THE FIRST PAST THE POST RULE

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Often an issue arises as to priorities with regard to the various claimants against an insurance policy. There may be one pot of money with a number of claimants, not all of whom, in view of the policy limits, can have their claims fully satisfied. Is there a "first past the post" rule, such that preference is given to the first claimant to file?

There is limited law in this area. The principle appears to be, however, that the first claimant to achieve a judgment or settlement may have the priority of a payout, but there is a discretionary element to the principle and it will not always apply.

A case that discusses in some detail the principle is a recent Alberta case of Justice Wittmann (then A.C.J.): ***Commerce & Industry Insurance Co. Canada Inc. v. Singleton Associated Engineering Ltd.***, 2005 ABQB 500, 53 Alta. L.R. (4th) 391. The case concerned a pipeline construction project that was insured by Commerce & Industry for professional liability insurance for the architects and engineers on the project. The liability insurance provided by Commerce & Industry was for $10 million dollars. There were multiple claims put forward in relation to the pipeline and damages were expected to be in excess of $93 million dollars. The insurer wished to settle the claim with the multiple claimants and proposed to either do so on a claim by claim basis or on global pro-rata basis. As could be expected, the parties could not agree on the proper approach and the matter was referred to court.

Justice Wittmann noted that the "first come first served principle" has been applied in the UK in a case dealing with errors and omissions insurance for Lloyd's insurance members and managing agents in ***Cox v. Bankside Members Agency Ltd.***, [1995] 2 Lloyd's Rep 437 (Eng. C.A.). In that case the Court had to decide between chronological priority as opposed to rateable distribution. The Court noted that there would be unfairness regardless of which approach was

taken, but that chronological priority was the ordinary rule. Chronological priority allows those who have obtained favourable judgments at great expense to recover on their judgments, even though it means that those "at the back of the queue" will be unlikely to share in the coverage. It also avoids adjusting the roles and obligations of the parties retrospectively. At paras. 26-27:

> One of the arguments raised by those opposed to chronological priority was that if such an approach were applied to the payout of the claims, those actions at the back of the queue would be unlikely to share in the coverage available, creating an injustice. The Master of the Rolls held at page 459-460:
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> > **The ordinary rule of chronological priority involves obvious hardship to the plaintiff names who are not at the front of the queue. But there is obvious hardship for plaintiff names if, having obtained favourable judgments at very great expense, they are denied the fruits of their judgments, perhaps facing bankruptcy before the judgments can be effectively enforced... One is of course sympathetic to all those who have suffered heavy losses in the Lloyd's insurance market, but I am not on balance persuaded that greater fairness would be achieved by a scheme of rateable allocation along the lines proposed** ..., even if this were feasible, than by application of the ordinary rule of chronological priority.
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> In a separate judgment Saville L.J. concluded at p. 466-467:
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> > **I can see no reason why equity should intervene to require that those first to call on the policy should have to share their recoveries with later claimants if and when the insurance became exhausted**. In the absence of an express or implied agreement to such an effect **it seems to me that to impose such a regime on the parties would again be, in effect, retrospectively to adjust their rights and obligations for no good reason** ... when co-assured enter into insurance of the present kind which gives them several rights, each simply takes the risk that cover may become exhausted as time goes by, leaving all thereafter exposed to uninsured risk. [Emphasis added]

Justice Wittmann noted that ***Cox*** has been followed twice in Canada by Ontario's Superior Court, in ***Laidlaw Inc. Re,*** 46 C.C.L.I (3d) 263, 2003 CarswellOnt 992, and ***Solway v. Lloyd's Underwriters*** (2005), 75 O.R. (3d) 129, 2005 CarswellOnt 1333.

He also noted that the insurer had cited a number of American authorities that have adopted the first come first served principle. The cases appear to have two main concerns when the chronological approach is not followed. One is that it would be inequitable for judgment holders to be prevented from proceeding on their claims; the other is that it discourages settlement if the insurer has to wait to determine all the claims before making a payout.

Ultimately, Justice Wittmann appeared to agree that the first come first served principle is generally applied unless there are good reasons for departing from the principle. In this case, Justice Wittmann found the general principle should apply. He relied to some degree on wording in the insurance policy that specified that the insurer will pay the sums it is legally obligated to pay, as well as a provision stating that the insured cannot bring an action against the insurer until final judgment or settlement is achieved.

In terms of the equities that applied in the case, Justice Wittmann found that if the first come first served principle was not applied other inequities would arise, namely that those who have obtained judgment or settlement would be precluded from accessing their insurance until all claims are determined. There could also be an issue of delaying access to excess insurance on the facts of the case. Further, encouraging settlement at an early stage could be thwarted by a pro-rata system that depends on the determination of all claims before a payout. As a result, settlements and judgments were ordered to be paid out according to the chronology of their making until the policy limits were exhausted, at paras. 40-42:

> Nor, am I persuaded that the fact that the Policy is a project policy constitutes a good reason for departing from the general rule of first come first served**. I acknowledge that there are potential inequities that arise in instituting the first come first served approach in circumstances where there may be a short fall in coverage. However, in eradicating the unfairness of uncertain coverage other inequities arise, namely that those against whom judgment has been obtained or settlement reached would be precluded from accessing their insurance until all claims in relation to the Project are determined.** This result could leave those insureds who proceeded first to judgment or settlement without insurance proceeds available to satisfy their

> creditor, Alliance. An inability to access the Policy may also effectively delay access to excess insurance, which may become particularly problematic in light of the insolvency concerns here.
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> **Moreover, commercial efficiency considerations should encourage reasonable settlement at an early stage of a claim. A pro rata scheme would likely thwart any reasonable possibility of achieving this objective.**
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> **There are myriad other potential problems that could arise if a pro rata scheme of pay out were imposed.** For example: there may be different limitation periods in relation to an indemnity policy which applies in various jurisdictions; it may be unclear when the excess insurers' duty to defend arises and how it is effected by the pro rata payout. These are merely examples intended to demonstrate the difficulties inherent in the imposition of a pro rata payment scheme not contemplated in the Policy. [Emphasis added]

In ***Laidlaw Inc. Re,*** 46 C.C.L.I (3d) 263, 2003 CarswellOnt 992, the insurance company sought a declaration that it was obliged to pay out settlements and judgments in the chronological order that they were incurred, agreed to or obtained. The insurance in question were Directors, Officers and Corporate Liability policies. There were few background facts given in the case and it appears to mainly have been a legal question based on the provisions of the policy. The insurance company sought to ensure that it did not have to ascertain all claimants under a policy before commencing settlements with known claimants.

The judge in the case agreed, relying both on a specific insurance condition and on the common law. The insurance condition stated that no action would lie against the insurer until the amount of the insured's obligation to pay was finally determined either by judgment or agreement. We note that this clause was also relied on by Justice Wittmann decision in relation to the ***Commerce & Industry*** policy.

The judge held that due to this clause the insurer was not required or allowed to consider claims that had not yet been determined before paying out claims that had been resolved. To do so would be to rewrite the insurance policy, at para. 13:

> It appears to me that the provisions of Clauses 8 and 18 set out above demonstrate that the intent is to trigger Homeco's obligation to pay once a claim has been finally determined by judgment or settlement (and endorsed by Homeco) and to vest in the claimant at that time a deemed right to recover such judgment or settlement against Homeco. As well it appears clearly contemplated that finally determined claims under the subject Policies will be paid as presented on a first come, first served basis. **I do not see that there is any provision in the subject Policies which would allow or require Homeco to consider claims or potential claims which have not been finally determined by judgment or settlement as opposed to its obligation to pay claims which have been finally determined.** To impose a requirement on Homeco (and a restriction on a successful claimant's direct right) which would oblige Homeco to defer payment (and the claimant collection) until such time as all claims and potential claims under the subject Policies are known and finally determined would constitute an unwarranted rewriting of the subject Policies. … [Emphasis added]

The judge also looked to ***Cox*** and American case law that held the first past the post principle encourages settlement, and held that it should apply in the case. It was noted that in ***Cox*** an exception to the rule was noted where 'a group judgment is obtained or where more than one is obtained at the same time', at para. 14, though the judge noted this may not be a true exception as there is no claimant truly first past the post in such a scenario.

Solway v. Lloyd's Underwriters (2005), 75 O.R. (3d) 129, 2005 CarswellOnt 1333 concerned a claim against a moving company that lost the possessions of two families in 1999, the Solways and the Bertrands. The Solways took their case to trial in 2001 and were successful through various levels of appeal in the following years. The Bertrands also commenced an action, but had done little to move the case forward and it had not yet proceeded to discoveries by 2005. The moving company's liability to the Solways was just over $725,000 and the Bertrands were seeking damages of $450,000. The applicable policy limit could not satisfy both claims.

One of the issues that arose was whether the Solway claim should be satisfied considering that the Bertrand claim was not yet determined. The Bertrands submitted that the Solway payout should be pro-rated to reflect the pending claim. They argued that the first past the post

approach promotes races to judgment and fosters competitive and potentially duplicative litigation.

The Court quoted from ***Laidlaw*** for the proposition that an insurer is not required to ascertain all claimants under a policy before paying any of them out. The Bertrands argued that they refrained from litigating their claim while the Solway action proceeded as a type of test case for reasons of judicial economy. However, the Court held that there was no evidence of an express agreement between the parties that one case would advance under this understanding, or that the Bertrands would help to fund the Solway case regardless of its outcome. The Court held that the circumstances did not warrant departing from the general rule of 'first past the post'.

Another factor was that the Bertrands did nothing to advance their case after the Solway case was finally determined in mid-2003. The Court therefore held "[i]n these circumstances I do not consider that equity requires a departure from the standard "first past the post" rule. Indeed, in my view, it would be inequitable to deprive the Solways of their entitlement to make first claim against the available insurance monies", at para. 68. As a result the Court ordered the Solway claim to be paid without any proration in consideration of the Bertrand claim.

The ***Solway*** decision was varied on other grounds on appeal, however the issue of prorating the Solway claim was not appealed: ***Solway v. Lloyd's Underwriters*** (2006), 80 O.R. (3d) 401, 2006 CarswellOnt 3160 (Ont. C.A.).

As mentioned in the foregoing cases, there is some room for exceptions to the general rule. One such case, which did not follow the rule on equitable grounds, was ***Behrns v. Burleigh*** (2006) 78 O.R. (3d) 370, 2005 CarswellOnt 7040 (Ont. Sup. Ct. Jus.). The case concerned the aftermath of a serious car accident which killed a mother and seriously injured her three month old child in one vehicle, and seriously injured a passenger in the other vehicle. The child, Randall Middleton, suffered serious head injuries and it was expected that he would have long-term impairments. His damages were expected to exceed $1 million dollars. Although the

accident had occurred six years previous to the court application, the child's doctors felt that they were not able to provide a reasonably reliable prognosis for him yet. As such, his counsel wished to delay the assessment of damages. On the other hand, the passenger who was injured had settled with the driver and wished to be paid her damages of $325,000. The issue of priorities arose as the limit on the insurance policy was $1 million dollars.

The Court turned to legislation in Ontario and noted that there are two sections in the *Insurance Act* which may be relevant. One section provides that in the case of car accidents, where one person has recovered a judgment but the insurer believes there are other potential claimants, the insurer may apply to pay the money into court and have the court deal with the payout of funds. A similar more general section also appears in the Act which states that if several persons are interested in insurance money, a court may apportion the funds, at paras. 10-11:

> Subsections 258(7) and (8) of the Insurance Act [FN2] provide that where any person has recovered a judgment against an insured in a motor vehicle accident, and where the insurer admits liability under the insurance contract, and where the insurer considers that there may be other claimants to the insurance proceeds, the insurer may apply to the court to pay the money into court. The funds are then dealt with as the court directs on application by any person interested in the proceeds. Apparently there are no reported cases under these provisions.
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> Section 133(3) of the Insurance Act provides:
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> > In all actions where several persons are interested in the insurance money, the Court or Judge may apportion among the persons entitled any sum directed to be paid, and may give all necessary directions and relief.

The Court noted that there were no reported cases under either section, and that the more general section, section 133, conferred a broad discretion on the court, and debated how the discretion should be used.

The Court noted that the common law prefers the 'first past the post' theory, but held that in this case there should be apportionment, given the nature and timing of the claims and the interests at stake. However, as the passenger should not have to wait for a final determination of the child's claim to receive some payment, the Court allowed proceeds to be apportioned provisionally on the basis of a calculating a 'reasonable maximum entitlement' for the child's claim, at para. 15:

> In this case there should be apportionment, given the nature and timing of the claims and the interests at stake. However, the Behrns should not have to await a final disposition of the Middleton trial to receive some payment. Even though it may be premature to fix damages for Randall Middleton, the price he pays for delaying his damages trial is a preliminary apportionment, with prejudice, on the basis of his likely reasonable maximum entitlement. Proceeds may be apportioned provisionally on the basis of this reasonable maximum claim, and further apportionment may be done - on an interim basis if that be appropriate - and in any event upon the final determination of Randall Middleton's claims.

The Court's focus on the equities of the case was summed up in para. 16 where it discussed the fact that both plaintiffs were innocent victims who deserved compensation, and that both parties should have their interests met, without prejudice to the other, as far as possible:

> **Randall Middleton and Julie Behrns are both "innocent victims" in this sad case. They have both suffered serious loss, and both are deserving of compensation. Both may suffer a shortfall in their compensation because the insurance proceeds available are insufficient to cover all the damages.** As a result, they are now placed in unenviable positions. Arguments on behalf of the Middleton child tend to denigrate the seriousness and urgency of Ms. Behrns' claims to tip the balance in favour of protecting a vulnerable infant. Arguments on behalf of Ms. Behrns tend to be critical of the delay tactics adopted by the Middleton infant's counsel, and the want of diligence by the Middleton infant's litigation guardian to tip the balance the other way. Neither of these approaches has merit. Ms. Behrns' injuries were serious and life-altering, meriting a settlement of $317,500 for her account. It matters not that she has not suffered life-ruining injuries. As an ordinary litigant, who has suffered very real loss through the fault of another, she is entitled to prosecute and then collect on her claim reasonably expeditiously. **It is simply wrong that her interests in obtaining compensation for the wrongs done to her should be subordinated to the interests of Randall Middleton. Similarly,**

> **Randall Middleton has suffered serious injuries, and he should be permitted to prosecute his claim in a manner that is reasonable given the nature of his injuries. His interests should not be prejudiced simply because Ms. Behrns is anxious to get her money. [Emphasis added]**

In coming to its decision, the Court reviewed the ***Solway***, ***Laidlaw*** and ***Commerce & Industry*** cases, and was able to distinguish each one. The Court noted that in ***Solway***, the Bertrands "lackadaisical" approach to litigation was a strong factor that deterred the court from exercising a discretion in their favour. As well, it was noted that there had been no joint management of the claims, which was different than the present case.

As for ***Laidlaw***, it was distinguishable as it was more concerned with whether the insurer had to wait to commence payouts in case any unascertained claims came forward, and was not directly about prorating claims between contending claimants. It also concerned claims in multiple jurisdictions which complicated matters. There was also no opposition in the case to applying 'first past the post'.

The Court felt that the ***Commerce & Industry*** case was the closest one on the facts to the present case, but disagreed with the reasoning applied in the case. The Court noted that there was no direct conflict between claimants for proceeds yet in ***Commerce & Industry*****,** as it was a case concerning a potential conflict, unlike the present situation. It was therefore not possible to assess the equities between the competing claimants.

As well, the Court relied on s. 133(3) of the *Insurance Act* as providing a discretion to apportion insurance proceeds, and noted that this seems to be the reverse of the common law presumption of first past the post, at para. 32:

> In section 133(3) of the Insurance Act, the legislature has conferred discretion on the court to apportion insurance proceeds, and to give necessary directions and relief in this regard. This provision does not contemplate a common law presumption that there will not be apportionment; quite the reverse. I see no reason why the phrase "persons entitled" ought to be

> restricted to judgment creditors. Litigants go to court to prove their entitlements, not to create them.

The Court noted that this case involved mandatory automobile coverage, unlike the insurance at issue in ***Commerce & Industry***, as another potentially distinguishing feature, but ultimately noted that even if it could not be distinguished on that basis, the Court declined to follow it.

The Court was most concerned about its use of discretion under the *Insurance Act* in this case, and noted that unlike in ***Solway***, there was no reason to exercise discretion against the child Randall Middleton in this case. The principle of 'first past the post' did not adequately account for the exercise of discretion mandated by the Act, at para. 35. The Court concluded that the principle of 'first past the post' "does not create a presumption against pro-rating claims where two or more claimants vie for payment from the same insurance proceeds and the matter is placed before the court by one of the claimants", at para. 36.

Finally, in determining that the facts of the case weighed in favour of pro-rating the insurance proceeds, the Court noted the following factors, at para. 37:

> I find the following circumstances of this case weigh in favour of pro-rating insurance proceeds between the Behrns and the Middleton plaintiffs:
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> (a) **The claims arise out of the same car accident**;
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> (b) **Julie Behrns and Randall Middleton are both entirely innocent of wrongdoing** and both have suffered damages as a result;
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> (c) The Behrns have prosecuted their action with diligence, and have sought as early a determination of their claims as possible;
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> (d) **Randall Middleton is an infant**. The claim has been prosecuted on his behalf by others. Any default in prosecuting the claim with diligence should not be visited upon him;
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> (e) **Randall Middleton's injuries include brain damage. The consequences of that damage are still not clear.** Randall may require considerable professional and medical support for much

of the rest of his life, or he could end up leading a relatively normal life. His doctors have determined that their ability to make a meaningful prediction of Randall's likely long-term prospects will improve materially once Randall reaches age 6. **Thus there is a reasonable, good-faith basis for Randall to seek to defer proving his damages until after he has reached the age of 6.**

(f) **The Behrns action and the Middleton action were case-supervised together.** The cases were to be tried one after the other, or as the trial judge may have directed, in respect to the issue of liability, until that issue was settled.

(g) The Behrns made it clear throughout the case supervision process that they wished the case to be tried as soon as possible. The Middletons made it clear that they wished the assessment of Randall Middleton's damages deferred at least until Randall turned 6. Both parties were aware throughout that there could be a shortfall in insurance proceeds. It was not until after the Behrns had a judgment, and before the Middleton case went to trial, that the Behrns took the position that they were entitled to payment in full because they were "first past the post". Had the Behrns taken this position prior to trial, there is no doubt that the Middletons would have sought a trial simultaneously, so as to share in the insurance proceeds equitably.

(h) In the positions taken before this court throughout the case supervision process, the Behrns took positions consistent with what appeared to be the common position of the parties that in the event of a shortfall, proceeds would be divided on a pro-rata basis.

(i) The Middleton action is ready for trial, subject to obtaining the required medical reports respecting Randall's long term prospects. Trial is now scheduled for May, 2006, although it is possible that this date will have to be deferred to the autumn of 2006 or spring of 2007.

(j) The court may make an order for payment out of a portion of the insurance proceeds, based upon the reasonable maximum recovery by Randall Middleton and the established claim of the Behrns. This will result in a payment being made to the Behrns now, which will mitigate the prejudice of further delay in the Middleton action. [Emphasis added]

The Court exercised its discretion to pro-rate the insurance proceeds in this case and allowed an initial pro-rated amount to be given to the injured passenger. The partial payment involved a few assumptions and calculations being made; the Court noted at para. 47 that it preferred this 'myriad of problems' rather than the gross inequities that would occur if pro-rata distribution was not done.

The *Insurance Act* provision relied on by the Court in ***Behrns*** also exists in Alberta's *Insurance Act* at section 525:

> Consolidation of actions
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> 525(1) If several actions are brought for the recovery of money payable under one or more contracts, the Court may consolidate or otherwise deal with them so that there is only one action for and in respect of all the claims made in the actions.
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> (2) If an action is brought to recover the share of money payable under a contract to one or more minors, all the other minors entitled, or the trustees, executors or guardians entitled to receive payment of the shares of the other minors, must be made parties to the action, and the rights of all the minors must be determined in one action.
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> **(3) In all actions where several persons are interested in the money payable under a contract, the Court may apportion any sum directed to be paid among the persons entitled to the insurance money, and may give all necessary directions and relief.**
> **[Emphasis added]**

As is noted in ***Behrns,*** this section appears to promote pro–rata distribution, which is the opposite of the outcome that results when 'first past the post' is applied from the common law.

Behrns has been applied once in the case law, in a recent case from Saskatchewan: ***Condominium Plan No. 96PA02840 v. Kolbuck***, 2009 SKQB 480, 345 Sask. R. 260. The case was brought to the Court specifically under s. 115 of the *Insurance Act,* the provision in

Saskatchewan that is equivalent to the one discussed in ***Berhns*** in Ontario and is almost identical to s. 525 in Alberta.

The applicants were the owners of a condominium complex that was damaged when one of the tenants, the Kolbucks, left their son unattended and he started a fire. The owners commenced an action in 2006; their loss exceeded $1.8 million dollars. The Kolbucks had liability insurance of $1 million dollars, and the parties agreed to accept the $1 million in insurance proceeds subject to any other claims from potential claimants. They agreed that $800,000 would be paid to the owners and that a $200,000 holdback would be held in an account until six months after the expiration of the limitation periods.

Two other actions were commenced against the Kolbucks, one by Trueman in May 2008, for $20,000, and another by a group of tenants under the name of Theissen that was also commenced in July 2008.

The owners applied in December 2009 for an order paying all the proceeds received pursuant to the settlement to the owners based on the 'first past the post' principle. Trueman and Thiessen submitted that the proceeds should be pro-rated among all the claimants.

The Court reviewed the common law principle with reference to ***Laidlaw***, ***Solway***, ***Commerce & Industry*** and another decision from B.C. that followed the approach, ***Aviva***. In ***Re Aviva Canada Inc.*** 2006 BCSC 1578, 60 B.C.L.R. (4th) 153, the B.C. Supreme Court stated that the 'first past the post' approach should be used in non-automobile insurance claims, and was quoted as follows, at para. 10:

> The "first past the post" approach has been followed in Solway v. Lloyd's Underwriters, [2005] O.J. No. 1331 (Ont. S.C.J.). It was considered and applied by Wong J. in Aviva Canada Inc., Re, [2006] B.C.J. No. 2799 (B.C. S.C.) and Wong J. made the following comments on the approach at para. 23:
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> > British Columbia courts should follow the precedent set by Ontario, Alberta and the United Kingdom and adopt the "first past

> the post" approach to non-automobile insurance claims. Given that there is no public expectation that all accidents which occur in a non-automobile context should be compensated, there is no underlying public interest rationale for the imposition of a pro-rata scheme. By contrast, as the judgments above have determined, any discussion of public policy suggests that the "first past the post" approach is preferable. Such an approach is the fairer option as it encourages early settlement which lessens the burden on the courts; it rewards those claimants who diligently move their claims forward; and it affords judgment creditors the opportunity to realize the fruits of their judgments as soon as possible.

The Court also quoted from ***MacGillvray on Insurance Law***, which states that in cases of competing claimants, the first party to obtain judgment is entitled to their judgment unless there is a good reason for departing from that basic rule, at para. 12.

Finally, the Court referred to the ***Behrns*** case as a comprehensive analysis of the case authorities on the 'first past the post' approach and noted that it also considered the application of the discretionary provision in the *Insurance Act*. It then applied the ***Behrns*** decision by looking to the circumstances of the present case.

The Court determined that the owners had agreed in their settlement to wait until January 31, 2009 to ascertain if any further claims were made and that the Kolbucks could then negotiate with those claimants to satisfy their claims. Trueman had commenced her action in May 2008 and had entered into settlement with the Kolbucks in August 2009 for $10,200. The six plaintiffs in the Thiessen action however had taken no steps towards resolving their claim after filing it in July 2008. There had been no examinations for discovery or any other proceedings. The total amount claimed by the plaintiffs was $111,847.

Based on this evidence, the Court noted that Trueman had not occasioned any delay and was deserving of her settlement funds (ie. apportionment) from the holdback funds. The plaintiffs in the Theissen action however had simply waited and wished to participate in the holdback on a pro-rata basis or to have the distribution of the holdback further delayed until their claims were

proven. This was found to be unfair, and the type of situation in which the 'first past the post' approach should be applied, at para. 18:

> The owners and the Kolbucks agreed to a holdback provision in their settlement agreements. The owners were not obliged to agree to a holdback provision, but specifically agreed to it which resulted in the matters being delayed. **Trueman has not occasioned any delay. She pursued her action to judgment in Provincial Court and then entered into minutes of settlement with the Kolbucks which limited her claim to the holdback as provided for in the agreement with the owners. However, the plaintiffs in the Thiessen action have taken no steps to prove their claim.** They have waited and apparently wish to participate in the holdback proceeds on a pro-rata basis or have the distribution of the holdback delayed further while they prove their claim**. It is this type of situation that the "first past the post" approach was meant to deal with. It was not meant to deal with the Trueman circumstances which are substantially different because of the steps that she has taken.** … [Emphasis added]

As a result, the Court allowed the owners and Trueman to pro-rate their respective claims and have those payments made out of court, and Thiessen 'having failed to take any steps to establish or prove their claim' was not entitled to a pro-rated share of the holdback proceeds, at para. 19.

Based on the foregoing, it appears that the case law is still developing in Canada with respect to the "first past the post" rule, and there continues to be a large discretionary role to apportion insurance proceeds. As the case law illustrates, in the exercise of its discretion the court may consider many factors, including if the claimant is a minor, the relative diligence of the parties in prosecuting their actions, and whether some of the claims are for personal injury, as opposed to property damage. For these and other reasons the court may find a pro-rata distribution of the policy proceeds more palatable than a strict application of the first past the post rule.

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