining issues on onus of proof. A new trial has often been ordered on errors with respect to onus of proof in a jury charge: see, for example, *Shapiro v. Wilkinson*, [1944] S.C.R. 443 (S.C.C.) (trial judge failed in jury charge to adequately deal with the statutory onus of proof under the *Highway Traffic Act*); *Curly v. Rusyn*, [1970] O.J. No. 192 (Ont. C.A.) (trial judge failed to instruct jury that onus of proof as to damages claimed rested on plaintiff); *Bennett (Next friend of) v. Visscher*, [1977] O.J. No. 1228 (C.A.) (trial judge failed to properly instruct jury on statutory onus of proof); *Giurlando (Litigation Guardian of) v. Cammalleri*, [1999] O.J. No. 767 (C.A.) (trial judge failed to make clear to jury that onus was on defendants to disprove negligence); *Losier v. Smirnov*, [2006] O.J. No. 830 (C.A.) (trial judge erred by speaking only of "competing onuses" without explaining much heavier statutory onus on the driver making left hand turn").
>
> 93 We conclude that a new trial on damages is required. Applying the criteria enunciated by Borins, J. in *Periera*, *supra*, it is clear that the charge leaves the jury with a misapprehension of the applicable legal principles, and that the law was not clearly stated on a critical issue.

[75] I agree that these principles, concisely summarized by Wilson J. from the Ontario authorities, should apply to this case.

[76] From that perspective, in my view there should be a new trial.

[77] Dr. Kajetanowicz correctly points out that the jury answered No to Question No. 1 – *i.e.*, that Dr. Kajetanowicz was not negligent – and did not address apportionment with the Settling Hospitals. From this, Dr. Kajetanowicz submits that, even if the judge misunderstood the burden of *Pierringer* apportionment, there can be no substantial wrong or miscarriage of justice.

[78] With respect, that submission is unsustainable. The reason is that, before any consideration of *Pierringer* apportionment, the misdirection on burden infiltrated the issue of Dr. Kajetanowicz's liability. The topic is discussed earlier (paras. 50-56).

[79] I will elaborate. The judge's misdirection on the burden respecting the fault of the Settling Defendants, viewed reasonably in the context of the course of trial and the entire charge, misled and distracted the jury respecting liability in the following respects:

> **First:** The jury was charged that "[t]he burden of proof is what a party must prove to succeed in his action" and, later "the burden remains on the Plaintiff to prove that each of these hospitals is negligent". An "action" asserts liability, and the Plaintiff's only "action" before the jury was against Dr. Kajetanowicz.
>
> **Second:** The charge told the jury that "[t]he Plaintiff submits that the IWK Health Centre did not meet the standard of care in this case". That message appeared to embed the Plaintiff's burden to prove the IWK's negligence into the Plaintiff's theory against Dr. Kajetanowicz. The message obscured the Plaintiff's actual theory – that Dr. Kajetanowicz's standard of care was independent of any negligence by the IWK.
>
> The Plaintiff acknowledged the fact that the IWK's process had failed. The Plaintiff did not "submit" to the jury that the IWK was negligent or advance for the jury's consideration any theory that rested upon the IWK's negligence. The Plaintiff's only submission was against Dr. Kajetanowicz. Counsel made this clear to the judge in the exchanges on January 25 through January 29.
>
> The Plaintiff's acknowledgement to the jury came after the judge had informed counsel that she would instruct the jury the Plaintiff had the burden

to prove the Settling Defendants' fault. The judge's ruling left the Plaintiff no option but to acknowledge the IWK's negligence. Then the judge's charge elevated the Plaintiff's acknowledgement to the status of a submission.

Third: The charge instructed that Dr. Kajetanowicz "was entitled to reasonably rely on hospital systems to work as intended, and hospital staff to carry out their responsibilities competently". The misdirection on the burden meant that the Plaintiff would be expected to prove the IWK system did not work as intended or that the IWK hospital staff did not carry out their responsibilities competently. But, if those were the facts, the jury would find Dr. Kajetanowicz was not negligent, because the judge directed the jury that he was "entitled" to rely on the IWK systems and staff to perform properly.

As a result, the Plaintiff was assigned an onus that counteracted his interest on the issue of liability.

Dr. Kajetanowicz's standard was to act as a reasonable neonatologist in the circumstances. It was for the jury to decide what is reasonable in the circumstances. Those circumstances included, as the charge said, the expectation that hospital systems will act as intended and hospital staff will perform competently. But those circumstances also included whether Dr. Kajetanowicz was aware of a flaw in the IWK's system and, if so, whether or how that awareness would affect a neonatologist's reasonable standard of conduct. The Plaintiff's theory of liability was that Dr. Kajetanowicz's awareness of a flawed IWK screening process heightened his standard of care.

In that sense, the judge's misdirection on burden distracted the jury from the Plaintiff's theory.

Fourth: Dr. Kajetanowicz's defence to liability rested on the IWK's "basic failures" that "brutally" misled Dr. Kajetanowicz and excused Dr. Kajetanowicz of any fault. Dr. Kajetanowicz had the burden to establish the facts which supported that assertion. Yet the jury was told:

> …. Dr. Kajetanowicz takes no position on the negligence of … the IWK Health Centre, at least formally, anyway. I think you can refer to the comments of the Defendant in his closing address, and recall the position he took there.

> There was no direction that Dr. Kajetanowicz had the burden to prove the IWK's failures upon which he relied.
>
> As there was little evidence on the topic, the omission may have affected the outcome. The individuals with the IWK and the Cape Breton Regional Hospital who handled Alexander's blood screen and test report in 2008 did not testify. There was no testimony, from an IWK or Regional Hospital witness with personal knowledge in 2008, about (1) what the IWK meant by "[r]ecall has been initiated by IWK Health Centre" on Alexander's screening report, (2) what the IWK expected from the Regional Hospital by remitting Alexander's screening report to the Regional Hospital and (3) what the Regional Hospital expected from Dr. Kajetanowicz by remitting Alexander's report to him.
>
> The misdirection on the burden allowed the Defendant to deny liability, by alleging the IWK's "basic failures", from a sanctuary where the absence of evidence was the Plaintiff's problem.
>
> **Fifth:** It is no answer to say that the misdirection – "[t]he burden remains on the Plaintiff to prove that each of these hospitals is negligent" – related to apportionment, not liability. The notion of opposing burdens for the same topic – *i.e.*, for the Settling Defendants' fault – itself would be confusing without a clear explanation to the jury. Nothing in the charge explained, or even suggested to the jury that the Defendant bore one burden on the issue for liability while the Plaintiff bore an opposing burden for apportionment.

[80] The jury was left with a misapprehension of the burden of proof on an issue that impacted liability. Burden of proof is life-blood to a jury charge. One cannot know what the jury would have done after an accurate instruction, but the misdirection skewed the dynamics of trial. There is a reasonable prospect that the outcome was affected, meaning there was a substantial wrong and miscarriage of justice.

Conclusion

[81] I would allow the appeal, overturn the Supreme Court's dismissal of the claim and order a new trial.

[82] The Court's Order will reserve on costs. At the hearing, counsel referred to a contingent agreement relating to costs. Counsel did not cite the particulars of that agreement. It is unclear whether that agreement might affect this Court's costs award. The parties should file any submission on costs by May 17, 2019, after which the Court will issue a supplementary Order on costs.

Fichaud J.A.

Concurred: Farrar, J.A.

Dissenting Reasons for judgment (Scanlan, J.A.):

[83] I have the benefit of my colleague's reasons and I adopt most of what he has said. For the reasons set out below, I disagree as to disposition.

[84] I agree with the majority that the instruction by the trial judge as to the plaintiff having the burden to prove the liability of the settling parties was incorrect. *Branco* highlights the risk to non-settling parties if they choose not to present evidence as to the liability, and extent of liability, of settling parties when there is a *Pierringer* Agreement. It is clear that at trial there was disagreement and/or confusion as to who, if anybody, was required to show the settling parties were negligent. In the end the trial judge incorrectly instructed the jury that the plaintiff had the burden of proving the settling parties' liability. In spite of that error, I am not satisfied that, in the context of this appeal, that misdirection warrants the matter being sent back for a retrial. Let me explain.

[85] During submissions on appeal, appellant counsel expressed the reluctance of the respondent, a doctor in the health care system, to blame others in that system for harm to patients in that system. Appellant counsel said that at trial the defendant focused on his role in the case. The evidence revealed that the respondent had identified a potential systemic flaw in the IWK and Regional Hospital's system and the respondent had a mechanism in place to help him detect shortcomings. In spite of having noted some systemic shortcomings in the IWK systems, in this case the respondent relied upon the notes in the IWK report that suggested that it had initiated a recall of the infant plaintiff once abnormalities were noted in the lab results.

[86] The jury had before it, all the evidence as to why the respondent had his own process, in addition to the IWK and Regional Hospital processes. He explained to the jury why he did not follow up even after the abnormal results were indicated in the IWK report. It was based on that evidence that the jury found the defendant was not negligent. In doing so they answered a single question:

> Question No. 1: Has the Plaintiff established that he Defendant, Dr. Andrzej Kajetanowicz was negligent? To answer this question, you must simply answer yes or no. If the answer is no, you do not answer any further questions. If yes, you proceed to the next question.

[87] Later in the jury instructions the trial judge said:

> … I remind you now, however, that did begin with the issue of whether the Plaintiff has established that Dr. Kajetanowicz was negligent. To answer this question, I want to tell you about the law of negligence as it involves doctors.

[88] As noted by my colleague, there were a total of ten possible questions put to the jury. They stopped after finding the respondent was not negligent.

[89] I pause here to repeat that I agree with the majority that, in the face of a *Pierringer* Agreement, the defendant assumes the burden of proving the extent of liability of the settling parties. That becomes important only if the non-settling party is found to be negligent. If the defendant is found to be negligent, then for there to be a proper apportionment of damages, the defendant bears the burden of proving the liability of those settling defendants. In practise, if a non-settling party is held liable, the terms of the *Pierringer* Agreement, including settlement amounts, also come before the court to ensure that the plaintiff does not obtain double recovery.

[90] As for the trial process, a defendant is not to be disadvantaged as a result of settling parties withdrawing from the trial. For example, the non-settling defendant has access to the witnesses, reports and materials in the possession of the settling parties. That said, a non-settling party does not have to show another party liable in order to avoid liability. A defence may be as simple as, I wasn't there. Why, in that case, is proof of liability of settling parties required? It is not. There may be many valid reasons a defendant may choose not to deal with the issue of other parties' liability. That is for a party and their counsel to decide.

[91] The whole purpose of *Pierringer* Agreements is to reduce costs and court time, as well as to provide some certainty for the settling parties. That said, a

Pierringer is not an instrument that will or should require a non-settling party to establish that someone else was at fault if it is not a necessary part of their defence. As in this case, a party may choose to say 'this is the evidence, it is for the jury to determine based on all the evidence before it if I was negligent in my actions'. The *Pierringer* process would offer little by way of savings if it simply shifted the burden of calling witnesses to the non-settling defendant, requiring them to prove something that was not necessary to relieve them of liability. Here the defendant presented evidence as to what he did or did not do, and why. Based on that evidence, the jury determined that he was not negligent. That process no doubt resulted in substantial savings for the parties and the court in terms of time and money. Proving the settling parties' negligence would have done nothing more in terms of the issue of the respondent's liability.

[92] As noted in the majority reasons at para. 27 above, *Horne*, *supra*, discussed when it is appropriate for an appellate court to set aside a jury verdict in a civil case concluding:

> 5. The appeal will be allowed only if the misdirection, viewed reasonably, was capable of affecting the jury's verdict or, put another way, potentially caused a substantial wrong or miscarriage of justice. This standard originated in a former rule of court in Nova Scotia, and continues as an appellate principle of review.

[93] The charge to the jury was perhaps not perfect in relation to the issue of the defendant doctor and his right to rely on the medical reports, and the other actors in the health care system. Perfection is not the standard required in a jury charge. The charge to the jury on that issue was adequate.

[94] In the present appeal I am not satisfied that any errors or deficiencies in the instructions to the jury warrant a retrial. More to the point, the instructions as to who had the burden of proving the non-settling parties' liability, while wrong, did not result in a 'substantial wrong or miscarriage of justice'. What occurred here is that, even in the absence of evidence aimed at proving other parties' negligence or liability, the jury determined that the defendant was not negligent.

[95] I would have dismissed the appeal.

Scanlan J.A.