TORT REFORM IN BRITISH COLUMBIA
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INTRODUCTION

In April 2002, the B.C. Government started a process of reviewing the current tort law system in British Columbia. This process was given the title “Civil Liability Review” and thus far has involved the government posing questions and soliciting input from the public on specific areas of possible reform. The results of that consultation process were made public in early 2003, and since then, the government has been silent on what its intentions are, if any, for bringing about tort reform.

This paper will examine the B.C. Government’s Civil Liability Review and explore the aspects of the tort system in which reform is being contemplated. However, before getting to those issues, it is useful to understand what tort reform means, and why many say tort reform is needed.

THE EVOLUTION OF TORT LAW

The modern Canadian tort system has its origins with events that occurred in the Summer of 1928 in a small Scottish town called Paisley. One evening Mary Donoghue, a store clerk in her early 30’s, went with a friend to the Wellmeadow Café. Mary ordered an ice cream float. The café owner brought Mary a tumbler filled with ice cream, along with a bottle of ginger beer. The owner poured some of the ginger beer into the tumbler and Mary proceeded to enjoy her dessert. Time passed and Mary’s friend offered to pour the remainder of the ginger beer into the tumbler. As the friend was pouring the ginger beer, a partially decomposed snail floated out from the bottle and into Mary’s tumbler. Because the bottle had been made of dark brown glass, neither Mary nor her friend had noticed the snail in the bottle.

Mary felt shock, became ill and was hospitalized. As a result of these events, she brought an action against David Stevenson, who had manufactured and bottled the ginger beer. After a trial and an appeal, the case finally made its way to the English House of Lords. The court found in favour of Mary, and held that Mr. Stevenson did owe a duty of care to Mary to see that she was not harmed by consuming the ginger beer.

Mary Donoghue’s encounter with the snail is now a tale of near epic proportion as her case, Donoghue v. Stevenson,1 is now widely renowned as being the genesis of our modern law of negligence. In that case, the House of Lords developed the “good neighbour” principle, or as Lord Atkin put it: “…you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.”2

2 The full key passage from the speech of Lord Atkins states as follows: “The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer’s question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to
In the 75 years since \textit{Donoghue v. Stevenson}, there has been an ongoing evolution of tort law. At times, developments in this area of law have seemed sudden, challenging the old adages that change in the law is slow and incremental.

Today, the group of people that constitute your neighbour to whom you owe a duty to take reasonable care, or put another way, the group of people that can potentially become a plaintiff with you being the defendant, has expanded. Today, legal principles which have historically limited the types of actions that could be brought, or have limited the time in which those actions could be brought, or have limited the amount of damages that could be claimed, are now being challenged, and in some instances, struck down by the courts.

Some of these developments which may cause concern to groups such as insurers and risk managers include:

1. The entrenchment of vicarious liability: At law, an employer is generally held responsible for the acts of his employee that are committed within the employee’s scope of work. Today, vicarious liability for sexual assault claims is one of the most prominent illustrations of the tort system expanding the liability of employers. There are many examples of cases in Canada involving sexual assault claims, many of which involve resident schools and churches, in which the employer has had to pay damages because of the sexual assaults committed by an employee.

2. The emergence of claims for pure economic loss: Historically, a party could not sue for pure economic loss in tort. Following cases such as \textit{Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.},\footnote{[1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193.} a claim for pure economic loss can now be maintained provided that there is a “real and substantial danger” and a “serious risk to safety”.


4. The enactment of class action legislation which has arguably promoted the litigation of smaller claims that in the past may not have been litigated because of cost.

5. The emergence of commercial host liability: Within the last decade, case law has firmly entrenched the principle that a commercial host who over-serves liquor to a customer can be held liable for injuries caused by that customer to a third person.

6. The possible emergence of social host liability: In the recent case \textit{Prevost v. Vetter},\footnote{2001 BCSC 312, 197 D.L.R. (4th) 292, rev’d 2002 BCCA 202, 210 D.L.R. (4th) 649.} the B.C. Supreme Court found a homeowner liable for injuries sustained by a third person following a party at their home in which minors had been consuming alcohol. This case is believed to have been the first in Canada to establish social host liability. However, the case was later overturned on appeal, not on its merits but because of a procedural irregularity in the manner in which the case proceeded to trial.

All of these developments since \textit{Donoghue v. Stevenson} have had the effect of expanding the possibility of any person, or any company being found negligent for its conduct if that person or company does not act with care and causes injury to another.
While the word “assault” may be too strong to many observers, to insurers and risk managers it may seem as if developments in tort law over the past few decades have been an assault on objectives such as limiting exposure and managing risk.

With all of these legal developments, it is no wonder that throughout the common law world, tort reform has become a hot topic in recent years. As we will see, the United States has perhaps the most experience with tort reform. As we will also see, while tort reform has been slow to come to Canada, there are clear indications, especially in British Columbia, that tort reform has become a key issue for industry and government alike.

THE MEANING OF TORT REFORM

As the law has developed since Donoghue v. Stevenson, there have been calls to bring about more rapid change to the tort system. The term “tort reform” has been coined to refer to initiatives that have the goal of bringing about such change.

Tort reform can have the objective of either restricting liability, or conversely can have the goal of expanding liability. Generally speaking, the experience in North America, and most notably in the United States, has been that tort reform initiatives have been intended to restrict liability.

Whether one views tort reform as good or bad will likely depend upon which interest group the person most closely aligns with. For example, in North America tort reform initiatives are often seen as being led by: (1) insurance companies; (2) large corporations that more often than not find themselves in the position of being a defendant rather than a plaintiff; and, (3) the defence bar. By contrast opponents to tort reform are often those more focused on plaintiffs’ rights, such as: (1) the plaintiff’s bar; and (2) a variety of citizen groups.

Tort reform does not always come in the form of wide sweeping legislative change to the entire tort system. Arguably, every court decision which addresses civil rights between a plaintiff and a defendant can affect tort law and can bring about a small measure of reform. The same can be said with minor legislative amendments which seem to happen with regularity each year.

A recent example in B.C. of an unexpected tort reform came on June 17, 2003, in the case of The Owners Strata Plan LMS 888 v. The City of Coquitlam. In that case, the court held that in order for a Strata Corporation to commence a law suit, it was first necessary for that Strata Corporation to pass a special resolution, requiring a 3/4 majority vote of all owners, authorizing the Strata Corporation to commence the action. This requirement was mandatory pursuant to provisions of the Strata Property Act. In that case, because the special resolution had not been obtained prior to the action being commenced, the court held that the action was a nullity.

The Coquitlam case was a typical “leaky condo” case. The effect of this decision had an immediate profound effect on all leaky condo litigation throughout British Columbia. Overnight, the law had arguably been reformed such that any leaky condo action in which the Strata Corporation had failed to pass a special resolution could potentially be declared a nullity.

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7 S.B.C. 1998, c. 43.
Further reform came shortly after the *Coquitlam* case. Before the case could make its way to the Court of Appeal, the B.C. Legislature stepped in and on December 2, 2003 passed Bill 90, amending the *Strata Property Act* to provide that the failure of a Strata Corporation to pass a special resolution prior to commencing a lawsuit does not render the action a nullity.

This recent experience with leaky condo litigation illustrates that reform to the tort system can come from the courts, but can also come from the legislature. However, when the topic of “tort reform” is discussed, those who routinely work within the legal system such as lawyers, risk managers, insurers and government officials more often than not tend to think of larger reform initiatives that will bring about wide sweeping change to several areas of tort law at once.

**THE AMERICAN EXPERIENCE WITH TORT REFORM**

In the United States, tort reform has arguably become an industry unto itself over the past decade or two. There are many large organizations devoted primarily to lobbying government to enact new laws to bring about tort reform. These organizations typically have the goal of restricting liability. An example is the American Tort Reform Association. This is a coalition of more than 300 businesses, corporations, municipalities and other associations who are interested in causing change to the civil justice system in the United States. Their members include 3M, the American Medical Association, Exxon and General Electric.

The cost of the American tort system has been monitored for the past several years by Tillinghast - Towers Perrin. In their publication *Tort Costs: 2002 Update*, the authors report that in 2001, the U.S. tort system cost $205 billion, an increase of 14.3% over the previous year. The authors suggest that at these levels, U.S. tort costs are equivalent to a 5% tax on wages. In their more recent *Tort Costs: 2003 Update*, the authors state that the U.S. tort system in 2002 cost $233 billion.

Tort reform in the United States has by no means been uniform. Not all States have enacted reforms, and for those States which have enacted reforms, not all aspects of the tort system have been affected. The result has been a checker board effect with each State often having dramatically different tort systems.

For example, focusing only on one issue within the tort system, namely joint and several liability, and looking only at a few U.S. States, the American Tort Reform Association reports that the law is as follows:

- In Alabama, Indiana, Kansas and Oklahoma, the courts have not applied the doctrine of joint and several liability whatsoever;
- In Alaska, joint and several liability was abolished in 1988 by a ballot initiative;
- In California, joint and several liability has been abolished only for non-economic damages, such as damages for pain and suffering and punitive damages;

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8 *Miscellaneous Statutes Amendment Act (No. 3)*, 2003, S.B.C. 2003, c. 96, s. 62.
9 The American Tort Reform Associations web site address is [http://www.atra.org/](http://www.atra.org/)
10 As of January 2004, this text is available on the internet at: [http://www.towersperrin.com/tillinghast](http://www.towersperrin.com/tillinghast)
11 See the American Tort Reform Associations web site, *supra*, note 9.
• In Florida, the legislature has enacted a multi-tiered approach for applying limits on joint and several liability. As a defendant’s percentage of fault increases, the maximum amount for which that defendant will be jointly liable also increases;

• In New York, a defendant who is 50% or less at fault is only severally liable for non-economic damages; however, this limitation does not apply to a variety of types of actions, such as motor vehicle cases, intentional torts, contract cases, construction cases, and product liability cases in which the manufacturer cannot be joined.

THE CANADIAN EXPERIENCE WITH TORT REFORM

Compared to the United States, tort reform across Canada is in its infancy. British Columbia is no different. In B.C., other than incidental reforms that appear to have arisen on a case by case basis (such as with the Coquitlam case and the subsequent legislative amendment), to date there have not been wide sweeping legislative tort reform to multiple aspects of the tort system. However, this could soon change.

The B.C. Government’s Civil Liability Review initiated in April 2002, on its face, indicates an expression of interest by the government to carry out some manner of tort reform.

The Civil Liability Review was initiated by a consultation paper distributed to the B.C. public by the Attorney General’s office. In this consultation paper, the Civil Liability Review is said to be a component of the government’s overall commitment to an ongoing process of law reform in British Columbia. The primary question posed in the Consultation Paper is, “Is it time to impose limits or growth?” Taken as a whole, the Civil Liability Review process which has been undertaken by the government has the appearance of being focused more towards the restriction of liability, similar to the experience in the United States.

The government’s Civil Liability Review focuses on six possible areas of tort reform. They are:

1. The law of limitations;
2. Joint and several liability;
3. The costs rule in the Class Proceedings Act;
4. Vicarious liability;
5. The non-delegable duty doctrine, and;
6. Structured damage awards.

Conspicuous by their absence in the Civil Liability Review consultation paper are other possible areas of tort reform which have had substantial attention in the United States. Among these are issues related to damage awards, particularly the collateral benefits rule and punitive damage awards.

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12 See the discussion above at page 4.
The Civil Liability Review process in British Columbia involved asking any interested party to respond to a written questionnaire drafted by the government and addressing the six areas of potential tort reform identified in the Civil Liability Review. The period for submission of responses to this questionnaire closed at the end of 2002 and in February 2003 the government released a lengthy document summarizing the responses. Unfortunately, other than giving an indication of current public opinion, the summary of responses does not indicate what reforms the B.C. Government intends to enact, nor does it indicate when these reforms may occur.

AREAS OF TORT REFORM BEING CONTEMPLATED IN BRITISH COLUMBIA

I. Limitation Periods

Tort actions, like nearly all actions, must be brought within a specified period of time, after which they become barred by statute. The present framework for limitation periods in British Columbia was created by amendments to the *Limitation Act* in 1975. Today, this framework includes the following general principles:

1. A 2 year limitation period applies to most actions for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty. This same 2 year limitation period also applies to a handful of specified types of actions, including intentional tort actions such as trespass to property, defamation, false imprisonment, and malicious prosecution.

2. A 6 year limitation period applies to certain specified actions relating to the recovery of collateral, goods and land, as well as all other types of actions not specifically provided for in the *Act*.

3. A 10 year limitation period applies to certain specific actions relating to the recovery of collateral, goods and land.

4. No limitation period applies to certain actions for possession of land, as well as for actions based on misconduct of a sexual nature, or actions based on sexual assault.

5. Postponement – the “discoverability rule”: In the case of tort actions involving personal injury, damage to property and professional negligence, the limitation period does not start to run until certain criteria are met:

   (a) the identity of the defendant is known to the plaintiff;

   (b) the facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing that:

      (i) an action would have a reasonable prospect of success, and

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16 *Ibid.*, s. 3(2).
17 *Ibid.*, ss. 3(5) and (6).
18 *Ibid.*, s. 3(3).
taking the person's circumstances into account, that person ought to be able to bring an action.

6. Postponement for people under a disability: A limitation period does not start to run in the case of a minor (18 years of age or less) or in the case of a person who is not capable of administering his own affairs. In either case, the limitation period will start to run once the disability ceases.

7. The ultimate limitation period for most medical negligence claims is six years.

8. The ultimate limitation period for most other actions is thirty years.

The Common Law Evolution of Limitation Periods

In recent years, leading court decisions have considered the meaning of many of the key provisions in the B.C. Limitation Act. The outcome of many of these cases has often had the effect of adopting the longer six year limitation as opposed to two years, and has had the effect of broadening the circumstances in which postponement of a limitation period will be allowed. This can have a significant impact on those individuals and companies who are commonly faced with having to defend legal actions.

Take for instance section 3(2) of the Act, which provides that a two year limitation period applies to all actions involving “damages in respect of injury to... property”. On first blush, this may suggest that all actions involving property damage are subject to a two year limitation. However, this is not the case. In the B.C. Court of Appeal case W.C.B. (B.C.) v. Genstar, Madam Justice McLachlin (as she then was) concluded that the phrase “injury to property” which is used in the Act refers only to the situation where properly is damaged by an extrinsic act, and not a situation where a claim arises from defects in the property itself. Accordingly, unless there is an identifiable extrinsic act which caused the property damage, a six year limitation period will typically apply.

To illustrate how the courts have subsequently interpreted the Genstar case and section 3, consider the recent B.C. Supreme Court case Pan Pacific International Realty Ltd. v. Grant & Sinclair Architects Ltd. In 1992 a contractor installed a fire protection sprinkler system in a residence. The system contained an elbow joint. The joint failed in October 1996 and flooded the residence. The owner of the residence started an action more than three years later. The contractor argued that the action was time-barred, because, since it involved property damage, a two year limitation period applied. The court disagreed. The two year limitation did not apply because the flooding from the sprinklers was not an identifiable external event. Rather, the court held that the damage resulted from defects in the property that only manifested over time. The limitation period was therefore six years.

A further example where the six year limitation period is being applied is in many of the “leaky condo” actions. In the B.C. Court or Appeal case Strata Plan NW 3341 v. Delta (Corp.), the court determined that a six year limitation period applied. The court rejected

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21 Ibid., s. 7.
22 B.C. Age o Majority Act, R.S.B.C. 1996, c. 7, s., 1.
23 Limitation Act, supra note 15, ss. 8(1)(a) and (b).
24 Ibid., s. 8(1)(o).
26 2001 BCSC 932, 13 C.L.R. (3d) 211.
the argument that repeated rainfall constituted an identifiable extrinsic event, and thus there was not “injury to property” which is required to establish a two year limitation.

A further example where the development of the case law has potentially placed a greater burden on defendants arises from cases dealing with the “discoverability rule” for postponing the running of a limitation period. The leading case on this issue is Novak v. Bond. The facts of the case were that between October 18, 1989 and October 1, 1990, Ms. Novak saw her doctor about a lump she had discovered in her breast. On October 4, 1990, a specialist diagnosed Ms. Novak as having breast cancer. She had a mastectomy, but the cancer spread to her lymph nodes. Over the next few years, she concentrated on getting well and maintaining a positive outlook that she had been cured. Unfortunately, in 1995 the cancer returned. In 1996, Ms. Novak sued her doctor, alleging that he had failed to diagnose her breast cancer prior to October 1990.

The doctor argued that the action was time-barred because it was subject to a two year limitation period. The Supreme Court of Canada did not dispute that a two year limitation period applied, but rather it concluded that there had been a postponement of the limitation period until 1995 when Ms. Novak learned that the cancer had returned.

As Madam Justice McLachlan wrote, the key question was whether, in light of the person’s own circumstances and interests, at what point could that person reasonably have brought an action? In the case of Ms. Novak, the court felt that during the time 1991-1995, because she was focusing on staying well and maintaining a positive outlook that she had been cured, her concerns were so serious, substantial and compelling that she could not reasonably have commenced an action. Therefore, the limitation period was postponed until 1995, and because the action was started in 1996, the action was not time-barred.

There are many further examples of recent B.C. cases which have resulted in a longer limitation period being applied, contrary to what the popular consensus may have been. First, in the case of actions against municipalities, it had long been a commonly held view that based on section 285 of the Local Government Act, a six month limitation period applied to any act done by a municipality under the powers conferred by the Act. However, in a pair of cases from 2002, the B.C. Court of Appeal held that section 285 does not apply to claims against a local government involving allegations of breach of a private or common law duty of care such as negligent inspection, failure to warn or negligent construction. Rather, the six month limitation only applies to circumstances in which, if the local government had complied with the existing statute when it caused injury to the plaintiff, it could have done that harm lawfully. One example given by the court in which section 285 might apply is the situation in which a local government purports to expropriate a parcel of land but fails to comply with one of the procedural requirements of a proper expropriation.

Second, in the case of multi-peril property policies, there has been a long standing debate as to whether the one year limitation period for starting an action against the property insurer starts to run from the date of loss, or whether it starts to run from the date a reasonably sufficient proof of loss is delivered. The debate has focused on whether multi-peril policies are governed by the “fire” part of the Insurance Act, or rather by the “general” part of the

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Act. In a pair of recent cases, the Supreme Court of Canada has confirmed that in the case of multi-peril insurance policies, the “general” part applies and the one year limitation period does not run from the date of the loss unless the loss was caused by a fire.

Reform of B.C. Limitation Periods

The B.C. Civil Liability Review has raised limitation periods as its first possible area of reform. The questions posed focus almost entirely on the 30 year ultimate limitation period. Those questions are:

1. The BC Law Institute has identified the option of reducing the 30 year Ultimate limitation period to 10 years. What, in your opinion, is an ultimate limitation period that balances the interests of the parties?

2. Are there causes of action which should be exempt from the ultimate limitation period or have a different limitation period? If so, why should these particular causes of action receive different treatment?

3. If the general ultimate limitation period is reduced to 10 years, is there a rationale for retaining the special six year medical and hospital ultimate limitation period?

4. How can the interests of minors and persons with disabilities be protected if a shorter ultimate limitation period is adopted?

5. What are the pros and cons of changing the commencement of the running of time from the point at which the cause of action accrues to when the breach of duty occurs?

The Summary of Responses tabulated by the B.C. Government concludes that the majority of those who responded to the questionnaire favoured reducing the ultimate limitation period from 30 to 10 years.

The nature of the questions posed by the Civil Liability Review, and the manner in which the government has tabulated the responses arguably raise an inference that if there is to be any significant change to the framework of B.C. limitation periods in the foreseeable future, that change will likely come in the form of a reduction of the ultimate limitation period. Based on the Civil Liability Review, there does not appear to be an interest on the part of the government to explore more sweeping reform, such as abolishing the distinction between two and six year limitation periods, or for that matter, reducing the two year limitation to one year.

II. Joint and Several Liability

Joint and several liability is the second issue addressed by the Civil Liability Review.

In B.C., where a plaintiff has contributed to its own injury, or in other words, a finding of contributory negligence is made against the plaintiff, then where there are two or more

33 Civil Liability Review – Consultation Paper, supra note 13, at p. 4.
34 Civil Liability Review – Summary of Responses, supra note 14, at p. 2.
defendants, their respective liability is “several”. This means that each at-fault defendant is only obligated to pay the plaintiff’s damages in accordance with the apportionment of fault assessed against that defendant. For example, if a plaintiff’s damages are assessed at $100,000, and the plaintiff is held to be 10% contributorily negligent, and if there are two defendants each held to be 45% liable, then the maximum that each defendant will ever have to pay the plaintiff is $45,000 (not including costs).

However, in B.C., where a plaintiff is not found to be contributorily negligent, all defendants against whom a finding of fault is made are jointly and severally liable for 100% of the plaintiff’s damages. This means that a successful plaintiff can seek to recover all of its damages from a single at-fault defendant, regardless of the apportionment of fault against that defendant. It is then left to that at-fault defendant to pursue contribution from the remaining at-fault parties by way of a third party claim. For example, if the plaintiff’s damages are $100,000, and liability is apportioned only among the two defendants on a 50-50 basis, then the plaintiff could attempt to recover the full $100,000 from either of the two defendants.

There are competing interests in relation to changing the joint and several liability rule. Plaintiffs have the interest of maintaining the rule, as it helps to ensure that they can be fully compensated for their loss, even if one or more of the at-fault defendants is impecunious. Conversely, at-fault defendants who have deep pockets are left with the prospect of having to pay the share of damages that cannot be paid by impecunious at-fault defendants.

From the perspective of the deep-pocket defendant, the worst case scenario would be where liability is apportioned 99% against an impecunious defendant, and 1% against the deep-pocket defendant. In this scenario, the principle of joint and several liability requires the deep-pocket defendant to bear the responsibility of paying 100% of the plaintiff’s damages, even though it was only 1% at fault.

The Civil Liability Review explored the various reforms that have been undertaken in other countries, and in various U.S. states. Some of those reforms are as follows:

Canada

The federal government has led the way and has already modified the principle of joint and several liability as it relates to actions involving the preparation of corporate financial statements. Under the new law if any of the defendants cannot pay their share of the award, on application by the plaintiff the court may order that the other defendants pay an additional amount in proportion to their degree of fault. The maximum additional amount payable cannot exceed fifty percent of the amount originally awarded against that defendant.

Australia

In Australia, some states have enacted legislation abolishing joint and several liability in actions involving defective building construction, and replaced it with a scheme of proportionate liability. Notably, a critical component to this reform was to also make insurance coverage mandatory for certain players in the construction industry. Making insurance coverage compulsory has the effect of limiting the prospect of being faced with an impecunious at-fault defendant.

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35 B.C. Negligence Act, R.S.B.C. 1996, c. 333, s. 1.
36 Ibid., s. 4.
37 Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 237.3.
United States

The United States has been more creative, and much more diverse, in the way it has brought about reform to the principle of joint and several liability. As discussed earlier, the reforms in various states have come in many forms. The different frameworks in the U.S. have been summarized in the recent publication Restatement of the Law Third, Torts: Apportionment of Liability:\textsuperscript{38}

1. Pure joint and several liability: This is the current rule in B.C.

2. Pure several liability: This rule has the effect of making the plaintiff bear the burden of an impecunious at-fault defendant not being able to pay its share of the damage award.

3. Joint and several liability with reallocation: In this case, if there is an impecunious at-fault defendant, all of the other at-fault defendants pay the shortfall in accordance with their respective apportionment of fault. To give an example, if there are five defendants all of whom are 20% at fault, and if defendant #1 cannot pay any damages, then the remaining four defendants each pay their own 20%, as well as sharing equally in the 20% that ought to have been paid by defendant #1. In other words, the remaining four defendants will pay 25% of the total damages.

4. Hybrid liability based on threshold percentages: In this case, the percentage of fault assessed against the deep-pocket defendant will determine if, or how much it must pay in lieu of the impecunious defendant.

5. Hybrid liability based on the type of damage: In states such as California and New York, reforms have been enacted to modify the joint and several liability principle so that a deep-pocket defendant remains jointly and severally liable for economic losses, such as wage loss, but only proportionately liable for non-economic losses such as pain and suffering and punitive damages.

Reform of B.C.’s Joint and Several Liability Rule

The B.C. Civil Liability Review posed six questions about possible reform to the joint and several liability rule which, unlike the questions dealing with limitation periods, appear to cover all possible issues relevant to reform of the principle. Those questions are:\textsuperscript{39}

1. Should the law of joint and several liability be legislatively modified or abolished?

2. If so, what type of legislative solution is preferable? Should one of the five tracks adopted in the United States be adopted? Why would one of these models be preferred over the others?

3. How might the interests of the plaintiff be protected if joint and several liability is abolished or modified?

4. Who should be required to obtain and maintain insurance and for what types of actions?


\textsuperscript{39} Civil Liability Review- Consultation Paper, supra note 13, at p. 7.
5. What alternatives are there to compulsory insurance?

6. What do you see as the outcome of the trend toward limited, and possible unavailable, insurance?

Based on the government’s Summary of Responses, there is no clear indication as to what reform is favoured by the public. All that is clear is that a majority of those who responded to the government’s questions favoured some type of reform. One can only speculate as to what the B.C. Government will do, if anything, to reform the joint and several liability principle.

III. Class Actions

In 1995, the B.C. legislature enacted the Class Proceedings Act, thus allowing a representative plaintiff to sue a tort-feasor on behalf of a class of individuals. The benefits of class action proceedings are well documented. For instance, in a situation where a group of individuals have similar claims all of which on their own involve a small sum of money, but collectively involve a large sum, there can be improved economies to have one class action, as opposed to multiple smaller actions. The cost to a plaintiff to bring an action on its own could be prohibitive, but as a class action, plaintiffs can share the cost of one action.

The Civil Liability Review has raised only one aspect of class actions as being the possible target of reform. That aspect relates to costs, and more specifically, whether costs can be awarded against the representative plaintiff, and if so, when. Currently in B.C., subject to only certain exceptions, section 37 of the Class Proceedings Act prohibits an award of costs being made against the plaintiff at a certification hearing. In contrast, the class action legislation in Ontario and Quebec does give the court discretion to award costs against an unsuccessful plaintiff.

The costs related questions posed by the Civil Liability Review were as follows:

1. What are the pros and cons of changing the costs rule in the Class Proceedings Act?

2. If the costs rule is changed, what form should the new rule take?

3. What type of mechanisms might be available to protect defendants against unreasonable cost burdens, while still promoting the goal of access to the legal system through the class action vehicle?

These questions from the Civil Liability Review generated substantially fewer responses. However, the majority of responses favoured not making any changes to the current class action costs rule primarily for the reason that the Class Proceedings Act has not been in force long enough to assess if reform is required.

IV. Vicarious Liability for Intentional Wrongs

As discussed earlier, an employer can be held vicariously liable for the tortuous acts of its employee where the employee is acting within the scope of duties of his or her employment. Recent cases have broadened the scope of conduct for which an employer can be held

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40 R.S.B.C. 1996, c. 50.
42 An Act Respecting the Class Action, R.S.O. R-2.1.
vicariously liable. This is most notable in actions involving claims of sexual misconduct committed by an employee. Whereas the thinking used to be that sexual misconduct was an intentional act for which the employer would not be vicariously liable, in certain circumstances the case law is now finding employers vicariously liable for intentional acts of sexual misconduct carried out by an employee.

For example, in the Supreme Court of Canada cases *Bazley v. Curry*\(^\text{44}\) and *Jacobi v. Griffiths*,\(^\text{45}\) the court held that vicarious liability for sexual assault can be imposed upon an employer where the employee's wrongful acts were committed in the course of employment. An act will be considered to have been done in the course of employment if the conduct is either (1) a wrongful act authorized by the employer, or (2) a wrongful and unauthorized mode of doing an act which is authorized by the employer.

The Civil Liability Review stated that in light of the recent case law, it was now an appropriate time to consider if reform was needed. The Civil Liability Review asked the following general questions:\(^\text{46}\)

1. Is there need for legislative reform of the current law of vicarious liability?
2. If so, what form should a legislative response take?
3. In what circumstances should an employer be held to a standard of strict liability for employee misconduct?

The generality of these questions, not surprisingly, led to a variety of responses with no clear consensus emerging on what type of reform, if any, is required.

It is unclear whether the B.C. Government will enact reform to the principle of vicarious liability for intentional wrongs. However, it would not be surprising if some manner of reform is legislated at some point in the future, particularly given that in many instances government agencies are the employer targeted by sexual misconduct law suits.

V. Non-Delegable Duty

As a general rule, a principal is not liable for the acts of an independent contractor, unless there is negligence in the hiring and supervision of that contractor. There is an exception to this rule which states that certain duties are "non-delegable", meaning that the principal must not only take care in selecting his contractor, but must also ensure that his contractor takes care. Recent cases have expanded the scope of those duties which are non-delegable. This has particularly affected the government in the area of contracting out highway maintenance responsibilities.

In a series of questions that appear to be motivated largely by self-interest, the government posed the following questions in the Civil Liability Review:\(^\text{47}\)

1. Is there a need for legislative reform of the non-delegable duty doctrine?
2. If so, what form should a legislative response take?


\(^{46}\)Civil Liability Review- Consultation Paper, supra note 13, at p. 9.

\(^{47}\)Ibid., at p. 10.
3. What types of statutory duties should be “delegable”?

4. How can the interests of plaintiffs be addressed if the Crown and other agencies are no longer subject to the non-delegable duty doctrine?

Very few of those who submitted a written response to the Civil Liability Review chose to answer these questions on the issue of non-delegable duty. As with the issue of vicarious liability, because the government can be seen as having a self-interest in the principle of non-delegable duty, it would not be surprising if at some point in the future some manner of reform is legislated.

VI. Structured Damage Awards

The final topic of discussion in the Civil Liability Review was whether reform is needed to give the court more flexibility in how large sums of damages are awarded. At present, a court in B.C. only has the power to award damages as a lump sum payment. Enabling the court to structure large damage awards can be advantageous to plaintiffs in the sense that they are assured of a flow of income over time, thus limiting the risk of spending the entire damage award all at once.

The questions posed by the Civil Liability Review were as follows:

1. Is there a need for a legislative initiative to permit structured damage awards?

2. What might be the consequences of giving the courts the power to structure damage awards?

3. If counsel has entered into a contingency agreement, what effect would a structured damage award have on that agreement?

The government received very few responses to these questions; however, the prevailing view appears to favour reform to allow for structured settlements, either in all cases, or at a minimum in those cases where the parties consent.

OTHER AREAS OF POSSIBLE TORT REFORM

1. Collateral Benefits Rule

A category of tort reform that has received a great deal of attention in the United States is collateral benefits. Collateral benefits refer to income or other sources of money that a plaintiff continues to receive while off work because of an injury. The concern is that a defendant cannot always deduct collateral benefits from a plaintiff’s wage loss claim, and therefore a plaintiff can potentially obtain more than full recovery of his or her wage loss.

The Supreme Court of Canada has made it clear in cases such as *Ratych v. Bloomer* and *Cunningham v. Wheeler* that where a plaintiff has contributed his or her own money towards obtaining a wage replacement benefit, such as disability insurance, then that collateral source of income cannot be deducted from the plaintiff’s wage loss claim. Further, gratuitous payments from a third party also cannot be deducted from a wage loss claim.

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48 Ibid., at p. 11.
However, in a situation where the plaintiff has not paid for the benefit, but merely continues to receive his or her full salary because of a contractual arrangement between the employer and the employee, then the plaintiff cannot claim for lost wages, because in fact he or she has not lost any wages. This was the case in Ratch, in which an RCMP officer, although injured, continued to receive his full salary as a result of provisions in the RCMP’s collective bargaining agreement.

Similar principles have been developed in the United States, with the added rule that evidence of collateral sources of income is not admissible at trial. In response, the tort reform movement has sought change to allow evidence of collateral sources of income to be introduced at trial, and to allow all collateral sources of income, including disability insurance benefits, to be deducted from a plaintiff’s wage loss claim.

Reform in the U.S. has been varied. For example, in Montana the collateral benefits rule has been abolished. In Alabama and Iowa, evidence of collateral sources of income is now permitted at trial, but a reduction of those collateral benefits from a wage loss award is not mandated. In Illinois, collateral sources of income over $25,000 can be offset against a wage loss claim, provided this does not reduce the judgment by more than 50%. As a final example, in New York there is a mandatory offset from a wage loss claim for collateral sources of income.

Given the clear statement of law from the Supreme Court of Canada on what benefits and sources of income can and cannot be deducted from a wage loss claim, it appears unlikely that the collateral benefits rule will undergo any judicial reform in the foreseeable future. If there is to be reform in this area of law, it will almost certainly have to come by way of legislation. However, because this topic was not discussed in the Civil Liability Review, one can reasonably infer that it is unlikely British Columbia will see any reform to the collateral benefits rule anytime soon.

2. **Punitive Damages**

In the United States, some states have passed legislation that restricts punitive damage awards. For instance, Colorado has passed a law saying that punitive damages cannot exceed compensatory damages. Other states such as Georgia and Nevada have placed a monetary limit on awards in certain types of cases. A more drastic approach has been taken in states such as Louisiana and New Hampshire which have simply abolished punitive damage awards altogether.

These U.S. legislative reforms to punitive damage awards are largely seen as a reaction to what had become, and in many U.S. states still is, a litigation lottery. One author has written that in California, between 1983 and 1985, juries awarded punitive damages in over two hundred of a total of fifteen hundred cases, totaling $450 million.51

Punitive damage awards in the U.S. are often based on a percentage of the defendant’s income, and in the case of large corporations, punitive damage awards can be several millions of dollars. One of the most notable examples is *Liebeck v. McDonald’s*, more commonly referred to as the “McDonald’s coffee case”. In that case, Stella Liebeck suffered severe burns to her lap when she spilled hot coffee just after she had bought the coffee from a McDonald’s drive through. A jury in New Mexico found that the McDonald’s coffee was too hot, and the jury awarded Ms. Liebeck punitive damages of $2.7 million which was said to be the equivalent of two days of coffee sales for McDonald’s. The trial judge later reduced the

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punitive damage award to $480,000 which was equal to three times the amount of her compensatory damages.

Another notable example of a large punitive award is Grimshaw v. Ford Motor Co.,\textsuperscript{52} often known as the “exploding Ford Pinto” case. The facts of that case were that in 1972 Lily Gray was traveling with thirteen year old Richard Grimshaw in a 1972 Pinto when their car was struck by another car traveling approximately thirty miles per hour. The impact ignited a fire in the Pinto which killed Lily Gray and left Richard Grimshaw with serious injuries. A judgment was rendered against Ford and the jury awarded the Gray family $560,000 and Matthew Grimshaw $2.5 million in compensatory damages. The jury then awarded $125 million in punitive damages, although this was subsequently reduced to $3.5 million.

Canada has yet to see punitive damage awards of the extent often seen in the U.S., which may explain why there appears to be little public discussion in Canada about having legislative reform to limit punitive damage awards. Nevertheless, punitive damage awards in Canada are not unheard of, and there is an indication that Canadian courts are prepared to allow punitive damage awards to increase.

A prime example is the recent insurance case Whiten v. Pilot Insurance Co.\textsuperscript{53} in which a jury awarded an insured punitive damages of $1 million. This case arose out of a fire which destroyed the Whiten’s home. The insurer denied coverage, alleging that the fire was arson. At trial, evidence was led regarding the insurer’s conduct in handling the claim, as well as evidence that the insurer had disregarded the advice of some of its experts that the fire was accidental. The jury found that the fire was accidental, and thus there was coverage for the loss. The jury then punished the insurer with the $1 million award of punitive damages. The Ontario Court of Appeal reduced the punitive damage award to $100,000. However, the original jury award of $1 million was re-instated by the Supreme Court of Canada.

**POSSIBLE CONSEQUENCES OF FAILING TO REFORM: THE LESSONS OF U.S. ASBESTOS LITIGATION**

Over the past 30 years, the United States has experienced a large number of actions related to asbestos. Judgments against asbestos manufacturers collectively have been in the billions of dollars. There are still thousands of pending law suits and there will likely be thousands more to come.

To Canadian observers, the statistics regarding the scope of U.S. asbestos litigation may seem staggering. A study by the Rand Institute for Civil Justice recently found that in the United States:\textsuperscript{54}

- as many as 2.4 million asbestos victims are yet to be found;
- new asbestos claims could total $210 billion;
- the largest damages award to date to a single plaintiff is $55.5 million;
- more than 6,000 companies have been named as defendants thus far;

\textsuperscript{52} 174 Cal. Rptr. 348 (1981).
\textsuperscript{53} Supra, note 4.
• at least 56 bankruptcies have been attributed to asbestos claims.

Developments in U.S. case law also may lead to more asbestos related claims, and even higher damage awards. The U.S. Supreme Court recently held in *Norfolk & Western Railway Co. v. Ayers*, that a person suffering from asbestosis, but not yet diagnosed with cancer, could nevertheless recover damages for a fear of developing cancer provided that fear was reasonable.

In the United States, the government has become involved in asbestos litigation in an effort to reform the process in which asbestos claims are handled, and in an attempt to more fairly allocate compensation to asbestos victims. Pending federal legislation in the United States includes the *Fairness in Asbestos Injury Resolution Act of 2003*. This proposed legislation focuses on creating a fund out of which asbestos claims would be paid. In what appears to be an effort to avoid legislative reform being imposed upon them, in October 2003 asbestos manufacturers and their insurers tentatively agreed to a $114 billion funding agreement.

While on a smaller scale, the phenomenon of U.S. asbestos litigation does have some similarities to certain types of civil litigation in Canada. For example, leaky condo litigation in British Columbia has impacted thousands of homeowners and has affected the entire construction industry. Hundreds of law suits have been filed, and more are likely to be filed. The scope and expense of the litigation has caused some contractors to go out of business. In the case of architects and engineers, liability insurers have already begun to refuse issuing new policies to those who are involved in condominium construction projects, and in some instances insurers have “bought-back” existing liability policies from their insureds. Without any insurance coverage and when faced with multiple law suits, these professionals quickly run the risk of diminishing all of their assets. In the long run, this could create an entire category of imppecunious defendants. In B.C. there are already examples of architects who have been involved in multiple leaky condo law suits and have gone into bankruptcy.

At present, only one leaky condo action in B.C. has gone to trial, and that case proceeded only on limited issues. However, as there begin to be more imppecunious defendants in these cases, settlement may become less likely as the deep-pocket defendants (those with assets and/or liability insurance) become less inclined to voluntarily abide by the principle of joint and several liability and pay the damages that should otherwise have been paid by the imppecunious defendants. Additional leaky condo trials appear to be inevitable, and as defence costs rise, the cycle of creating more imppecunious defendants threatens to continue.

A similar cycle appears to be emerging with sexual assault claims in Canada. Take for example the situation of a church or other non-profit agency that operates residential schools. A claim of sexual assault against one employee can bring serious if not fatal financial hardship to the employer because of the doctrine of vicarious liability. The hardship is compounded where allegations are made by multiple claimants, and further compounded if allegations are made against multiple employees.

Without tort reform, there is a risk that the available dollars to both defend and settle leaky condo actions and sexual assault claims could evaporate.

CONCLUSION: WILL CHANGE OCCUR?

If the B.C. Government’s Civil Liability Review is any indication, legislative tort reform is likely to occur at some point in the future. However, the extent of those reforms, and the timing of those reforms are questions that remain unanswered.

Many groups have urged that significant reform such as those raised in the Civil Liability Review should only come after thorough public debate. The Law Society of British Columbia and the Canadian Bar Association each replied to the Civil Liability Review by saying that in the allotted time, they could not provide a meaningful response to such broad issues.

The most likely reforms to be carried out in the future would appear to be: (1) reducing the ultimate limitation period from 30 years to 10 years; and, (2) modifying the present system of joint and several liability to give deep-pocket defendants some relief from having to pay all of the damages owing by impecunious defendants. These reforms are almost certain to come in the form of legislative enactments, as opposed to further developments in the case law. Legislative change of this scope is typically slow to occur. For the immediate future, tort reform in B.C. is more likely to continue on an incremental and case by case basis.

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