MINISTRY OF ATTORNEY-GENERAL
CIVIL LIABILITY REVIEW

Lesperance Mendes Submission Regarding Joint and Several Liability

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I. Introduction

This paper is written in response to the Ministry of Attorney-General's Civil Liability Review Consultation Paper (the "Civil Liability Review"). It addresses the principle of joint and several liability, one of the possible areas of reform identified by the Attorney-General. As the review of this principle is undertaken in the context of civil liability, we have not commented on its application in the area of contract law, where joint obligations commonly arise.

For the reasons set out below, it is our opinion that the principles of shared liability recognized in the *Negligence Act* are not in need of reform. We believe these principles are balanced, and consistent with sound legislative policy.

Our paper is organized into four parts:

1. A review of how joint and several liability has evolved in British Columbia from its common law origins.

2. A consideration of the policy behind joint and several liability.

3. A survey of proposals and reforms in British Columbia, Ottawa, England and Wales, Australia, New Zealand and the United States.

4. A consideration of the following concerns:

    a. shared liability in building envelope and other construction negligence claims;

    b. the settlement of multiparty claims.

II. The Evolution of Shared Liability in British Columbia

One of the problems in this area of law is its terminology. There is joint liability, several liability, and joint and several liability. To add to the confusion, the literature sometimes refers to"concurrent" and "independent" tortfeasors. A defendant might therefore be described as an "several concurrent tortfeasor", or by some other combination of terms. The results are often difficult for laypeople and lawyers alike to understand.

We therefore begin with a brief conceptual review. Whether tortfeasors are concurrent or independent depends on whether their actions combine to cause the same loss. Concurrent tortfeasors are those whose actions combine to produce one, indivisible loss.

Independent tortfeasors combine to produce distinct losses. Consider a passenger who suffers an injury to his back as the result of an accident caused by the negligence of his driver and the driver of another car, and then suffers a brain injury as the result of an adverse reaction to an anesthetic negligently administered at the hospital. The two drivers are concurrent tortfeasors with respect to the back injury. The hospital is an independent tortfeasor with respect to the brain injury.

Whether tortfeasors are joint or several depends on their state of mind at the time of committing their tort. Joint tortfeasors act with a common purpose or design to cause the plaintiff's loss. Employers and employees, principals and agents, and persons who act in concert are examples.

Several tortfeasors, on the other hand, do not act with a common purpose. In the case of a concurrent tort, their independent actions nonetheless converge to produce one loss.

Other jurisdictions sometimes use "solidary" liability to refer to the concept of joint and several liability. The term is borrowed from the civil law concept of liability *in solidum* ("for the whole").

We are concerned with concurrent tortfeasors rather than independent tortfeasors. We are not particularly concerned with whether concurrent tortfeasors have committed a joint or several tort. This is because s. 4 of the *Negligence Act* operates to make all concurrent tortfeasors "jointly and severally" liable, with one significant exception. Sections 1 and 2 of the Act provide that if a plaintiff's loss is caused in part by her own fault, then the liability of concurrent tortfeasors is several only.

The focus of our paper is therefore concurrent tortfeasors (whose actions combine to produce one loss) who, regardless of whether they acted with a common purpose or independently, are jointly and severally liable under the *Negligence Act*.

A. Shared Liability at Common Law

At common law, there was no apportionment of liability among concurrent tortfeasors. Rather, liability was viewed as an indivisible obligation for which all who shared liability were responsible. A plaintiff at common law could, therefore, recover his total damages from anyone sharing liability for his injury.[1] A defendant who satisfied a liability shared with others was not entitled to any contribution from his fellow tortfeasors,[2] since each defendant was responsible for the entire loss.

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1. *Hill v. Goodchild*, 5 Burr. 2790, 98 Eng. Rep. 465 (1771).

2. *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng Rep. 1337 (1799).

However, as liability was an indivisible concept at common law (and unable to be apportioned), a plaintiff whose actions contributed to his own loss was equally responsible for his entire loss, and not permitted to recover any damages whatsoever.[3] It was only with the introduction of apportionment legislation (in British Columbia, the *Negligence Act*) that contributory negligence ceased to be a bar to the recovery of damages.

B. The Negligence Act

British Columbia's *Negligence Act*[4], introduced in 1925, corrected the injustices that arose at common law. Its operation is well-known to lawyers in the Province. When a plaintiff is not at fault, liability among defendants is joint and several.[5] The Act permits contribution and indemnity among tortfeasors, requiring the Court to determine each party's degree of fault.[6]

When the plaintiff is also at fault, however, liability is several only.[7] The plaintiff is entitled to recover from each defendant "the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person".[8] This is so whether all tortfeasors have been sued or not.[9]

The current understanding of the *Negligence Act* was not definitively settled until 1986, when a five member panel of our Court of Appeal decided *Leischner v. West Kootenay Power & Light Co. Ltd.*[10] The Court confirmed that a plaintiff's contributory fault resulted in several liability only, reaffirming its decision two years earlier in *Cominco Ltd. v.*

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3 The rule originates in *Butterfield v. Forrester* 11 East. 60, 103 Eng. Rep. 926 (1809).

4 R.S.B.C. 1996 c. 333.

5 *Negligence Act*, s. 4.

6 Section 4(2)(b). This section does not apply to actions arising before April 17, 1985 resulting from injury to or death of a married person, if one of the persons found to be at fault is the spouse of that person. In those cases, damages, contribution and indemnity are not recoverable for the portion of loss or damage caused by the fault or negligence of the spouse: *Negligence Act* s. 5.

7 *Negligence Act*, s. 1.

8 *Negligence Act*, s. 2(c).

9 *Leischner v. West Kootenay Power and Light Co.* (1986), 70 B.C.L.R. 145 (C.A.).

10 *Supra*, note 9, affirming (1983), 150 D.L.R. (3d) 242 (SC).

Canadian General Electric Company Ltd. and others.[11]

III. Policy Considerations

In considering proposals for reform, it is helpful to keep in mind why rules of shared liability have arisen in the first place. The purpose of the law in this area is simple: to allocate the loss that arises when an insolvent defendant is unable to satisfy its share of a judgment.

Several and joint and several liability assign this loss as follows:[12]

> Preliminarily, it is important to appreciate that the primary consequence of what form of joint and several liability is imposed is the allocation of the risk of insolvency of one or more responsible tortfeasors. Joint and several liability imposes the risk that one or more tortfeasors liable for the plaintiff's damages is insolvent on the remaining solvent defendants, while several liability imposes this insolvency risk on the plaintiff.

Solvent defendants, particularly those whose fault is minimal, often complain about the unfairness of having to bear the consequences of another's insolvency in joint and several liability regimes. Their objections do not withstand close scrutiny.

First, one must remember that joint and several liability arises only if the solvent defendant is a cause of the entire loss for which it is jointly and severally liable. If the other defendants had not erred, the solvent defendant would still be (solely) liable for all of this loss. Should the solvent defendant be able to reduce its liability, simply because other defendants have also breached their duty to the plaintiff?

Second, appeals to fairness by such defendants are particularly wanting in British Columbia. In this Province, a plaintiff enjoys the benefit of joint and several liability only if she shares no responsibility for her loss. If a plaintiff is at fault to any degree, sections 1 and 2 of the *Negligence Act* provide for several liability, and shift the entire loss created by insolvency onto the plaintiff. This is so even if the fault of the plaintiff is minimal, or substantially less than that of the solvent defendants.

Since joint and several liability arises in British Columbia only when the plaintiff is blameless, a solvent defendant must be prepared to argue that it is more fair to impose the loss created by a defendant's insolvency on an innocent plaintiff, than on a defendant who, but for the fortuity of its co-defendant's negligence, would be directly liable to the plaintiff for his entire loss.

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[11] (1984), 50 B.C.L.R. 145.

[12] American Law Institute, *Restatement of the Law: Torts - Apportionment of Liability* (2000), p. 100.

It is significant that a plaintiff must be blameless before he can rely on joint and several liability in British Columbia. As we review below, joint and several liability has been under siege in the United States. Its decline in that country has been due in part to its availability even where a plaintiff is partly at fault. As the American Law Institute's *Restatement of the Law: Torts - Apportionment of Liability* (2000) (herein, the "*Restatement*") observes:[13]

> Before the adoption of comparative fault, tortfeasors who caused an indivisible injury were held jointly and severally liable.... The justification for requiring one defendant to bear the burden of an insolvent defendant's negligence was that as between a culpable defendant and an innocent plaintiff, the culpable defendant should bear the full burden of the plaintiff's injuries. With the advent of comparative responsibility, this justification for requiring defendants to bear the entire share of insolvent defendants is no longer compelling.

Third, even if solvent defendants can legitimately complain of unfairness, it is important to discern its source. A defendant who pays more than its share of a judgment may have a legitimate grievance. But this injustice has not been caused by the plaintiff, who receives no more than the law says is her due. The culprits are instead the insolvent defendants, who are unavailable to shoulder their burden. Sometimes the demise of these parties is due to their inability to cope with market forces. Often, however, it is the result of a deliberate business strategy which cloaks itself in the corporate veil, relies on the principle of limited liability, and seeks absolution in the *Bankruptcy and Insolvency Act*.

One American commentator has described the balance of equities between the innocent plaintiff and culpable defendants as follows:[14]

> In this context, it seems obvious that the expense and risk of apportionment should be borne by the tortfeasors rather than the innocent plaintiff. By definition, the innocent plaintiff bears no responsibility for any of his injury. Each tortfeasor, on the other hand, was a tortious, actual, and proximate cause of the plaintiff's entire injury and thus bears independent full responsibility for the injury. The fact that other tortfeasors also contributed does not detract from each tortfeasor's independent full responsibility to the innocent plaintiff, but rather only provides a basis for a claim of contribution against those other tortfeasors. If some of the tortfeasors are insolvent or otherwise unavailable an unfair apportionment of liability among the tortfeasors results, but the unfairness is solely a matter among the tortfeasors, The plaintiff is not a part of and is not responsible for that unfairness, whereas each tortfeasor is responsible for the plaintiff's injury.

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[13] *Restatement*, p. 204. See also Reporter's Note, p. 214:

> The critical question is who should bear the risk of insolvent parties. the advent of comparative fault, at least when some fault is attributed to the plaintiff, removes the traditional justification for imposing all of that risk on defendants.

[14] R.W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 22 U.C. Davis L. Rev. 1141 (1988), p. 1186.

IV. Proposals for Reform

A. BC Law Reform Commission Report on Shared Liability

In 1986, the Law Reform of British Columbia issued its *Report on Shared Liability* (the "BCLRC Report"). The focus of the BCLRC Report was somewhat different from that of the Civil Liability Review. First, the Report examined the problems flowing from the common law distinction between joint liability and joint and several liability, ultimately concluding the distinction had little utility and ought to be abolished. Second, the Report examined the *Negligence Act* and the judicial interpretation of its provisions, and concluded that a more modern statement of the law was required.

The Commission took a fairly radical approach to these issues, recommending that the *Negligence Act* be replaced in its entirety with new legislation modeled after the *Uniform Contributory Fault Act*, with some modifications. This new Act would extend to all "wrongful acts", defined as follows:

> "wrongful act" means an act or omission that constitutes
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> (a) a tort,
>
> (b) a breach of contract or statutory duty that creates a liability for damages, or
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> (c) a failure of a person to take reasonable care of his own person, property or economic interest
>
> whether or not it is intentional.

The BCLRC Report also proposed that all liability among concurrent wrongdoers be joint and several, eliminating the principle of joint torts. The *Law and Equity Act* would be amended accordingly by adding a provision comparable to the following:

> Where two or more persons are, but for this section, jointly liable to satisfy a common obligation, their liability is deemed to be joint and several.

Included among the Commission's recommendations are two that are directly relevant to the Civil Liability Review. The Commission proposed that the joint and several liability of concurrent wrongdoers not be affected by the contributory fault of the plaintiff, as currently required by sections 1 and 2 of the *Negligence Act*. The BCLRC Report proposed the following amendment:

> The fault of a person who contributes to his own loss or damage should not sever the liability of persons who, but for the contributory fault, would be jointly and severally liable for the loss or damage.

The Commission further concluded that joint and several liability can operate unfairly where a solvent defendant must make up the shortfall created by a defendant who is unable to pay the plaintiff's damages. It recommended that the Court be given the power to reallocate the contribution of each defendant as follows:

> Where liability is joint and several and the court is satisfied that there is no reasonable possibility of collecting contribution or judgment from a party contributing to a person's loss or damage, the court shall make an order that it considers necessary to apportion the contribution or judgment that cannot be collected among the other parties proportionate to their degrees of fault.

As we note below, several American jurisdictions have adopted a similar approach, described in the *Restatement* as "Track C".

B. The Federal Government

In 1995 the Standing Senate Committee on Banking, Trade and Commerce (the "Committee") held hearings on modernizing the *Canada Business Corporations Act* and, in the context of this review, was asked to consider the issue of auditors' liability.

Representatives of the Canadian Institute of Chartered Accountants (CICA) appeared before the Committee to outline their liability concerns. Not surprisingly, CICA asked that Federal and Provincial statutes be amended to provide that liability in negligence for financial information provided by accountants and others be several only.

The Committee made the following recommendations:

1. Joint and several liability should continue for economic loss claims arising from financial information, but only if the plaintiff is "unsophisticated", or if the loss was caused by the defendant's fraud or dishonesty.

2. In all other cases involving financial information provided by professionals such as accountants, appraisers, lawyers and corporate directors under the *CBCA*, the *Bank Act* and other federal finance legislation, joint and several liability should be replaced with "modified proportionate liability".

3. The Federal Government should consult with interested parties to determine how the shortfall created by the insolvency or unavailability of a defendant should be shared between sophisticated plaintiffs and the remaining defendants in instances of modified proportionate liability. The Committee favored limiting sophisticated plaintiffs to several liability. It also considered reallocating losses caused by insolvency among the plaintiff and solvent defendants, and recommended adopting the reallocation formula set out in

the *US Private Securities Litigation Reform Act of 1995*.

4. Further consultation should be undertaken to develop an appropriate test to distinguish between "unsophisticated" and "sophisticated" plaintiffs. The Committee favored a net worth approach, suggesting that the threshold should be at least $100,000 (excluding pension plans, RRSP's, cars, home furnishings and equity in a principal residence). If all assets were included, the threshold would increase to the equivalent of $200,000 US.

The Committee also recommended further study in respect of claims not involving the transmission of financial information, and that Provincial governments take the necessary steps to allow professionals to create limited liability partnerships.

The Committee offered a number of rationales for curtailing joint and several liability. It observed that joint and several liability distorted the legal process by encouraging plaintiffs to target deep pocket defendants. It had a negative impact on the accounting profession and had raised the cost of liability insurance. A move to another form of liability would be unlikely to impair the deterrence objective of tort law. Because of these drawbacks, joint and several liability had been modified or replaced in other jurisdictions. In general, the Committee concluded that joint and several liability was outdated and that Canada had to change to keep pace with reforms undertaken by its major trading partners.

We find the Senate Committee's approach to be impractical, and of limited assistance. First, the recent financial scandals uncovered in the United States suggest that justice is unlikely to be served by limiting the liability of accountants and other financial professionals.

Second, the reason for limiting sophisticated investors to modified proportionate liability appears to be that higher net worth individuals are likely to have a better understanding of the financial information presented to them. Net worth is a blunt tool for measuring such sophistication. Our *Negligence Act* is far more precise, permitting the Court to examine whether, given the actual circumstances of a case, a plaintiff knew or should have known better. A finding that the plaintiff contributed to his own losses to any degree invariably results in several liability under our *Negligence Act*, a more defence- oriented outcome than reallocation under modified proportionate liability.

Regardless of the merits of the Committee's approach, it has no application to the vast majority of tort claims, which do not involve reliance on financial information. One simply cannot correlate joint and several liability to the net worth of the victim of a personal injury, for example. Even where the knowledge of a plaintiff may be in issue, reliance on net worth would be difficult to justify. A condominium buyer's net worth or has nothing to do with her appreciation of the quality of a building envelope's construction.

C. England and Wales

England too has grappled with the issue of whether to legislate a change to concept of joint and several liability, with the accounting profession and those involved in the building industry leading the fight. In May 1995, the Common Law Team of the Law Commission was invited by the Lord Chancellor's Department and the Department of Trade and Industry to undertake an initial feasibility investigation of the law of joint and several liability, with the results of the investigation intended to enable the Law Commission and the Government to determine whether a full Law Commission project on the law of joint and several liability should be undertaken. In its 1996 report,[15] the Common Law Team concluded that a full project was not justified.

The Team's objections to the concept of "full" proportionate liability arose from a consideration of both practice and principle. With respect to practice under such a system, the following concerns were raised:

1. Would the total damage be divided amongst named defendants or amongst all wrongdoers?

2. How would one apportion liability against a person who is not a party to the action and therefore has not presented any defence?

3. If an unknown wrongdoer were later identified and proceedings brought against that person, is that wrongdoer entitled to challenge earlier findings of proportionate liability?

While the Common Law Team ultimately concluded that, in practice, a system of proportionate liability would be workable and could be confined to non-personal injury cases, it raised four primary objections of principle to the system.

First, full proportionate liability is unfair to the plaintiff because it shifts the risk of a defendant's insolvency from the other defendants to the plaintiff, a result which the Team concluded could not be supported when the plaintiff was legally blameless for the loss suffered. As between an innocent plaintiff and defendants who have caused an actionable loss, the defendants ought to bear the risk of insolvency.

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[15] England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996).

Second, the existing principle of joint and several liability "rests on standard, well-accepted principles of causation that present a formidable hurdle for plaintiffs."[16] To be held jointly and severally liable for loss, each defendant must have been causally responsible for the whole of the loss:[17]

> As a matter of causation, and blameworthiness relative to P, joint and several liability follows from each defendant being 100 per cent responsible for the whole of P's loss.

The Team found the following excerpt from Professor Richard Wright's paper *The Logic and Fairness of Joint and Several Liability* responsive to this second objection:[18]

> If joint and several liability actually resulted in a defendant's being held liable for more damages than she tortiously caused or for which she was responsible, or held her liable for the actions of others rather than her own actions, it would indeed be unjust. The premise, however, is false. Joint and several liability only applies to injuries for which the defendant herself is fully responsible. She is responsible for the entirety of some injury only if her tortious behaviour was an actual and proximate cause of the entire injury. She is not liable for injuries, including separable portions of injuries, to which she did not contribute....
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> [Take a] ... situation ... [where] each defendant clearly was a tortious cause of the entire injury and therefore is individually responsible for the entire injury. Yet, assuming that the defendants were equally negligent, the opponents of joint and several liability would assert that to hold either defendant liable for more than half of the injury would result in "holding a 50% negligent defendant liable for 100% of the injury (or damages)", "holding a defendant liable for more damages than she caused or were occasioned by her negligence" and "holding a partially [50%] responsible defendant fully responsible", thus making her shoulder the other defendant's responsibility in addition to her own." All of these statements reflect a fundamental confusion between each defendant's individual full responsibility for the damages that she tortiously caused and comparative responsibility percentages that are obtained by comparing the defendants' individual full responsibilities for the injury. Neither defendant in either of these situations was merely "50% negligent" or "50% responsible." Such statements make as much sense as saying that someone is "50% pregnant." Nor did either defendant's negligence cause or occasion only 50% of the plaintiff's injury. Rather, each defendant was 100% negligent, each defendant's negligence was an actual and proximate cause of 100% of the injury, and each defendant therefore is fully responsible for the entire injury. Only when we *compare* their individual responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, *when compared to the other*, bears 50% of the total *comparative* responsibility for the injury. [original emphasis]

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[16] England and Wales, Law Commission, Common Law Team*, Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 3.13.

[17] England and Wales, Law Commission, Common Law Team*, Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 3.13.

[18] England and Wales, Law Commission, Common Law Team*, Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 3.14, citing (1992) 23 Memphis State L. R. 45, pp. 54 - 56 (emphasis in the original).

Third, the possibility that a plaintiff could recover less by being the victim of two wrongs (either of which would have been sufficient to cause the loss, one by a solvent defendant and the other by an insolvent defendant) than if he had been the victim of just a single wrong (by a solvent defendant) was seen as an odd result of a proportionate liability system. The Team further stated that "this argument is, of course, in no sense answered by pointing to the obvious fact that the victim of two wrongs (one by a solvent defendant and the other by an insolvent defendant) would be better off under either regime than the victim of a single wrong by an insolvent wrongdoer."[19]

Fourth, even if one recognized that the law may operate harshly against a wrongdoer who is only trivially blameworthy, relative to the fault of other wrongdoers, it seemed unacceptable to the Common Law Team that, in a situation where the peripheral wrongdoer becomes insolvent, the risk of that wrongdoer's insolvency should be borne by the blameless plaintiff rather than the principal wrongdoer.

With respect to two possible versions of a modified proportionate liability system, the Common Law Team noted that in a system which provided for *proportionate liability for peripheral wrongdoers only*, any attempt to define who is a "peripheral" wrongdoer was bound to be arbitrary. In addition, there would also be a danger that the courts would simply manipulate the attributed share or responsibility to invoke or reject proportionate liability.

In the case of professional defendants, where any wrongdoing was likely to be the result of a failure to act, the Team commented that applying a system of proportionate liability to the peripheral professional wrongdoer, could be strongly criticized as undermining the reason for the professional's involvement:[20]

> The reason why one engages a supervising architect is to ensure that builders' defective work is corrected. The main purpose of a statutory audit is provide assurance that the published accounts present a true and fair view of the company's affairs.

The Team rejected the accountants' argument that the principle of joint and several liability acted as a disincentive to taking on new challenges to beat fraud, stating:[21]

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[19] England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 3.15.

[20] England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 4.21(iii).

[21] England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 3.22.

> We feel bound to voice the opposite concern. Would not the abolition of joint and several liability remove a valuable incentive for auditors (and other defendants) to take care in their work? Would it really aid the fight against fraud if auditors knew that their liability was limited to their proportionate share of liability relative to the blame of the fraudster?

While a system which provided for *proportionate liability with some reallocation of an uncollected share* might "soften to some extent the objections of the principle",[22] the Team concluded that the objections of principles discussed in the context of full proportionate liability still applied to this modified model.

The Common Law Team was careful to state that, in reaching its conclusions on the principle of joint and several liability, it was not dismissing the "very real problems faced by many professional defendants in obtaining affordable insurance."[23] The Team however noted that the abolition of joint and several liability would not bring an end to the possibility of large claims against auditors:[24]

> In a letter to the New Zealand Minister of Justice, Professor Richard Sutton writes that the problems arise from "a complex mix of factors. They include uncertainty about when a professional is going to be held negligent, disproportionately large claims, heavy costs of litigation and forensic tactics which put the burden of those costs on to defendants ... [T]he problems arise from the combined effect of [those] factors ... not just the solidary liability rule...."

The Team further noted that the expansion of the tort of negligence into the realm of pure economic loss on a restricted basis was as important an explanation for the increase in claims against professional defendants as was the principle of joint and several liability. With the abolition of the principle, "the court might feel more free to find in favour of plaintiffs."[25]

Although not strictly within its mandate, the Team went on to suggest some alternative solutions to the problem of "deep pockets" defendants, particularly professional defendants.

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22 England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 4.26.

23 England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 5.1.

24 England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 3.21.

25 England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 3.21.

Among the alternatives considered were:[26]

a. Compulsory insurance schemes for potential defendants;

b. Contractual exclusions of liability by professionals or non-contractual disclaimers of liability to third parties;

c. Capping of professional liability by statute.

D. Australia

In Australia, principles of solidary liability[27] are determined at the territorial level. Aside from the area of construction-related claims, all Australian jurisdictions have retained, and indeed broadened by statute, common law principles of joint and several liability. In general terms, the various states have enacted legislation:[28]

a. essentially abolishing the distinction between joint tortfeasors and several tortfeasors at common law;

b. permitting a plaintiff who has been contributorily negligent to recover, subject to a reduction of damages;

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[26] England and Wales, Law Commission, Common Law Team*, Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996), para. 5.37.

[27] In Report 89 (1999), *Contribution between Persons Liable for the Same Damage*, the New South Wales Law Reform Commission defined solidary liability as:

> A situation where, of two or more concurrent wrongdoers, each is liable severally and all are liable jointly to an injured person and that injured person may choose to sue each wrongdoer separately or any number jointly and also may choose to recover full compensation from any one of the wrongdoers against whom judgment is entered.

[28] Australia Capital Territory, *Law Reform (Miscellaneous Provisions) Act 1955*, as amended, sections 10 through 17; New South Wales, *Law Reform (Miscellaneous Provisions) Act 1946*, as amended, sections 2, 5; Northern Territory, *Law Reform (Miscellaneous Provisions) Act*, as amended, sections 11 - 21A; Queensland, *Law Reform Act 1955*, as amended, sections 5 - 11; South Australia, *Law Reform (Contributory Negligence and Apportionment of Liability) Act*; Tasmania, *Wrongs Act 1954*, as amended, sections 3 and 4; Victoria, *Wrongs Act 1958*, as amended, sections 23A - 24AD and section 25 - 28AA; Western Australia, *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*, as amended, sections 4 - 5 and 7.

c. creating rights of contribution between joint tortfeasors;

d. abolishing the judgment bar rule with respect to joint tortfeasors;

e. abolishing the settlement bar rule with respect to joint tortfeasors.

1. New South Wales Law Reform Commission

Over the 1990's, the New South Wales Law Reform Commission (the "NSWLRC") considered and, in three published reports[29], strongly rejected any changes intended to narrow the scope of the existing system of solidary liability.

In 1985, the NSWLRC was charged with the task of reviewing and making recommendations on the law governing rights of contribution between two or more persons responsible for the same damage. By necessity, the NSWLRC reviewed the law of solidary liability and, in particular, considered the primary criticism of the doctrine leveled by traditional deep-pocket defendants:[30]

> Critics of solidary liability argue that it is unjust that a claim whose comparative fault is minor should be called upon to meet the whole of the plaintiff's claim simply on the basis of ability to pay.

In an example that is wholly appropriate to the "leaky condo crisis" in southern British Columbia, the NSWLRC concluded that focusing on comparative fault between defendants missed the rationale for solidary liability:[31]

> It is not accurate to say that a number of concurrent wrongdoers is only responsible for a part of the plaintiff's loss. In all but exceptional cases, the causal responsibility of each wrongdoer extends to the whole of the plaintiff's loss. *Each wrongdoer is liable on the basis that, had it not been for his or her negligence or other breach of duty, the whole of the loss to the plaintiff would have been avoided.* An example will help to illustrate this point. Assume P engages a builder to build a house and also an architect to supervise the building. The house is structurally unsound due to both faulty workmanship of the builder and negligent failure of the architect to detect these defects. In the Commission's opinion it would not be unfair in

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[29] Report 89 (1999) - *Contribution Between Persons Liable for the Same Damage*; Discussion Paper 38 (1997) - *Contribution Between Persons Liable for the Same Damage*; Report 65 (1990) - *Community Law Reform Program Eighteenth Report: Contribution Among Wrongdoers: Interim Report of Solidary Liability*.

[30] New South Wales Law Reform Commission, Report 65 (1990) *Contribution Among Wrongdoers: Interim Report in Solidary Liability*, Chap. 2, para. 4.

[31] New South Wales Law Reform Commission, Report 65 (1990) *Contribution Among Wrongdoers*: Interim Report in Solidary Liability, Chap. 4, para. 14.

> this situation to allow P to recover the full cost of repairing the building from either of the builder or the architect. Had the architect not been negligent the defects in workmanship would have been discovered and remedied. The whole basis of the duty that the architect owed to the plaintiff was directed toward ensuring that the builder completed the building in accordance with specifications and in a workmanlike manner. In these circumstances it can hardly be an answer to a claim from the plaintiff for the architect to point to the fault of the builder. Similar arguments would apply if it were the builder rather than the architect that was sued. That is not to say that no issue as to the division of responsibility between the builder and the architect arises, it clearly does. However, that is an issue that arises as between the tortfeasors themselves. [emphasis added]

The NSWLRC then noted that, as between a wholly innocent plaintiff and concurrent wrongdoers, it seemed unobjectionable that solidary liability imposed on the wrongdoers the risk that one or more of them might be judgment-proof. The NSWLRC also rejected any arguments that distinguished the effects of personal injury on the one hand and pure economic or property loss on the other:[32]

> While it is often assumed that there is a qualitative distinction between personal injuries that affect bodily integrity, and those that cause solely economic or property loss, this may not always be the case. Instances can be envisaged where loss of property or financial security, for example, in the case of small investors or homeowners, could be equally devastating compared with some types of physical injury.

The NSWLRC also considered and rejected arguments with respect to risk-minimization and alleged insurance crises. With respect to the former, the NSWLRC confirmed that one of the aims of the tort system was to encourage the avoidance of negligence entirely and that, by abolishing solidary liability, a powerful incentive to compel potential defendants to take steps to entirely avoid damage to others would be lost. With respect to the allegations of an insurance crisis, the NSWLRC found that there was a dearth of empirical evidence to support the argument, and that any inability to obtain insurance could have just as easily been caused by the insurance industry's own business practices.

In reaching its conclusions on solidary liability, the NSWLRC was well aware that many states in the United States had adopted a limited form of proportionate liability but held that the motivations for the legislative changes did not exist in Australia:[33]

> Caution should be exercised in drawing comparisons with US law as so many aspects differ from Australian law. Matters such as the absence of effective joinder provisions, the continued use of juries in civil matters and different costs rules have added to the general pressure for civil justice reforms in the United States, one of which has been the limited introduction of various forms of proportionate liability.

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[32] New South Wales Law Reform Commission, Report 89 (1999) - *Contribution Between Persons Liable for the Same Damage*, Chap. 2, para. 2.20.

[33] New South Wales Law Reform Commission, Report 89 (1990) - *Contribution Between Persons Liable for the Same Damage*, Chap. 2, para. 2.14.

2. Construction-Related Reforms

Each of New South Wales[34], South Australia[35], Victoria[36] and Northern Territory[37] have passed legislation to abolish the principle of joint and severally liability in construction deficiency claims, although the principle survives in respect of claims for personal injury or death caused by the deficiencies.

In each jurisdiction, the legislation provides for a mandatory insurance scheme (both in the form of mandatory warranties and mandatory liability insurance for certain building practitioners) to respond to homeowners' claims for the repair of building deficiencies. Unfortunately, the value of the insurance programs as a substitute for tort claims has been undermined by the recent financial collapse of one of Australia's leading construction warranty insurers. The remaining insurers have apparently only agreed to remain in the market as long as the coverage afforded is significantly reduced and the territorial government provides assurances with respect to reinsurance.[38] As a result, each state has recently passed legislation to reduce the scope of the mandatory insurance coverage.[39] The coverage is now intended as a last resort for the homeowner, responding only when the builder is insolvent or deceased or has disappeared.[40] In at least one state, Victoria, builders are no longer required to obtain warranty insurance for multi-unit residential buildings in excess of 3 storeys as the warranty insurers have refused to offer coverage of this nature.[41]

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[34] *Environmental Planning and Assessment Act 1979*, Part 4C.

[35] *Development Act 1993*, Part 6, Division 7.

[36] *Building Act 1993*, Part 9.

[37] *Building Act 1996*, Part 13.

[38] New South Wales Legislative Council Hansard of May 9, 2002, page 1873.

[39] See, for example, Victoria, *Building (Multi-Storey Residential Building Exemption) Regulations 2002*; New South Wales, *Home Building Amendment (Insurance) Act 2002.*

[40] Victoria Building Commission publication entitled "Changes to Builders Warranty Insurance", effective as of July 1, 2002.

[41] Media release from the Minister for Finance and the Minister for Planning, Victoria, dated April 10, 2002.

3. Professional Liability

New South Wales has also adopted the *Professional Standards Act 1994*, legislation intended to cap the liability of professional and other occupational associations who have submitted and received approval for a scheme from Professional Standards Council and the responsible minister. The amount of the cap is determined by either of a multiple of the fee charged or by a specific amount back by insurance or business assets. The cap does not apply to claims involving death or personal injury. Similar measures have been considered in Western Australia but not yet adopted.

4. Conduct of Litigation

The NSWLRC's 1999 Report[42] also examined the procedural consequences of moving to a system of several liability. It concluded that the burden of such changes would tend to fall on the plaintiffs.

The NSWLRC noted that, under the solidary liability system, defendants are typically better able and, indeed motivated, to identify other potential wrongdoers. By contrast, a change to a proportionate liability system would require the plaintiff to include more defendants in the litigation in order to ensure something near full recovery. Not stated by the NSWLRC but a logical extension to its comments is the fact that solidary liability encourages defendants to identify other wrongdoers at an early stage of the proceedings, rather than "sand-bagging" a plaintiff close to trial with the spectre of an unnamed wrongdoer being liable for some or all of the plaintiff's losses.

Other procedural concerns raised by the NSWLRC included:

a. How would the presiding judge allocate fault in the absence of one or more wrongdoers in the litigation?

b. If the judge proceeded to make a ruling on apportionment in such circumstances, would the finding be binding on the wrongdoers not included in the litigation?

c. If the ruling was not binding, would the result be inconsistent verdicts and under-compensation to the plaintiff?

d. Who bears the onus of proof in a proportionate liability system? Is the

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[42] New South Wales, Law Reform Commission, Report 89 (1999) - *Contribution Between Persons Liable for the Same Damage*.

plaintiff required to prove a negative - that certain potential defendants are not liable? Or does the onus shift to the defendants to show that others are in fact liable for the plaintiff's losses?

e. If both non-economic and economic losses are suffered, how will recovery be addressed? The NSWLRC expressed a concern that two sets of rules would create unnecessary complexity in resolving claims.

f. How would proportionate liability affect motivations to settle? The NSWLRC noted arguments for and against the change as follows:[43]

> It has been suggested that the introduction into litigation of complicated questions of proportionate liability would have the undesirable effect of hindering settlement. The resultant uncertainty in litigation may be more likely to benefit defendants, in particular those supported by insurers. On one side it can be argued that, if solidary liability were abolished, a defendant's liability would be lower, easily predicted and settlements would become easier, whereas on the other aside it can be argued that a reduction of risk at trial might reduce the incentive to settle.

g. Would a change to a proportionate liability system in one jurisdiction result in forum shopping by the plaintiffs?

E. New Zealand

As has occurred in Australia, New Zealand's statutory law has broadened the common law principles of joint and several liability for multiple wrongdoers causing a single damage to the plaintiff.[44] New Zealand has, by statute, abolished common law claims for personal injury, with compensation for personal injury addressed through a no fault accident insurance scheme.[45]

In May 1998, the New Zealand Law Commission (the "NZLC") released its report on Apportionment of Liability[46], which reaffirmed and expanded the conclusions reached in its preliminary paper released in 1992.

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[43] New South Wales, Law Reform Commission, Report 89 (1999) - *Contribution Between Persons Liable for the Same Damage*, para. 2.53.

[44] *Law Reform Act 1936*, as amended, section 17 and *Contributory Negligence Act 1947*, as amended, section 3.

[45] See various *Accident Compensation Acts* and *Accident Insurance Acts*.

[46] NZLC R47.

As with virtually all other Commonwealth law commissions investigating this issue over the last 20 years, the NZLC rejected any change to the current system of liability which is "*in solidum* (that is, each defendant is liable for the whole of the plaintiff's loss)."[47]

In its investigations, the NZLC considered the arguments raised by proponents of a proportionate system of liability:[48]

> There is a complaint that the solidary rule imposes liability in excess of responsibility. But the whole basis of the law of civil liability is that quantification is determined not by the degree of the defendant's fault but by the extent of the injury to the plaintiff. Trifling negligence, a momentary inattention for example, can cause horrific damage. Gross negligence can result in minor or no damage. As between plaintiff and defendant it is not the fault but the loss that is measured, and there is no reason why this principle should cease to apply simply because there is more than one wrongdoer....
>
> Contrary to the assertions of the opponents of joint and several liability, a defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behaviour does not become "partial" or "minimal" simply because other defendants' tortious behaviour was much worse, individually or in the aggregate. Otherwise, plaintiffs would be subject to a perverse "tortfest", in which the more defendants there were, or the worse they behaved, the less individual responsibility each defendant would bear for the injury.

While aware of the retreat from solidary liability in various jurisdictions in the United States, the NZLC cautioned that:[49]

> unlike New Zealand liability for personal injury survives and ... there is greater use of juries in civil cases. ...[T]here was an absence of the will or power by judges to intervene when juries, in making damage awards, ran amok.

With respect to the concerns raised by deep pocket defendants, the NZLC noted that there were various ways of addressing the problems without interfering with the current system of liability, including:

a. permitting professional firms to incorporate;

b. in the case of auditors, exercising better judgment in the selection of clients and indeed "showing clients the door" when necessary; and

c. legislating a cap on liability.

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[47] NZLC R47, page 1, para. 2.

[48] NZLC R47, page 5, para. 7, citing Wright, "*The Logic and Fairness of Joint and Several Liability*" (1992) 23 Memphis State LR 45 at 59.

[49] NZLC R47, page 8, para. 15.

F. The United States

The recently-published *Restatement* surveys American approaches to shared liability since the advent of apportionment legislation permitting "comparative responsibility". It divides these approaches into five "Tracks", and recommends a set of principles which ought to be followed under each Track.

Regardless of which Track is followed, however, the *Restatement* recommends that the following categories of defendants remain liable on a joint and several basis:

1. Intentional tortfeasors.[50]
2. Persons who are vicariously liable for the tortious acts of another.[51]
3. Persons who are liable because of a failure to protect the plaintiff from intentional harm by another.[52]
4. Persons who act in concert ("joint tortfeasors" at common law).[53]

1. Track A - Pure Joint and Several Liability

This is joint and several liability as we know it in British Columbia, with the exception that it applies even where the plaintiff is contributorily negligent.

2. Track B - Pure Several Liability

In Track B jurisdictions, the plaintiff is able to recover from each defendant only that defendant's comparative share of the damages.

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[50] *Restatement*, § 12.

[51] *Restatement*, § 13.

[52] *Restatement*, § 14.

[53] *Restatement*, § 15.

3. Track C - Joint and Several Liability with Reallocation

Track C jurisdictions require the assignment of responsibility to all persons who contributed to a loss, including the plaintiff. Each party is then jointly and severally liable for the entire loss, less that portion for which the plaintiff is responsible (i.e. if the plaintiff is 20% at fault, the other parties are jointly and severally liable for 80% of the plaintiff's damages). A defendant that pays more than its several share of the plaintiff's damages is entitled to contribution, subject to the principle of reallocation:[54]

> § C21. *Reallocation of Damages based on Unenforceability of Judgment*
>
> (a) Except as provided in subsection (b), if a defendant establishes that a judgment for contribution cannot be collected fully from another defendant, the Court reallocates the uncollectible portion of the damages to all other parties, including the plaintiff, in proportion to the percentages of comparative responsibility assigned to the other parties.

The onus is on defendants to apply for reallocation, and until a reallocation order is made a plaintiff is free to enforce its judgment against any defendant on a joint and several basis.[55] States which have adopted reallocation have given defendants anywhere from 30 days to one year after verdict, entry of judgment or exhaustion of appeals in which to bring this application.[56]

The Restatement also considers several liability with reallocation, which permits the plaintiff to collect from the defendants on a several basis, and allocate the share of any insolvent defendant to other parties (including the plaintiff, if he is at fault). This obviates the risk that a defendant will pay more than its share and then be unable to recover its overpayment from its co-defendants. The *Restatement* does not favour this alternative:[57]

> [S]everal liability with reallocation has certain undesirable features. It requires even plaintiffs who bore no comparative responsibility to identify and sue all persons who are potentially liable for the plaintiff's injury (including those who may be beyond the jurisdiction of the Court), to obtain a judgment against each one, and to attempt to collect the judgment from each defendant.

The Civil Liability Review *Consultation Paper* describes Track C in this language, appearing to suggest that it takes an approach that is less generous to plaintiffs than our *Negligence Act*:

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54 *Restatement*, p. 204.

55 *Restatement*, p.205.

56 *Restatement*, p. 216.

57 *Restatement*, p. 211.

> Track C retains the concept of joint and several liability, but permits reallocation of the uncollectible portion of a judgment among *all* parties, including the plaintiff. [original emphasis]

In fact, Track C is *more* favourable to plaintiffs than our present law. This is evident from the *Restatement's* comment on the principle of reallocation:[58]

> The rule stated in this section does, however, result in the full risk of insolvency being placed on defendants when the plaintiff is free of any comparative responsibility. Thus this section continues the common law principle that an innocent plaintiff may recover all damages from any solvent defendant.

Thus under both Track C and our current law, a plaintiff who is not at fault can recover all of his damages from any defendant on a joint and several basis. The advantage of Track C to plaintiffs becomes apparent when the plaintiff is at fault. Under our current law, a plaintiff who is at fault is limited to recovering on a several basis. Under Track C the plaintiff may still recover on a joint and several basis, subject to reallocation.

To illustrate, consider a scenario in which a passenger who is 20% at fault for his injuries, assessed at $100,000, sues her driver and the driver of the other car, each 40% at fault. Assume the driver of the other car is uninsured and insolvent.

> *Negligence Act*: Under our current law, the passenger would recover from her driver, on a several basis, $40,000.
>
> Track C: The plaintiff would recover $40,000 from her driver. The $40,000 shortfall presented by the driver of the other car would be reallocated to both the plaintiff and the solvent driver, with 20/60 of the $40,000 shortfall ($13,333) reallocated to the plaintiff, and 40/60 of this shortfall ($26,666) reallocated to her driver. The plaintiff would therefore recover $66,666 under Track C.

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[58] *Restatement*, pp. 204 - 05. See also p. 216:

> The reallocation provision in § C21 also comports with provisions in a number of states what have abolished joint and several liability for independent tortfeasors, except where the plaintiff is attributed no responsibility for the injury.... Of course, this exception reflects the common law rule before the adoption of comparative fault, which made independent tortfeasors jointly and severally liable for a plaintiff's indivisible injury. Section C21 results in the same outcome in those instances in which the plaintiff is found free of responsibility.

4. Track D - Joint and Several Liability with Threshold Percentage

This approach renders defendants whose liability exceeds a threshold percentage jointly and severally liable, and all less blameworthy defendants merely severally liable. The threshold percentage in some jurisdictions is 50%, while others impose joint and several liability on any defendant whose responsibility exceeds that of the plaintiff.

The rationale for Track D is the unfairness that arises in cases where “deep pocket” defendants whose responsibility is marginal or even questionable have been required to bear all of the plaintiff’s loss. A case often cited by proponents of this approach is *Kaeo v. Davis*[59] in which a jury apportioned 99% responsibility to the defendant driver of the vehicle in which the plaintiff was riding, and 1% to a municipality because of a curve in the road at the scene of the accident.

While the Threshold Percentage model has intuitive appeal, its critics are compelling. They point out that although it may be unfair to burden a minimally responsible defendant with a plaintiff’s unrecoverable loss, this unfairness does not justify transferring the loss to a minimally responsible plaintiff. This criticism is particularly apt in British Columbia. In this Province, joint and several liability arises only where the plaintiff is innocent. Whatever arguments may be made for allocating an unrecoverable loss to an innocent plaintiff rather than to a defendant who is blameworthy, even if only to a small degree, they do not have fairness to commend them.

Another disadvantage is that the Threshold Percentage approach distorts considerations for joinder of parties. Plaintiffs are presented with a dilemma. Do they limit the number of defendants, to increase the probability that the liability of a solvent defendant will exceed the threshold percentage and become joint and several? Such a strategy courts the risk that joint and several liability may not be triggered, and the plaintiff will be left with several liability and an unrecoverable loss. Increasing the number of defendants in order to guard against the risk of an unrecoverable loss, on the other hand, tends to increase the likelihood that the threshold liability will not be exceeded by any defendant.

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[59] 719 P. 2d 387 (1986).

5. Track E - Joint and Several Liability depending on Type of Damage

The *Restatement* describes Track E as follows:[60]

> § E18 *Liability of Multiple Tortfeasors for Indivisible Harm*
>
> If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each defendant is jointly and severally liable for the economic damages portion of the recoverable damages and, subject to the exceptions in § 12 (intentional tortfeasors) and § 15 (persons acting in concert), is severally liable for that defendants's comparative share of the non-economic damages.

The focus is on the nature of the plaintiff's damages, rather than on whether these damages flow from a loss that is purely economic or accompanied by personal injury or property damage. A claim for personal injury, for example, may give rise to both pecuniary damages, which would be subject to joint and several liability, and non-pecuniary damages, which would not.

The rationale for linking joint and several liability to economic losses does not travel well north of 49th parallel. The distinction is driven by the American jury which, unfettered by limits on non-pecuniary damages, has on occasion made exorbitant awards.[61] Economic damages in the United States, on the other hand, are more capable of objective measurement and less prone to be arbitrary. This concern does not present itself in Canada.

The *Restatement* takes no formal position on the appropriate rule for tortfeasors who do not act intentionally.[62] It does, however, reveal a preference for the Reallocation approach of Track C:[63]

> The rule states in this Section and in § C18 imposes the financial risk of insolvency on all legally responsible parties in proportion to their responsibility....

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[60] *Restatement*, p. 241.

[61] *Restatement*, p. 252.

[62] *Restatement*, p. 99.

[63] *Restatement*, p. 205. See also *ibid.* p. 101:

> It is difficult to make a compelling argument for either a pure rule of joint and several liability or a pure rule of several liability once comparative responsibility is in place. Each of these alternatives has the handicap of systematically disadvantaging either plaintiffs or defendants with the risk of insolvency, Each of these systems can, however, be made more attractive by providing a reallocation provision when one or more defendants is insolvent.

The allocation of the risk of insolvency adopted in this 'C' Track is the fairest means of handling this problem.

As of 2000, a survey of the American regime revealed the following approaches:

a. 14 states and the District of Columbia have adopted a pure joint and several liability system.

b. 4 states have, like British Columbia, adopted joint and several liability where the plaintiff is without fault, and some variant of several liability in other instances.

c. 7 states permit reallocation.

d. 10 states have a threshold bar.

e. 8 states make liability contingent on the type of damages.

f. 16 states have several liability only.

Some jurisdictions resort to more than one approach and have been counted twice. As the *Restatement* is not yet widely available, we have enclosed a copy of the survey Tables found at pp. 151 - 159 of the report.

V. Construction Litigation

A. Is Several Liability the Answer?

It has suggested by some that the Provincial Government's review of joint and several liability has been prompted in part by *Strata Plan NW 3341 v. Canlan Ice Sports Corporation*[64] in which the Municipality of Delta was found jointly and severally liable for the entire cost of repairing a "leaky condominium". The speculation is that the Government is concerned about a run on the public purse by other strata corporations, pressing their demands for compensation on local governments.

If the Civil Liability Review is motivated in part by this concern, this priority should be tempered by the necessity of providing relief to the true victims of the "leaky condo crisis". The magnitude of this problem is captured in the following exchange between two

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[64] 2001 BCSC 1214 (SC), aff'd 2002 BCCA 526..

Honourable Members of the Legislature on July 18, 1997:[65]

G. Bowbrick: This morning I'd like to address the issue of home-ownership, in particular the rights that we as purchasers of homes, as consumers, should be able to expect and the obligations that we should be able to expect to be met by developers and builders of those homes. [Page 5989]

Home-ownership is an integral part of North American culture -- at least, the dream of home-ownership is. I think all of us in this country expect that we should be able to buy a home. We know that we'll have to work hard to pay the mortgage and that one day we'll own a home that will contribute to our sense of security in our later years. It seems to me that this is a reasonable expectation. Unfortunately, for thousands of home buyers in British Columbia, this is a dream which often becomes a nightmare, because they have purchased homes with fundamental problems -- a situation commonly known as the leaky condo syndrome.

For example, in my constituency of New Westminster there are hundreds of New Westminster residents who have purchased condominiums in recent years. In one building that I'm aware of -- I've met with the residents -- each of the owners in that building faces a $25,000 assessment to fix problems that were created by shoddy construction. Hon. Speaker, that is absolutely outrageous. People in British Columbia have a right to expect better than that....

R. Coleman: I thank the member across the House for his comments with regard to this serious issue.... The one thing we have to remember, though, as we deal with this particular issue is that there's a number of people that bear responsibility other than just the builder....

The first authority that people deal with when they're dealing with the structure of a building is the municipal planning department of any municipality. The municipalities have a tendency at times to push the marketplace into what we will call "aesthetically pleasing designs" that meet their particular view of a particular look for their municipality.... We should recognize that we're dealing with stucco finishings for the most part. You'll seldom find a leak in the design of a building with stucco finishing that has adequate eaves over top of the building so that water is deflected. We are in a very wet climate, and we have this particular concern.

So municipal planning departments have to step up to the front. The Architectural Institute has to step up to the front, and the engineering people have to step up, as well as the building community and everyone else, and start to design buildings that fit our climate and fit the designs so that they're capable, so this problem doesn't continue in the future. [10:30]

[Page 5990] ... The story the member tells about the $25,000 assessment in a condominium for somebody that's just bought a condominium within three to five years of purchase is happening on a regular basis all over the lower mainland of British Columbia. It is a very frustrating, very time-consuming and very expensive process for everyone involved....

G. Bowbrick: More and more people are saying that it's time for government intervention. This is what my constituents are telling me; this is what happens when I meet with the strata council in one of these buildings in New Westminster....

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65 Hansard, Volume 7, Number 2 - Friday, July 18, 1997, Official Report of Debates of the Legislative Assembly [emphasis added].

> Perhaps if the industry wants to keep its head in the sand on this, we should look at other possibilities. Perhaps we should look at legislation to pierce the corporate veil, as it's called, to ensure that when developers or builders set up shell companies to develop one project and then fold it and move on to the next project.... Maybe there should be legislation to ensure that ripped-off homeowners have a legal trail to follow to sue that developer or homebuilder.

The $25,000 assessment referred to in this exchange is by no means out of the ordinary. In 1998 the average repair cost was estimated to be $766,000 per condominium and $23,300 per strata lot.[66] Our firm has been involved in one case where the cost of repairs ranged from approximately $45,000 to $80,000 per owner, and in another where it averaged over $160,000 per strata lot.

This social problem has been the subject of three reports by the Commission of Inquiry into the Quality of Condominium Construction in British Columbia (the "Barrett Commission"). While noting the magnitude of the problem, the Barrett Commission commented only briefly on joint and several liability. It made two recommendations, confined to the liability of local governments:[67]

> Recommendation #18: That the *Municipal Act* be modified to remove the joint and several liability of a municipality while retaining proportionate liability.
>
> Recommendation #19: That the *Vancouver Charter* be amended to be compatible with the proportionate liability held by other municipalities.

The Barrett Commission provided little analysis to support its recommendation of several liability for local governments. The core of its reasoning was as follows:[68]

> Regarding municipal liability for failure to enforce the [Building Code], the Commission is of the view that fear of litigation is effectively leading to an inability of building officials to perform their function. The Commission strongly believes that its recommendation concerning municipal liability should be accepted and enacted. That would ensure that municipalities, including Vancouver, would be liable for matters that were their fault but they would not wind up paying large judgments when their degree of responsibility was minimal.

We submit this is not a compelling justification for repealing a principle that has been part of our common law since the formation of this Province. The Barrett Commission failed to address the policy behind joint and several liability. It did not appear to have considered whether inadequate municipal inspections have really been due to a fear of litigation, or to other more mundane causes such as a lack of training or funding.

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[66] Commission of Inquiry into the Quality of Condominium Construction in British Columbia, *The Renewal of Trust in Residential Construction* (June 1998), p. 13.

[67] Commission of Inquiry into the Quality of Condominium Construction in British Columbia, *The Renewal of Trust in Residential Construction* (March 2000), p. 126.

[68] Commission of Inquiry into the Quality of Condominium Construction in British Columbia, *The Renewal of Trust in Residential Construction* (March 2000), p. 128

Our fundamental objection to the Barrett Commission's recommendation concerning joint and several liability, however, is that it is directed to a symptom of the leaky condo crisis rather than its cause. Municipal governments may very well be paralyzed by the spectre of joint and several liability. The correct course of treatment for this anxiety is not to limit their liability, and transfer the ensuing losses onto innocent condominium owners. It is to create a residential construction industry in which other solvent parties are available to shoulder the burden that otherwise falls onto local governments.

Accountable parties were in short supply while the leaky condo crisis was developing. The New Home Warranty Program proved inadequate, and was not universal. Many developers, contractors and sub-trades followed a business strategy of incorporating new companies, sometimes on each new project, in order to avoid legal accountability. Consultants were permitted to practice with insufficient insurance.

The Government has already taken significant steps to change this state of affairs. The mandatory licencing of homebuilders under the *Homeowner Protection Act* has removed many questionable contractors from the marketplace. The warranty available under the Act will ensure that most building defects are repaired, without recourse to litigation. These preventative measures should bring greater relief to municipalities than a regime of several liability.

B. Retrospective Application

The aversion of our legal system to retroactive legislation is another reason for not appeasing municipalities and other proponents of reform in the construction industry. To provide relief to these defendants, any legislation would have to be retroactive, or at least retrospective. Most "leaky condo" owners bought their homes in the 1990's. A majority of these owners would have sustained damage to their properties and would therefore have an accrued cause of action by the time of any amendment. These plaintiffs could claim that a repeal of joint and several liability would interfere with a vested property right, specifically, their right to sue the parties responsible for the faulty construction of their home on a joint and several basis.

A substantial number of these owners would also have commenced litigation by the time of any amendment. Depriving these plaintiffs of joint and several liability would be particularly unfair. Not only would these plaintiffs have their vested rights impaired retrospectively, many would have incurred significant legal fees on the understanding that the defendants would be held jointly and severally accountable. It would be unjust to change a fundamental premise of such litigation in midstream.

VI. Settlement of Multiparty Litigation

During the course of multiparty lawsuits, defendants often approach the plaintiff with individual offers of settlement. Such partial settlements, often described as "BC Ferries agreements", have received surprisingly little attention in our Courts.[69] They are consequently often fraught with difficulty. Among the issues with which litigants must contend are:

a. Whether a defendant who has settled with a plaintiff can be brought into proceedings by another defendant.

It is generally recognized that a defendant who has protected itself from liability to the plaintiff through a settlement agreement cannot be sued for contribution and indemnity under s. 4 of the *Negligence Act*.[70] The settling defendant can, however, in certain cases be the subject of third party proceedings seeking a declaration regarding the degree to which the damages of the plaintiff were caused by the fault of the settling party.[71] Declaratory relief is available where defendants would be hindered in proving the degree of fault of the settling tortfeasor, if it is not subjected to the full panoply of discovery and due process applicable to parties under the Rules. This potential exposure to third party proceedings for declaratory relief is a disincentive to settlement for defendants, and results in the often unpalatable demand that the plaintiff indemnify the settling tortfeasor for legal fees.

We recommend that the Rules be amended to provide that where a plaintiff enters into a settlement which prevents it from suing for any damages caused by the fault of the settling tortfeasor, defendants cannot third party a settling tortfeasor for declaratory relief or otherwise. However, the Rules should provide for enhanced discovery against the settling party (i.e. perhaps requiring it to make its documents available for the inspection of the remaining defendants, respond to interrogatories, and produce a

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[69] After *British Columbia Ferry Corp. v. T&N plc* , [1996] 4 W.W.R. 161 (C.A.). In the United States such settlements are called "Pierringer agreements", after *Pierringer v. Hoger* 124 NW 2d 106 (Wisc. SC 1963).

[70] *Orange Julius Canada Ltd. v. Surrey* 2000 BCCA 467, paragraph 65, following *Giffels v. Eastern Construction*, [1978] 2 S.C.R. 1346, p. 1354.

[71] *British Columbia Ferry Corp. v. T&N plc* , supra, note 69.

representative for a pre-trial examination).[72] The Rules should also address whether, and to what extent, the settlement agreement is producible.[73]

b. Whether a settlement with one defendant extinguishes the joint liability of other parties.

Traditionally, the answer has depended on whether the settlement was by way of a release or a covenant not to sue. This distinction has little to commend it[74], and Courts have often found ways around it, usually holding that an instrument which "releases" a defendant is in substance a covenant not to sue.

c. Whether a judgment against one defendant will release others who are jointly liable with it.

The answer depends in part of the underlying cause of action. At common law, in cases of breach of contract or breach of trust, a plaintiff is not, by obtaining judgment against one defendant, precluded from suing another who was jointly liable. In tort, however, judgment against a joint tortfeasor may bar the plaintiff from suing other tortfeasors.[75]

The *Law and Equity Act* has partially addressed this concern. Section 48 provides:

> (2) The obtaining of an order against any one person jointly liable does not release any others jointly liable *who have been sued in the proceeding*, whether the others have been served with process or not. [emphasis added]

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72 See *Ontario New Home Warranty Program v. Chevron Chemical Company and others* (1999), 46 O.R. (3d) 130, para. 77, in which the Ontario Superior Court of Justice granted non-settling defendants enhanced rights of discovery against settling defendants, under the provisions of the *Class Proceedings Act*.

73 In *British Columbia Children's Hospital v. Air Products Canada Ltd./Prodair Canada Ltée* (2001), 91 B.C.L.R. (3d) 295 (S.C.), Neilson J. concluded that a settlement agreement was not privileged, but that certain portions of it, dealing with the settlement funds paid to the plaintiff, were irrelevant and not subject to production, at least until trial.

74 The need for reform here is particularly acute. As the *Restatement* observes, Reporter's Note, p. 304:

> The one-settlement-releases -all rule may be the most widely and harshly criticized legal rule of all time.

75 *Les Constructions Scarmar Ltée v. Geddes Contracting Co. Ltd.* (1989), B.C.L.R. (2d) 188, pp. 192 and 198.

In the leading decision on the effect of this section, our Court of Appeal concluded that s. 48(2) preserves a plaintiff's right to sue other joint tortfeasors only if they are parties to the proceeding in which judgment was taken. The common law bar continues to preclude a plaintiff who has obtained judgment against a jointly liable tortfeasor from suing other jointly liable tortfeasors in separate proceedings. The Court observed that it was unable to "discern what reasonable purpose or objective the legislature intended to accomplish" in drawing this distinction.[76]

d. <u>How a settlement with a jointly liable tortfeasor affects the damages a plaintiff can claim from the remaining defendants at trial.</u>

Can the plaintiff sue for his entire damages, less the amount received from the settling party? Or must the plaintiff give the defendants a credit for the proportionate liability of the settling party? Consider a case where the plaintiff sues for $1 million, and settles for $150,000 with one defendant. Assume that at trial, the remaining defendants establish the settling defendant was 30% at fault. Must the plaintiff credit the defendants with the $150,000 received, or $300,000 (30% of $1 million)? If the settling defendant is not found liable at all at trial, can the plaintiff recover $1 million in damages on top of a $150,000 "windfall"?[77]

Multiparty litigation often imposes enormous burdens on litigants and the judicial system. Partial settlements with one or more defendants provide timelier justice, and typically result in simplified proceedings which decrease legal expenses for all parties and place less demand upon the Courts.

Reform of the law governing the settlement of multiparty litigation would benefit all parties and improve the administration of justice. We therefore recommend that the Attorney-General review this area of law with a view to facilitating partial settlements.

VII. Conclusion

For the foregoing reasons, we recommend that the Attorney-General not reform the principles of shared liability in the *Negligence Act*. Joint and several liability has been a fundamental principle of our tort law for centuries. Our *Negligence Act* has modified this

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[76] *Les Constructions Scarmar Ltée*, supra, note 75, at p. 200.

[77] The answer, according to *Holmes v. Hanna* 2001 BCSC 1228, para. 20 is "no". "If the plaintiff is not required to account for the settlement monies ... there would be a double recovery, in violation of a fundamental principle of tort law": at para. 22.

principle in a balanced manner, recognizing that a plaintiff is entitled to judgment on a joint and several basis only where he is free of all fault.

Joint and several liability has been examined and upheld in other common law systems to which we commonly look for guidance. It continues to be recognized in England and Wales, Australia (with the exception of construction claims) and New Zealand. While considerable reform has occurred in the United States, the significant differences between Canadian and American legal systems invite caution when drawing comparisons.

We submit that concerns about the exposure of our local governments in building envelope litigation are not well-founded, have already been addressed through the mandatory warranties and licencing available under the *Homeowner Protection Act*, and present problems of retrospectivity.

One area which could benefit from legislative intervention is the law concerning settlement of multiparty lawsuits. This area of law raises several issues which currently complicate and frustrate the orderly settlement of such litigation.

Lesperance Mendes
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