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## Consultation Paper on Contribution after Settlement under the Negligence Act

March 2013

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The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its strategic mission is to be a leader in law reform by carrying out:

- the best in scholarly law reform research and writing; and
  - the best in outreach relating to law reform.
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# Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the tentative recommendations set out in this consultation paper, but it is not necessary. We will also accept general comments on reform of the law on contribution and indemnity under the *Negligence Act* after a settlement of multiparty litigation.

The best way to submit a response is to use a response booklet. You may obtain a response booklet by contacting the British Columbia Law Institute or by downloading one at <http://www.bcli.org/bclrg/projects/contribution-after-settlement-under-negligence-act>. You do not have to use a response booklet to provide us with your response.

Responses may be sent to us in one of four ways—

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If you want your response to be considered by us as we prepare the final report for the Contribution after Settlement under the *Negligence Act* Project, then we must receive it by **30 September 2013**.

Your response will be used in connection with the Contribution after Settlement under the *Negligence Act* Project. It may also be used as part of future law-reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their name confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: <http://www.bcli.org/privacy>.



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## EXECUTIVE SUMMARY

### INTRODUCTION

This consultation paper contains proposals to amend the *Negligence Act* to deal with issues arising in multiparty litigation when one or more (but not all) of a number of defendants enter into a settlement agreement with the plaintiff and a non-settling defendant subsequently asserts its right to contribution or indemnity against a settling defendant. The proposals are open for public comment until **30 September 2013**. Responses to this consultation paper received before that time will be considered in the preparation of the final report for this project, which is due in fall 2013.

This project is being carried out at the invitation of the Ministry of Justice for British Columbia.

### WHAT IS CONTRIBUTION AFTER SETTLEMENT?

The Contribution after Settlement under the *Negligence Act* Project is concerned with a relatively narrow set of issues that arise in specific circumstances. These circumstances occur in multiparty litigation—that is, when a plaintiff is suing more than one defendant. In this litigation the plaintiff has suffered damages or monetary loss at the hands of two or more defendants (who with technical accuracy would be described as *concurrent wrongdoers*). The plaintiff is blameless for the damage or loss; in other words, contributory negligence is not an issue here.

The plaintiff and one (or more) of these defendants then agree to enter into a settlement agreement. (This agreement may be made before or after the commencement of court proceedings; for the purposes of this consultation paper, nothing turns on this matter of timing.) The settlement agreement only involves some of the defendants, and it only purports to settle a part of the plaintiff's total claim. So it can be called a *partial settlement*.

After the settlement, the plaintiff carries on with the proceedings against the non-settling defendants. When the proceedings make it to court, the court will be called on to apply a governing statutory provision, section 4 of the *Negligence Act*. Section 4, in essence, sets out three general rules for the court to apply.

- If the court finds that the damage or loss is caused by two or more persons, then the court must determine the degree to which each of these persons (which would include both settling and non-settling defendants) was at fault. This degree is expressed as a percentage of the total fault.
- The defendants found to be at fault are jointly and severally liable to the plaintiff. This means that the plaintiff is free to pursue any one or combination of them to the exclusion of others.
- As between themselves, the defendants have rights of contribution or indemnity. Contribution and indemnity are remedies developed in the law of unjust enrichment. They apply here if a defendant has been made to pay any amount to the plaintiff in excess of the amount that would be due in accordance with that defendant's degree (or share) of the fault for the damage or loss. (This may occur because the joint-and-several-liability rule allows the plaintiff to proceed or enforce its judgment against any of the defendants to the exclusion of others.) The goal is to bring the amounts actually paid by the various defendants into line with the degree of fault as found by the court.

Section 4 has nothing specific to say about settlement agreements, but its effect on partial settlements can be dramatic. If the amount paid under the settlement agreement ends up being less than the amount that the court ultimately determines that the settling defendant is responsible for, then the non-settling defendants may take the view that they are being forced to pay more than their fair share and may invoke their right of contribution or indemnity against the settling defendant. As a result of this possibility, the non-settling defendants have an incentive to bring a settling defendant back into the proceedings, by issuing a third-party notice to that settling defendant.

The purpose, of course, of entering into a settlement agreement is to extricate oneself from the court proceedings. The prospect of being dragged back into them by way of a third-party notice can undermine any incentive to enter into a partial settlement. This can impose added costs and delays on the litigants in any specific proceedings and across the civil-litigation system as a whole. The purpose of this consultation paper is to examine whether the law can strike a better balance among the interests at play in these circumstances.



## THE STRUCTURE OF THE CONSULTATION PAPER

### Introduction

The consultation paper contains two main parts. The first of these parts discusses some background information that is meant to illuminate the current state of the law. The second considers the issues for reform that arise from the current law and sets out the BCLI's tentative recommendations for reform.

### Background on the Current Law

The part of the consultation paper concerned with the current law addresses three topics.

First, it provides an overview of the *Negligence Act*. Although a wide-ranging review of this act is outside the scope of this project, the consultation paper contains a summary of the three major ways in which the act changed the common law. These changes are: (1) casting contributory negligence as a partial, rather than a full, defence to a plaintiff's claim; (2) providing for apportionment of fault for a plaintiff's damage or loss among multiple wrongdoers; and (3) extending rights to contribution and indemnity to wrongdoers who are liable under the law of torts. The consultation paper also discusses the scope of the *Negligence Act* and gives an illustration of how the act's general principles may apply to a specific case involving a partial settlement.

Second, it examines the development of the case law in this area. The British Columbia courts wrestled with how to apply the governing rules of the *Negligence Act* to partial settlements throughout the 1980s. A landmark decision was rendered in the early 1990s, and subsequent cases have followed its conclusions. This leading case decided, in brief, that a non-settling defendant's rights to contribution and indemnity can survive a partial settlement and can be exercised against a settling defendant, if that settling defendant did not pay an amount that was proportionate to its share of the fault.

Third, it discusses the use of settlement agreements as a means to protect settling defendants from contribution and indemnity claims. There has been increasing interest in British Columbia in so-called proportionate share settlement agreements, which hold out the prospect of insulating settling defendants from contribution and indemnity claims. This is done by the plaintiff agreeing to forego recovery from a non-settling defendant of any amounts attributed by the court to a settling defendant's share of the fault for the plaintiff's claim. The consultation paper examines

three types of proportionate share settlement agreements: the *Mary Carter* agreement; the *Pierringer* agreement; and the *BC Ferry* agreement.

### Issues for Reform and Tentative Recommendations

The consultation paper addresses three issues for reform. It begins with an overview, noting that although the issues to be discussed may seem technical in nature, they actually engage with the following broad policy objectives of civil procedure and tort law:

- encouraging timely settlement of complex litigation;
- ensuring fair compensation for a plaintiff who has suffered damage or loss;
- protecting a non-settling defendant from prejudice deriving from an agreement to which it was not a party; and
- providing clear and practical rules for lawyers and litigants.

Legislation cannot satisfy all of these goals to the maximum extent. So the task is to strike the best balance among them.

The first issue examines whether the *Negligence Act* should be amended to expressly address partial settlements. Arguments in favour of such an amendment include that it would support and encourage settlement agreements and it would add clarity and certainty to the law. Arguments against amending the legislation point out that the current arrangement protects the interests of plaintiffs and non-settling defendants and that parties to a settlement agreement are free to try to craft the agreement to extend protection from contribution claims to settling defendants. The BCLI tentatively recommends amending the *Negligence Act*. A legislative provision would provide greater certainty than can be achieved through private agreements. This certainty would promote the early settlement of complex litigation, which would benefit litigants and the broader society.

The second issue concerns the exact content of the proposed amendment to the *Negligence Act*. The consultation paper examines four proposed rules. It tentatively recommends a rule that applies when a plaintiff enters into a partial settlement. The rule reduces the plaintiff's claim by an amount proportionate to the degree to which the settling defendant or defendants are found to be at fault for the damage or loss and clarifies that a settling defendant is not subject to a claim for contribution or indemnity from a non-settling defendant. This rule is seen as striking the best balance among the four policy goals set out earlier. It is also consistent with previous law-reform recommendations.

The third issue considers a settling defendant's rights to contribution and indemnity. If a settling defendant ends up paying more under a partial settlement than the court ultimately determines to be its share of the fault, then the case law has said that a settling defendant has a valid contribution claim against a non-settling defendant (or non-settling defendants). Other jurisdictions have written this rule into their equivalents of British Columbia's *Negligence Act*, but the BCLI is not tentatively recommending this reform. There does not appear to be a pressing need to have the legislation address this issue.

## **CONCLUSION**

The BCLI encourages public comment on the tentative recommendations for reform in this consultation paper. The responses we receive will be considered and will help us in drafting the project's final report.



## CHAPTER I. INTRODUCTION

When is a settlement agreement not a final and conclusive end to the threat of a court proceeding for a potential defendant? One answer to this question is when the potential defendant shares blame for the damage or loss caused with other potential defendants. In accordance with how the courts have interpreted the *Negligence Act*,<sup>1</sup> these other defendants are able to issue a third-party notice to the defendant who has settled with the plaintiff, bringing that person back into the proceedings.<sup>2</sup> And if those proceedings result in that defendant being assigned a share of the blame for the damage or loss that ends up being greater than the amount paid out in the settlement, then the settling defendant is liable to make a contribution to the other defendants.

The Contribution after Settlement under the *Negligence Act* Project is designed to examine the merits of this situation. The British Columbia Law Institute began this project in September 2012 and it aims to publish the project's final report in fall 2013. This consultation paper is a major milestone in the life of the project, as it puts forward the BCLI's proposals for reform of the law, for public consideration. These proposals, along with the responses received to them, will form the basis of the BCLI's final recommendations for reform. The Contribution after Settlement under the *Negligence Act* Project is being carried out at the invitation of the Ministry of Justice for British Columbia.

At the heart of this project is very specific set of problems that flow from what may be called a "partial settlement" of multiparty litigation.<sup>3</sup> In essence, a partial settlement involves litigation with at least three people. One is a plaintiff—someone who has suffered a monetary loss or damage due to the actions or omissions of at least two wrongdoers. The plaintiff commences civil proceedings against these two wrongdoers, making them defendants in the proceedings. One of these defendants agrees to settle with the plaintiff.<sup>4</sup> But the other defendant does not; this defendant instead opts to see the proceedings through to judgment.

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1. RSBC 1996, c. 333.
  2. See British Columbia, *Supreme Court Civil Rules*, r. 3-5 (1) (a) (third-party claim for contribution).
  3. *Lau v. Bayview Landmark Inc.* (2006), 34 CPC (6th) 138 at para. 19, 145 ACWS (3d) 1013 (Ont. SCJ), Campbell J. ("I accept the general premise of settlement of actions in part where settlement in whole may not be possible. Partial settlement can well result in shortened, less expensive trials and may well be the precursor to a full settlement.").
  4. For the purposes of this consultation paper, nothing actually turns on whether this settlement occurs before or after the injured person commences court proceedings. For the sake of simplicity, this consultation paper will refer to plaintiffs and defendants throughout its narrative por-

For the sake of brevity, this consultation paper will from now on refer to these three people as P (the plaintiff), D1 (the settling defendant), and D2 (the non-settling defendant).

The issues engaged by partial settlements can quickly become very abstract (and mathematical) in nature. So it is helpful to keep a concrete example in mind throughout the discussion that follows. Here is a simple example<sup>5</sup> of a partial settlement, based on a motor-vehicle accident:

*Suppose that P, a cyclist, is injured when D1's car collides with P. D1 had swerved to avoid D2's small child, who had run into the road. P calculates that the loss is \$100 000; D1 accepts this figure, estimates that, as between D1 and the parent of the child (D2), D1 was no more than 50 percent to blame, and offers to settle P's claim. Suppose, further, that D2 refuses to settle because D2 does not think she was liable. D1 offers P \$50 000 in final settlement of P's claim against D1. P needs the money, and, in order to avoid the expense, delay, and uncertainties of litigation, accepts D1's offer. P subsequently commences a proceeding against D2. D2 issues a third-party notice to D1. The court finds that D2 was negligent, and that P's recoverable loss is \$100 000. But the court also concludes that D1 was more at fault than D2. As between the two of them, D1 is 75 percent to blame and D2 is only 25 percent to blame.<sup>6</sup>*

In the sections that follow, this consultation paper will return to this example. Those sections will progress toward a consideration of the issues for reform, including an analysis of the leading options for resolving those issues. But before considering re-

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tions, even though it might be more accurate to use generic terminology, such as *injured person* and *wrongdoer*. Where enhanced precision is required (in the framing of issues for reform and tentative recommendations), this consultation paper will adopt the more-generic terminology.

5. This example is deliberately kept simple in order to better highlight the issues at play and make them clear to a wide audience. But as a result it may not be representative of the bulk of multi-party litigation, which can often be highly complex. For example, a judge in a recent case, who was confronted with “eleven groups of defendants,” remarked that “a schematic diagram of who is suing whom [in this case] looks like the ‘triple reverse’ from a football play book.” See *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110 at para. 2, 200 DLR (4th) 667, Fruman JA (for the court) [*Amoco Canada*].
6. This fact pattern is based on one provided by the Ontario Law Reform Commission. See Ontario Law Reform Commission, *Report on Contribution among Wrongdoers and Contributory Negligence* (Toronto: Ministry of the Attorney General, 1988) [Ontario Report] at 99. But this fact pattern is not a direct quotation from the Ontario Report; some of the details have been changed to better suit this consultation paper's purposes.

form, it is important to have a grounding in the current law and an understanding of why the law developed in the way that it did. This involves reviewing, in some detail, the leading cases. But it must begin with a brief overview of the general principles of the governing statute, the *Negligence Act*.





## CHAPTER II. BACKGROUND ON THE CURRENT LAW

### A. The Negligence Act

#### 1. INTRODUCTION

This project is concerned with fine-tuning the law to address a relatively narrow issue, and not with wholesale reform of the *Negligence Act*.<sup>7</sup> First enacted in 1925,<sup>8</sup> and last seriously amended in 1936,<sup>9</sup> the act's general principles appear to have stood the test of time.

The *Negligence Act* changed the common law most significantly in the following three areas: (1) contributory negligence; (2) apportionment of fault; and (3) contribution and indemnity between defendants. This section discusses these topics in turn, then provides a brief note on the scope of the act, and ends with an illustration of how the act's principles may be applied to a fact pattern.

#### 2. CONTRIBUTORY NEGLIGENCE

A plaintiff must “exercise reasonable care with respect to his or her own safety, or the safety of his or her own property. . . .”<sup>10</sup> Otherwise, the plaintiff's claim may be met with the defence of contributory negligence.<sup>11</sup>

“[A]ll that is necessary to establish [contributory negligence]” is, in the words of a leading case, “to prove . . . that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.”<sup>12</sup>

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7. *Supra* note 1. *See*, below, appendix B at 49 (for the text of the *Negligence Act*).

8. *Contributory Negligence Act*, SBC 1925, c. 8.

9. *Contributory Negligence Act*, SBC 1936, c. 12.

10. G. H. L. Fridman, *Introduction to the Canadian Law of Torts*, 3d ed. (Markham, ON: LexisNexis Canada, 2012) at 126.

11. *See ibid.* (“The expression ‘contributory negligence’ is misleading. It suggests that the plaintiff has been ‘negligent’ in the same way as the defendant. . . . For a plaintiff to be guilty of contributory negligence it is not necessary for the plaintiff to have been guilty of the breach of a duty of care owed to the defendant.” [footnote omitted]). In a trial, the defendant bears the burden of proving contributory negligence. *See* David Cheifetz, *Apportionment of Fault in Tort* (Aurora, ON: Canada Law Book, 1981) at 187 (“The onus is on the defendant who pleads contributory fault to prove, on the balance of probability, the specific manner in which the injured person has failed to take reasonable care of himself.”).

12. *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] AC 601 at 611, [1951] 3 DLR 705 (UKPC), Viscount Simon.

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People fail to meet this standard all the time, so accidents involving contributory negligence are quite common. Take, for example, some familiar situations involving motor-vehicle accidents. A plaintiff, who was distracted by the car's radio and was driving too fast for road conditions, may collide with a defendant who ran a red light. Or a plaintiff may freely accept a ride from a defendant whom the plaintiff knows to be too drunk to drive, and may be injured when that defendant drives off the road. Or a plaintiff may be injured when the plaintiff's car is rear ended, but those injuries are made much worse by the plaintiff's failure to wear a seat belt.<sup>13</sup>

For a long time the law struggled with how to deal with contributory negligence. The problems started with a case in the early nineteenth century,<sup>14</sup> which held that contributory negligence was a complete defence to a plaintiff's claim.<sup>15</sup> In other words, a plaintiff who was contributorily negligent was not able to receive compensation for a loss or an injury.

Over time, courts and lawyers began to see that the doctrinaire application of this common-law rule "result[ed] in manifest unfairness, particularly where the negligence of the injured party is slight in comparison with the negligence of others."<sup>16</sup> So the common law developed exceptions to the rule, which relieved against some of its harshness, but had the side effect of making the law less certain and predictable.

The *Negligence Act* gave the law a fresh start by doing away with the common-law conception of contributory negligence as a complete defence to a plaintiff's claim. How it accomplished this feat is the subject of the next section of this consultation paper.

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13. See Philip H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011) at 109–10. These three examples illustrate a point made by a commentator that, if you boil down the many cases involving contributory negligence, three general types of cases emerge: (1) cases "[w]here the negligence of the plaintiff is a contributing cause of the accident as a result of which he suffers damage"; (2) cases "[w]here the negligence of the plaintiff consists in his assuming such a position that, by the very fact of assuming that position without more, he exposes himself to the risk of involvement in an accident as a result of which he suffers damage"; (3) cases "[w]here the negligence of the plaintiff, who has assumed a position not dangerous per se as in (2) above, consists in his failure to take the precautions for his safety necessitated by that position, and the consequent exposure, in the event of an accident, to some or additional damage." See Nigel P. Gravells, "Three Heads of Contributory Negligence" (1977) 93 LQR 581 at 584–94.
  14. See *Butterfield v. Forrester* (1809), 11 East. 60, 103 ER 926 [*Butterfield* cited to East.].
  15. See *ibid.* at 61, Lord Ellenborough CJ ("One person being in fault will not dispense with another's using ordinary care for himself.").
  16. *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210 at para. 94, 153 DLR (4th) 385 [*Bow Valley*, McLachlin J. (dissenting in part; La Forest J. concurring)].
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### 3. APPORTIONMENT OF FAULT

Underlying the common-law position on contributory negligence was “[i]n essence, . . . a ‘causation’ rationale.”<sup>17</sup> At common law, the cause of a person’s injury was seen as an all-or-nothing matter. It resided either in the plaintiff’s or in a defendant’s conduct. Taking this approach led naturally to the conclusion that contributory negligence had to be a complete defence to a claim. “Degree of fault,” as the Law Reform Commission of British Columbia noted, “was too vague a concept to have meaning.”<sup>18</sup>

The *Negligence Act* adopted just this concept at its heart.<sup>19</sup> The act’s “rules” that govern the awarding of damages in any case in which fault for an injury is apportioned between two or more persons require a court to:

- ascertain the damage or loss suffered by each person in its dollar value;
- determine the degree to which each person is responsible for that damage or loss and express it as a percentage “of the total fault.”<sup>20</sup>

So, under these rules, it is possible for a court to conclude that a defendant’s actions, for example, make the defendant 75 percent responsible for a plaintiff’s injury, but the plaintiff’s contributory negligence leaves the plaintiff 25 percent to blame. Contributory negligence as a partial defence is born.

These rules also apply to cases in which more than one defendant is responsible for a plaintiff’s damage or loss—that is, to multiparty proceedings, which are at the heart of this consultation paper. It is important to pause here and note how the law operates when multiple people may be liable for some damage or loss.

Liability in these circumstances “may be separate or shared.”<sup>21</sup> The law refers to separate liability as *several liability*, “in the sense that the fault of a person for loss or damage is distinct or severable from the fault of anyone else.”<sup>22</sup> On the other hand,

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17. *Ibid.* at para. 90.

18. *Report on Shared Liability*, LRC 88 (Vancouver: The Commission, 1986) [British Columbia Report] at 7.

19. *See supra* note 1, s. 1.

20. *See ibid.*, s. 2.

21. British Columbia Report, *supra* note 18 at 9.

22. *Ibid.*

*shared liability* arises “[w]here two or more persons promise to do the same thing or are responsible for a common injury to another. . . .”<sup>23</sup>

The law further divides shared liability into two types: *joint liability* and *joint and several liability*. “The chief distinction between the two kinds of shared liability is procedural,” explains the Law Reform Commission of British Columbia. “If liability is joint, the plaintiff must usually proceed against all who share liability in the same proceeding. If liability is joint and several, the plaintiff may elect to proceed against defendants separately.”<sup>24</sup>

These distinctions end up having a significant impact on how British Columbia courts apportion liability, depending on whether the case at issue features a contributorily negligent plaintiff or not. Courts applying the *Negligence Act* in this province have determined that when the plaintiff’s damage or loss is the fault of multiple defendants, then those defendants are jointly and severally liable. But if the damage or loss is partly due to the plaintiff’s contributory negligence, then the defendants are severally liable.<sup>25</sup>

The practical effect of this decision can be illustrated by a simple example. If P has suffered damages of \$10 000 and a court determines that D1 is at fault for 50 percent of those damages, D2 for 25 percent, and P (through P’s contributory negligence) is at fault for 25 percent, then P is entitled to recover severally (that is, separately) \$5 000 from D1 and \$2 500 from D2. But if P has suffered damages of \$10 000, and a court determines that D1 is at fault for 75 percent of those damages and D2 for 25 percent, then, thanks to joint and several liability, the “obligation is indivisible” and a “plaintiff may elect to proceed against defendants separately.”<sup>26</sup> So P would be perfectly within its rights to, for example, require that D2 pay the whole \$10 000.

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23. *Ibid.*

24. *Ibid.*

25. See *Leischner v. West Kootenay Power and Light Co. Ltd.* (1985), 150 DLR (3d) 242, 45 BCLR 204 (SC) [*Leischner* cited to BCLR], varied on other grounds (1986), 24 DLR (4th) 641, 70 BCLR 145 (CA); *Cominco Ltd. v. Canadian General Electric Co. Ltd.* (1983), 4 DLR (4th) 186, 50 BCLR 145 (CA) [*Cominco* cited to BCLR].

26. See British Columbia Report, *supra* note 18 at 9.

### 4. CONTRIBUTION AND INDEMNITY

The clear unfairness of such a result for D2 leads directly to the third major policy objective of the *Negligence Act*, which involved liberalizing common-law rules on contribution and indemnity between defendants.

Contribution and indemnity developed within the body of law known as unjust enrichment. The distinction between the two concepts was explained in a recent court case.<sup>27</sup> “A claim for indemnity,” the court said, “seeks recovery of the entire amount that . . . has [been] paid to the plaintiff. A claim for contribution seeks only a portion of that amount.”<sup>28</sup>

Returning to the example from the previous page, once P sought and obtained payment of its full \$10 000 judgment from D2, D2 would have a contribution claim for \$7 500 against D1.<sup>29</sup> This claim would bring liability for P’s damages into line with the apportionment of fault found by the court (D1: 75 percent at fault; D2: 25 percent at fault).

A longstanding common-law rule held that contribution could not be extended from its home in the law of unjust enrichment to cover cases that involve torts (such as negligence).<sup>30</sup> The *Negligence Act*<sup>31</sup> did away with this common-law rule by expressly providing that contribution applies to “a shared obligation arising in tort.”<sup>32</sup>

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27. See *Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192, 3 BCLR (5th) 326 [*Scott Management*].

28. *Ibid.* at para. 19 Neilsen JA (for the court). Claims for indemnity are very rare, but contribution claims arise frequently. They are the major topic of this consultation paper. So, for the sake of economy of language, the narrative parts of this consultation paper will from now on refer simply to *contribution* rather than the technically more accurate *contribution and indemnity*.

29. The current position on when a limitation period on a contribution claim begins to run may be summarized as follows: “[t]he cause of action for contribution does not accrue, and the limitation period does not begin to run, until the defendant tortfeasor sued by the plaintiff has been found liable.” See *Scott Management, ibid.* at para. 23 (citing, among other cases, *British Columbia Hydro and Power Authority v. Van Westen*, [1974] 3 WWR 20 at 22 (BCSC)). The law will change on 1 June 2013, when new legislation on limitation periods comes into force in British Columbia and for the first time sets out an express “discovery rule for claims for contribution or indemnity.” See *Limitation Act*, SBC 2012, c. 13, s. 16. See also, below, appendix B at 51 (for the text of the new legislative provision).

30. See *Merryweather v. Nixan* (1799), 8 TR 186, 101 ER 1337 (KB).

31. See *supra* note 1, s. 4 (2)

32. British Columbia Report, *supra* note 18 at 8.

The “seminal prerequisite” that must be fulfilled in a contribution claim is that the person from whom contribution is claimed “must be, or must have been at some time, potentially liable to the injured person” for the damages or loss that the injured person has suffered at the hands of both the person claiming contribution and the person from whom contribution is claimed.<sup>33</sup>

### 5. SCOPE OF THE ACT

There is one other wrinkle that is worth noting as part of this general review of the legislation. The title *Negligence Act* obscures the true scope of the act.

In interpreting the act’s key term—*fault*—the courts have found that there is scope to apply its rules on apportionment and contribution to cases that do not involve negligence. Exactly how far these provisions of the act may extend is unclear. What can be said with confidence is that courts in British Columbia<sup>34</sup> have applied the act to intentional-tort<sup>35</sup> and contract<sup>36</sup> claims.

But a recent case<sup>37</sup> involving a claim of price-fixing under the *Competition Act*<sup>38</sup> held that, although courts have determined that the act’s reference to “fault applies to a

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33. Cheifetz, *supra* note 11 at 38. See also *Giffels Associates Ltd. v. Eastern Construction Co.* (1977), [1978] 2 SCR 1346 at 1354, 84 DLR (3d) 344 [*Giffels Associates*], Laskin CJ (for the court) (“... I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made ... by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss.”).

34. Some courts in other provinces have not interpreted their versions of the *Negligence Act* as applying as broadly as the British Columbia act. These differing judgments stem, at least in part, from differences in wording in the versions of the act that are in force across the country. See, e.g., *Trends Holdings Ltd. (Trustee of) v. Tilson*, 2006 SKQB 395 at para. 32, 284 Sask. R. 24, McIntyre J. (“Although the Saskatchewan Court of Appeal has acknowledged that a strong argument can be made for the proposition that the *Contributory Negligen[ce] Act* [RSS 1978, c. C-31] should apply to intentional torts, the current state of the law suggests that the *Act’s* application is limited to actions that are grounded in negligence.”).

35. See *Brown v. Cole*, [1996] 2 WWR 567, 14 BCLR (3d) 53 at para. 20 (CA), Hollinrake JA (Wood JA concurring) (“the word ‘fault’ in the British Columbia *Negligence Act* goes beyond negligence and includes intentional torts”).

36. See *Harrington v. Dow Corning Corp.* (1997), 29 BCLR (3d) 88 at para. 14, 8 CPC (4th) 262 (SC), MacKenzie J. (“The B.C. *Negligence Act* also avoids the use of the term ‘tortfeasor,’ extending its application to breach of contract and other non-tortious fault.”).

37. See *Main v. Cadbury Schweppes PLC*, 2010 BCSC 816, 8 BCLR (5th) 305 [*Main*], *aff’d*, 2011 BCCA 21, 300 BCAC 302, *leave to appeal to the SCC refused*, [2011] SCCA No. 105 (QL).

38. RSC 1985, c. C-34.

broad variety of intentional wrongs,” this does not mean that the act automatically applies to any cause of action.<sup>39</sup> Noting that “the issue has not been considered by the Supreme Court of Canada,”<sup>40</sup> the court suggested that a cautious approach must be taken to novel claims about the scope of the act.<sup>41</sup>

### 6. APPLICATION TO FACT PATTERN

An illustration of how these general rules work in practice can be seen by applying them to the car-bicycle collision fact pattern from earlier in this consultation paper.<sup>42</sup> Recall that P had suffered damages of \$100 000, had settled with D1 for \$50 000, and had carried on with proceedings against D2. As a result of those proceedings, the court apportioned fault as between D1 and D2 as follows: D1—75 percent; D2—25 percent.

The first point to notice is that P was not contributorily negligent in this fact pattern. So D1 and D2 will be jointly and severally liable for P’s damages.<sup>43</sup> As a result, P is able to recover the remaining \$50 000 in damages solely from D2.

Now the key issue, from D1’s and D2’s points of view, is whether the *Negligence Act*<sup>44</sup> allows D2 to obtain a contribution from D1 with respect to this \$50 000 judgment. After all, the court has found D1 to be 75 percent at fault. A contribution of \$25 000 would bring the actual amounts paid by D1 and D2 into alignment with the court’s apportionment of fault:

D1—75% at fault = \$75 000

D2—25% at fault = \$25 000

But how does this result track with D1’s settlement agreement with P? Didn’t D1 agree with P to conclusively settle her part of the action for \$50 000? Is it fair to ask D1 now to make a further payment of \$25 000? And if the law says it is, then what incentive is there for D1 to enter into a settlement agreement, knowing that D2 will have a countervailing incentive to bring third-party proceedings against D1 and keep her participation in the action very much alive? Conversely, is it fair for an

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39. *Main*, *supra* note 37 at para. 19, Butler J.

40. *Ibid.* (citing *Blackwater v. Plint*, 2005 SCC 58 at para. 67, [2005] 3 SCR 3).

41. *See Main*, *supra* note 37 at para. 19.

42. *See*, above, at 2.

43. *See Negligence Act*, *supra* note 1, s. 4 (2) (a).

44. *See ibid.*, s. 4 (2) (b).

agreement between P and D1 to effectively override the court's ultimate apportionment of fault by causing D2 to have to accept monetary responsibility for a greater share of the damage to P?

Nothing in the *Negligence Act* directly addresses these questions. So the answers to these and similar questions have ended up turning on how the courts have interpreted the legislation.

### B. Evolution of the Current Law

#### 1. INTRODUCTION

British Columbia's courts have wrestled with how to apply the *Negligence Act*'s rules on contribution between defendants to cases involving partial settlements. The courts' conclusions on this subject cannot be characterized as a simple and inevitable application of general principles. Instead, the courts have embraced, over the years, two quite different positions on the issues. These positions are embodied in the two leading British Columbia cases, *Westcoast Transmission Co. v. Interprovincial Steel and Pipe Corp.*<sup>45</sup> and *Tucker (Guardian ad Litem of) v. Asleson*.<sup>46</sup>

#### 2. THE WESTCOAST TRANSMISSION CASE

*Westcoast Transmission* involved an action for breach of contract and negligence resulting from the failure of a natural-gas pipeline. P was the pipeline operator; D1 was an engineering firm that P had retained "to perform mill inspection services relative to the manufacture of the pipe"; and D2 was the pipe's manufacturer.<sup>47</sup>

After commencing court proceedings, P settled with D1, releasing it from all claims. D2 then brought third-party proceedings against D1, claiming contribution under the *Negligence Act*. D1 applied to have D2's third-party proceedings struck out.

The court stated the well-known test that "only in plain and obvious cases should pleadings be struck out"<sup>48</sup> and proceeded to consider D1's argument for striking out D2's third-party proceedings. In basic terms, this argument turned on asserting that

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45. (1985), 60 BCLR 368, 31 ACWS (2d) 19 (SC) [*Westcoast Transmission* cited to BCLR].

46. (1991), 86 DLR (4th) 73, (*sub nom. Tucker (Public Trustee of) v. Asleson*) 62 BCLR (2d) 78 (SC) [*Asleson* (SC) cited to BCLR], *rev'd on other grounds* (1993), 102 DLR (4th) 518, (*sub nom. Tucker (Public Trustee of) v. Asleson*) 78 BCLR (2d) 173 (CA) [*Asleson* (CA) cited to BCLR].

47. *Supra* note 45 at 369, McLachlin J.

48. *Ibid.* at 370.



there were only three possible bases on which D2's contribution claim could succeed and negating each of those three bases.

Only one aspect of D1's argument is germane to this consultation paper: a claim for contribution under section 4 of the *Negligence Act* in which P is not contributorily negligent.<sup>49</sup> This part of D1's argument directly raised the issue at the heart of this consultation paper, which is the effect of a partial settlement on the *Negligence Act's* rules on contribution.

The court held that D2 would only have a right of contribution under section 4 if P could recover "the whole amount of the loss"—including any amount attributable to D1—from D2.<sup>50</sup> But, in the court's view, "this scenario is impossible."<sup>51</sup> Since P had settled its claim against D1, had been paid in full for it, and had released D1 from further liability with respect to it, D2 "could not be required to pay to [P] any portion of a judgment recovered which may be attributable to [D1]."<sup>52</sup> So "there is no possibility [of a] successful claim for contribution . . ." by D2 against D1.<sup>53</sup>

This reasoning held sway over a number of other British Columbia cases decided in the late 1980s and early 1990s.<sup>54</sup> But the law took a dramatic turn with the judgment, in 1991, in the *Asleson* case.

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49. For the sake of completeness, the other two bases involved a claim for contribution in which P is found to be partially at fault and a claim based in tort law (not the *Negligence Act*) for breach of a duty owed by D1 to D2. On the first of these bases, the court noted that if P were held to be partially at fault for the damage to the pipeline, then, as a result of how the courts have interpreted s. 1 of the *Negligence Act*, D1 and D2 would be severally liable (not jointly and severally liable) for their respective shares of the damage. So "... [D2] can be found liable only to the extent to which it is personally at fault. [D2] cannot be found liable to pay [P] anything on account of [D1's] fault. In such circumstances [D2] would have no claim for contribution or indemnity against [D1]" (*ibid.* at 371); *see also Leischner, supra* note 25; *Cominco, supra* note 25. On the second basis, the court held that there could be no duty of care owed by D1 to D2 because "[t]here is nothing on the facts or on the pleadings as they now stand or as they may reasonably be amended, given the circumstances now known, which would suggest that [D1] undertook any responsibility to [D2] in the performance of its tests" (*supra* note 45 at 376–77).

50. *Ibid.* at 372.

51. *Ibid.*

52. *Ibid.* at 373.

53. *Ibid.* The court also held that any contribution claim by D2 would likely have failed in this case, "[e]ven in the absence of the settlement and the release . . ." because the case was indistinguishable from *Yemen Salt Mining v. Rhodes-Vaughn Steel Ltd.* (1976), 2 CPC 318 (BCSC) (*ibid.*).

54. *See Sylte v. Jackson Brothers Logging Co.* (1988), 27 BCLR (2d) 357, 10 ACWS (3d) 64 (SC) (P's relative was riding a motorcycle along a highway when he collided with a cable left there by D2,

### 3. THE ASLESON CASE

*Asleson* concerned the assessment of damages in a personal-injury action. P (an infant represented by the public trustee) was a passenger in a pickup truck owned by her father and driven by her mother (D1) on a provincial highway. After “encounter[ing] an extremely icy stretch of highway,” D1 lost control of the truck, skidded across the highway, and collided with a semi-trailer truck driven by D2.<sup>55</sup> “As a result of the collision [P] sustained a serious injury to her brain which has had permanent and disabling consequences.”<sup>56</sup>

P commenced court proceedings against D1, D2, and D3 (the government of British Columbia). Before those proceedings reached trial, P settled with D1 for an amount that was at the limit of D1’s third-party liability insurance coverage. P provided D1 with a release, but continued her proceedings against D2 (alleging that he was driving at “at too high a rate of speed in the circumstances”) and D3 (alleging that it

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killing him—D1 was government of British Columbia—P commencing two *Family Compensation Act* proceedings, one against D1 and one against D2—court ordering proceedings to be heard at the same time—P agreeing to discontinue proceedings against D1—D2 issuing third-party notice, claiming contribution from D1—court allowing D1’s application to strike out notice); *Cook v. Teh* (1988), 28 BCLR (2d) 300, 11 ACWS (3d) 192 (SC) (applying *Westcoast Transmission* in case involving a missed limitation period); *Wintrup v. Surrey (District of)*, [1988] BCJ No. 527 (QL) (SC) (P injured when he fell after stepping into a pothole—P commencing proceedings against D1 (the district) and D2—P agreeing to dismiss proceedings against D1—D2 issuing third-party notice to D1, claiming contribution—court finding no basis for contribution claim and striking out notice), *aff’d* [1990] BCJ No. 609 (QL) (CA); *Dureau v. Kempe-West Enterprises Ltd.*, [1990] BCJ No. 1480 (QL) (SC) (P purchased a newly constructed home—subsequently its foundation failed—D1 was (collectively) the company that built the home and its principal—P agreeing to consent dismissal order of proceedings against D1—despite failure of other defendants to agree to consent dismissal order, it was entered—P subsequently applying to set aside order—court granting application, noting that other defendants’ consent was necessary because their rights to contribution were affected by order); *Krusel v. Firth* (1991), 54 BCLR (2d) 392, 25 ACWS (3d) 1221 (SC) (P injured when he fell, or was pushed, into swimming pool—P commencing proceedings against a number of parties, including D1—the guest who allegedly pushed P—and D2—the owner of the house where the pool was located—P settling claim with D1—D2 issuing third-party notice claiming contribution—court striking out notice, concluding that D1 could no longer be liable for P’s injuries, so there was no basis for D2’s contribution claim). *But see Boyton Holdings Ltd. v. A Firm of Lawyers*, [1988] BCJ No. 1664 at para. 21 (SC) (QL), Hardinge LJSC (“I agree with counsel for the Defendants that the *Westcoast* case should be confined to its particular facts.”).

55. *Tucker v. Asleson*, [1991] BCJ No. 954 at para. 1 (SC) (QL), Finch J.

56. *Ibid.*

failed in its “duty to keep the highway properly sanded, salted and plowed, so as to keep it free o[f] ice or snow”) for the remainder of her claim.<sup>57</sup>

At trial, the court concluded that “[t]he negligence of all three [defendants] contributed to the collision, and to [P’s] serious injuries.”<sup>58</sup> Since the court was “unable to say that the fault of one is greater than the fault of another,” it “apportion[ed] fault equally” among D1, D2, and D3.<sup>59</sup>

After this initial judgment, D2 and D3 returned to court, “adduced further evidence,” and “presented further argument” on five issues “arising from these findings.”<sup>60</sup> One of these issues concerned the “application and effect of s. 4 of the *Negligence Act* . . . and whether [D2] and [D3] are jointly and severally liable, in view of the fact that [D1] settled the claim against them prior to trial.”<sup>61</sup>

Readers should recall here that section 4 of the *Negligence Act* performs three basic tasks. First, in cases in which two or more people have caused someone to suffer damage or a loss, the section calls on the court to “determine the degree to which each person was at fault.”<sup>62</sup> Second, if two or more people are at fault for the damage or loss, then the section holds them to be jointly and severally liable for the damage or loss.<sup>63</sup> Third, the section makes contribution claims apply to those two or more wrongdoers to “the degree to which they are respectively found to have been at fault.”<sup>64</sup>

D2 and D3 were concerned with the second of these rules. The gist of their argument was that P’s partial settlement with D1 had the effect of “‘sever[ing]’ the parties’ joint liability.”<sup>65</sup> As a result, D2’s and D3’s “liability now cannot exceed two thirds of the total damages awarded, because they cannot be required to pay any portion of the loss attributable to the negligence of the released party [D1].”<sup>66</sup> Although this

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57. *Ibid.* at paras. 2–4.

58. *Ibid.* at para. 131.

59. *Ibid.*

60. *Asleson* (SC), *supra* note 46 at para. 3, Finch J.

61. *Ibid.*

62. *Supra* note 1, s. 4 (1).

63. *Ibid.*, s. 4 (2) (a).

64. *Ibid.*, s. 4 (2) (b).

65. *Asleson* (SC), *supra* note 46 at para. 94.

66. *Ibid.* at para. 94. The court noted that the “practical significance” of the “resolution of this issue”

was not a contribution claim, D2 and D3 did point out that “the release of [D1] has interfered with their right to claim contribution or indemnity from her,”<sup>67</sup> and they marshalled the *Westcoast Transmission* line of cases in support of their argument.<sup>68</sup> This argument opened the door to the court’s searching examination of the issues arising from and the case law on partial settlements and contribution under the *Negligence Act*.

The *Asleson* court found *Westcoast Transmission* and the cases following it to be wanting in the following areas.

- Almost all of the *Westcoast Transmission* line of cases were “motions concerning pleadings” and were “decided upon assumed facts, or at least upon facts not found following a trial on the merits of the case.” This casts a shadow over assertions in some of those cases that P was “paid in full” for its losses.<sup>69</sup>
- Supporting much of the “reasoning” in the *Westcoast Transmission* line of cases is “the premise that [P] should not be compensated twice for the same loss.”<sup>70</sup> But these concerns appear to be overblown. They also distract the court from its main task, which is to apply section 4 of the *Negligence Act*. The imposition of joint and several liability under section 4 does not turn on “the amount of the loss suffered by the plaintiff, nor upon whether the plaintiff has been paid in part for that loss.”<sup>71</sup> Further, it would be perverse “if a rule which was designed to prevent double-compensation, or over-compensation, could be used in this case to prevent the plaintiff from making a full recovery.”<sup>72</sup>
- The reasoning of the *Westcoast Transmission* line of cases also leads to the extraordinary result that “an agreement between a plaintiff and a joint tortfeasor can limit or affect the statutory rights of *another* joint tortfeasor who was not a party to the agreement.”<sup>73</sup>

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would “affect [P’s] right to recover approximately \$200,000 of the total damages awarded” (*ibid.* at para. 99).

67. *Ibid.*

68. *Ibid.* at para. 95.

69. *Ibid.* at para. 128.

70. *Ibid.* at para. 130.

71. *Ibid.* at para. 131.

72. *Ibid.* at para. 133.

73. *Ibid.* at para. 134 [emphasis in original]. Strictly speaking, D1, D2, and D3 were not “joint tortfea-

- There are other means available to guard against overcompensation of P, such as by P and D1 including an indemnity of D1 in their settlement “against any third party claims for contribution and indemnity.”<sup>74</sup>
- Finally, the conclusion in *Westcoast Transmission* is not in accord with general principles articulated by the Supreme Court of Canada<sup>75</sup> and is inconsistent with earlier decisions of the British Columbia Court of Appeal.<sup>76</sup>

Taking these criticisms into account, the *Asleson* court concluded that D2’s and D3’s rights to contribution from D1 remained intact, despite the settlement agreement between P and D1.<sup>77</sup> And “[s]o long as that defendant’s rights to contribution and indemnity remain intact, the liability of all tortfeasors remains joint and several.”<sup>78</sup> In the court’s view, D1 should have tried to “protect” its “position” by ensuring that its settlement agreement with P contained appropriate language, guarding D1 against any further liability for contribution.<sup>79</sup>

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sors,” but were *several concurrent tortfeasors*, which is the technical term to describe two or more wrongdoers whose torts have combined to produce the same damage to P. See Glanville L. Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (London: Stevens & Sons, 1951) at § 1 (“Two or more tortfeasors are joint tortfeasors (a) where one is the principal of or vicariously responsible for the other, or (b) where a duty imposed jointly upon them is not performed, or (c) where there is concerted action between them to a common end. . . . Concurrent tortfeasors are tortfeasors whose torts concur (run together) to produce some damage. They are either joint concurrent tortfeasors (briefly, joint tortfeasors), where there is not only a concurrence in the chain of causation leading to a single damage, but also (apart from nonfeasance or breach of a joint duty) mental concurrence in some enterprise, or several concurrent tortfeasors, where the concurrence is exclusively in the realm of causation.” [footnote omitted]).

74. *Asleson* (SC), *supra* note 46 at para. 136.

75. *Ibid.* at para. 171 (citing *Parkland (County) No. 31 v. Stetar* (1974), [1975] 2 SCR 884, 50 DLR (3d) 376 [*Parkland* cited to SCR]).

76. *Asleson* (SC), *supra* note 46 at para. 172 (citing *Reekie v. Messervey* (1989), 59 DLR (4th) 481, 36 BCLR (2d) 316 (CA); *Hongkong Bank of Canada v. Touche Ross & Co.* (1989), 36 BCLR (2d) 381, 74 CBR (NS) 164 (CA)).

77. *Asleson* (SC), *supra* note 46 at para. 171 (“. . . I see no reason why a plaintiff’s settling with one joint tortfeasor should have the effect of limiting or barring another tortfeasor’s rights to contribution and indemnity under s. 4 of the *Negligence Act*.”). See also *ibid.* at para. 173 (“I conclude that in this case [P’s] settlement with [D1] does not sever the joint and several liability imposed by s. 4 of the *Negligence Act* upon all defendants. The agreement of settlement and release between [P] and [D1] does not affect [D2’s and D3’s] rights to claim contribution and indemnity from [D1]. And the present defendants remain jointly and severally liable for all of the loss [P] has suffered, subject to any agreement which they have made themselves.”).

78. *Ibid.* at para. 171.

79. *Ibid.* (“The position of the settling tortfeasor can be protected either by his taking a covenant for

On appeal, these conclusions were affirmed.<sup>80</sup> Further, while not expressly overruling *Westcoast Transmission*, the court of appeal did express some dissatisfaction with its reasoning.<sup>81</sup>

## C. Developments Since the Asleson Case

### 1. CASE LAW

Despite concerns raised by some in the legal profession,<sup>82</sup> courts in British Columbia have continued to apply *Asleson* as the leading authority on contribution after settlement under the *Negligence Act*. A review of the cases shows that the principles stated in *Asleson* have cropped up in a wide variety of situations.

*T. W. N. A. v. Canada*<sup>83</sup> involved complex residential-school litigation. P commenced proceedings in the Supreme Court of British Columbia claiming damages for physical and sexual assault from D1 (the Anglican Church of Canada), D2 (the government of Canada), and a number of individual defendants. Shortly thereafter, P commenced similar proceedings against D1 and D2 in the Federal Court of Canada. Early on in the supreme-court litigation, P discontinued proceedings against D2. It then agreed with D1 to enter consent orders in both the supreme-court and the federal-court proceedings dismissing those actions against D1. Sometime later, the federal-court proceedings against D2 were discontinued. P immediately decided to add D2 as a defendant in the supreme-court proceedings. D2 issued a third-party notice to D1, claiming contribution. D1 applied to have the third-party notice struck out. The court refused, citing *Asleson*.<sup>84</sup>

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indemnity from the plaintiff . . . or by giving that tortfeasor credit as a matter of equity, for any amount he has paid against another tortfeasor's claim for contribution and indemnity. . .").

80. See *Asleson* (CA), *supra* note 46 at para. 118 (CA), Southin JA (Proudfoot JA concurring). Note that the court of appeal varied other conclusions in *Asleson* (SC), *supra* note 46, and that one justice dissented from Southin JA's conclusions on some of the other issues raised in the case.

81. See *Asleson* (CA), *supra* note 46 at para. 119.

82. See Karen Martin & Jeff Van Hinte, "Multi-party Litigation Update" (2004) 62 *Advocate* 849; Karen Martin, "Advising Clients on the Settlement of Multi-party Litigation" (1997) 53 *Advocate* 205.

83. [1999] BCJ No. 2585 (QL) (SC).

84. *Ibid.* at para. 21, Williamson J. ("I conclude, however, that the princip[al] reason the third party notice should not be dismissed is that to do so would be to curtail Canada's statutory right to determine a claim for contribution and indemnity from the Church, a claim grounded upon s. 4 of the *Negligence Act*, and allegedly upon certain contractual obligations. The principle has been articulated in this province in the case of [*Asleson*]. . .").

In *Prairie Hydraulic Equipment Ltd. v. Lakes District Maintenance Ltd.*<sup>85</sup> D1 was a manufacturer of snow-removal equipment. P ordered some of this equipment, which it proceeded to install on a truck chassis for D2 and D3. P paid D1 in full for this equipment, and subsequently entered into a dealer agreement with D1. But D2 and D3 withheld \$50 000 of the amount they owed to P. P sought a credit in this amount to its dealer account with D1. When D1 refused, P unilaterally withheld \$50 000 in settlement of an invoice for an unrelated order from D1. A complex series of claims and counterclaims, in the courts of British Columbia and Alberta, ensued. Ultimately P settled its claims with D1, but a third party who had been brought into the litigation issued a fourth-party notice to D1, claiming contribution. The court refused to set aside the notice, stating that “[i]t thus appears that [*Asleson*] represents the current law on this issue.”<sup>86</sup>

Finally, in *FBI Foods Ltd. v. Glassner*<sup>87</sup> P had successfully sued D1 and D2 for breach of confidence in relation to a drink recipe.<sup>88</sup> P appealed the judgment, claiming additional damages and remedies, and D1 and D2 cross-appealed. Before this appeal was heard, P and D1 settled, with D1 paying P the nominal amount of \$1.00. P was successful in its appeal against D2, obtaining damages for lost profits and an injunction.<sup>89</sup> But D2 appealed to the Supreme Court of Canada, which disallowed the injunction and sent the matter back to the British Columbia Supreme Court for reassessment of damages.<sup>90</sup> Throughout the appeal process, D2 asserted its right to claim contribution from D1. Ultimately, P and D2 settled the action, with D2 paying \$300 000 to P. In this proceeding, D2 sought contribution of \$150 000 from D1. D1 opposed, arguing (among other points) that the “the covenant not to sue [D1, which P had] given in settlement extinguished [D1’s] liability to [P].”<sup>91</sup> The court rejected this argument, concluding that “[b]y analogy, [the] reasoning [in *Asleson*] applies in this case.”<sup>92</sup>

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85. 2001 BCSC 796, 91 BCLR (3d) 148.

86. *Ibid.* at para. 22, Chamberlist J.

87. 2001 BCSC 151, 86 BCLR (3d) 136 [*Glassner*].

88. See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1994] 8 WWR 727, 93 BCLR (2d) 318 (SC).

89. See *Cadbury Schweppes Inc. v. FBI Foods Ltd.* (1996), 138 DLR (4th) 682, 23 BCLR (3d) 326 (CA).

90. See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 SCR 142, 59 BCLR (3d) 1.

91. *Glassner*, *supra* note 87 at para. 18, Dillon J.

92. *Ibid.*

Courts in British Columbia have also considered *Aselson* in some cases that do not involve settlement agreements.<sup>93</sup> There is more on this topic later in this consultation paper.<sup>94</sup>

## 2. DEVELOPMENTS WITH SETTLEMENT AGREEMENTS

### (a) Introduction

Perhaps the most significant development in the wake of the *Aselson* case has been its effect on settlement agreements. Parties to multiparty litigation and their lawyers have embraced the *Aselson* court's call to "protect" themselves from any negative implications of the decision through the provisions of their settlement agreements.<sup>95</sup>

There is a limitless number of ways to structure a settlement agreement. As multiparty litigation tends to raise complex legal issues, partial settlements of this type of litigation tend toward the complicated and detailed end of the spectrum of settlement agreements. The purpose of the sections that follow is not to give a comprehensive account of the types of agreements that may be used or the drafting, procedural, and ethical issues that may arise in using a partial settlement agreement. (Readers who are interested in these topics may pursue them in the sizable amount of practical<sup>96</sup> and academic<sup>97</sup> commentary that has been published to address them.)

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93. See, e.g., *Scott Management*, *supra* note 27 (application to set aside third-party notices claiming contribution—applicant arguing that lapsed limitation period barred contribution—court of appeal concluding at para. 54 that it was "bound" by decision in *Asleson*).

94. See, below, section II.C.3 at 27.

95. *Aselson* (SC), *supra* note 46 at para. 136.

96. See H. Elizabeth Allard, "Settlement Agreements in Multi-Party Settlements," in Continuing Legal Education Society of British Columbia, *Construction Law, 2008 Update: Materials Prepared for the Continuing Legal Education Seminar, Let's Talk Construction Law, Held in Vancouver, BC, on April 25, 2008* (Vancouver: Continuing Legal Education Society, 2008) 4.2.1; Ariel DeJong, "The Effect of a B.C. Ferry Agreement on the Joint Liability of Non-settling Tortfeasors," in Continuing Legal Education Society of British Columbia, *Construction Law, 2004 Update: Materials Prepared for the Continuing Legal Education Seminar, Construction Law: The 20 Minute Mentor, Held in Vancouver, B.C. on November 25, 2004* (Vancouver: Continuing Legal Education Society of British Columbia, 2004) 5.3.1; Stacey Boothman, "Liability after the BC Ferries Agreements," in Continuing Legal Education Society of British Columbia, *Insurance Law Conference, 2004: Materials Prepared for the Continuing Legal Education Seminar, 4th Annual Insurance Conference, Held in Vancouver, B.C. on May 6, 2004* (Vancouver: Continuing Legal Education Society, 2004) 2.1.1; Martin & Van Hinte, *supra* note 82.

97. See, e.g., Barbara Billingsley, "*Margetts v. Timmer Estate*: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" (1998) 36 Alta. L. Rev. 1017; Peter B. Knapp, "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994) 20 Wm. Mitchell L. Rev. 1; June F. Entman, "Mary Carter Agreements: An Assessment of Attempted Solutions"



Instead, the goal of the sections that follow is much more modest: simply to acquaint readers with the leading types of settlement agreements that have been discussed in the case law on partial settlements of multiparty litigation. This information will be important in weighing whether or not legislation is necessary to address the issues for reform that arise in this area of the law.

*(b) Covenant Not to Sue and Indemnity*

There are two basic building blocks, noted in *Asleson* (SC)<sup>98</sup> and other cases, to the partial settlement of multiparty litigation: the covenant not to sue and the indemnity.

Typically, when a plaintiff settles with a defendant, the plaintiff releases the defendant from all claims in connection with the plaintiff's damage or loss. This usually isn't done in multiparty litigation because, under a longstanding common-law rule, a release of one joint tortfeasor (= a wrongdoer who has committed a private or civil wrong—that is, a *tort*) is considered to be a release of all joint tortfeasors responsible for the plaintiff's damage or loss.<sup>99</sup> "To avoid the effect of that rule," lawyers developed the covenant not to sue.<sup>100</sup> Although it is rare nowadays to encounter true joint tortfeasors,<sup>101</sup> the covenant not to sue continues to be used in cases involving multiple wrongdoers because the consequences of using a release in the wrong circumstances are so harsh.<sup>102</sup>

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(1986) 38 U. Fla. L. Rev. 521; Katherine Gay, "Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems" (1983) 36 Ark. L. Rev. 570; John E. Simonett, "Release of Joint Tortfeasors: Use of the *Pierringer* Release in Minnesota" (1977) 3 Wm. Mitchell L. Rev. 1; Harrold J. McComas, "Tort Releases in Wisconsin" (1965) 49 Marq. L. Rev. 533.

98. See *supra* note 46 at paras. 104, 136.

99. See Williams, *supra* note 73 at § 11 ("It has long been settled that the release of one joint tortfeasor releases all the others. Reasons given for this rule are technical, and even fictitious; according to earlier cases, the reason is that a release is a 'satisfaction in law,' according to the later, it is that the cause of action is one and indivisible, so that when it goes for one it goes for all. . . . However this may be, the rule has been too often affirmed to admit of doubt. . . ." [footnotes omitted]). See also *Restatement (Third) of the Law of Torts (Apportionment of Liability)* § 24, rep. note (1999) ("The one-settlement-releases-all rule may be the most widely and harshly criticized legal rule of all time.").

100. *Restatement (Third) of the Law of Torts (Apportionment of Liability)* § 24, rep. note (1999).

101. See *supra* note 73 (setting out the three circumstances in which multiple tortfeasors can be considered to be joint tortfeasors).

102. See Allard, *supra* note 96 at 4.2.5 ("the general practice is to give a covenant not to sue to the settling party").

A simple covenant not to sue will not assist D1 if D2 makes a contribution claim.<sup>103</sup> This point was noted in *Asleson*, but the court also observed that D1 could protect itself by means of an indemnity from P.<sup>104</sup> An indemnity is simply an agreement (or, in this case, a term of a broader settlement agreement) that requires someone to reimburse another person for that person's loss. Indemnities may take on many forms; a simple example of an indemnity in a partial settlement would require P to repay to D1, dollar for dollar, any amount that D1 ultimately had to contribute to D2.

### (c) *Mary Carter Agreements*

Since the decision in *Asleson*, lawyers and litigants in multiparty proceedings have turned to more sophisticated types of settlement agreements, which tend to go under the umbrella name *proportionate share settlement agreement*.<sup>105</sup> Two types of agreements that originated in the United States have had a significant impact on the development of proportionate share settlement agreements in Canada.

The first type is called the *Mary Carter* agreement.<sup>106</sup> *Mary Carter* agreements originated in the United States in the 1930s, were first approved by American courts in the 1960s, began to crop up in Canadian court proceedings in the 1980s and 1990s,<sup>107</sup> and have continued to be used in this country.<sup>108</sup>

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103. See Knapp, *supra* note 97 at 8 (“At best, the covenant not to sue permitted a settling defendant to purchase only a partial and uneasy peace.”).

104. *Asleson* (SC), *supra* note 46 at para. 136 (“In making a settlement with the plaintiff, a party could stipulate for a covenant from the plaintiff to indemnify him, to the extent of his payment, against any third party claims made by joint tortfeasors against him for contribution and indemnity.”).

105. See *Amoco Canada*, *supra* note 5 at paras. 11–12 (“The litigation of large losses in Canada has been characterized by two opposing trends: first, the practice of adding every conceivable party as a defendant or third party in order to spread out the risk of liability, which complicates and slows the litigation process; and second, the use of settlement agreements to help speed litigation and curb legal fees. Now past is the day when ‘settlement agreement’ can be understood to refer solely to the final resolution of all outstanding issues between all parties to a lawsuit, effectively bringing the suit to an end. In the last several years, in response to increasingly complex and commensurately dilatory and costly litigation, a new generation of settlement agreements has been cautiously adopted by the litigation bar.”).

106. See *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967) [*Mary Carter*] (case lending its name to agreement). *Mary Carter* agreements have also been called “a guaranteed verdict agreement, Gallagher Covenant, or loan receipt agreement”: see Gay, *supra* note 97 at 570 [footnotes omitted].

107. See, e.g., *J. & M. Chartrand Realty Ltd. v. Martin* (1981), 22 CPC 186, 9 ACWS (2d) 400 (Ont. HC); *Petty v. Avis Car Inc.* (1993), 13 OR (3d) 725, 103 DLR (4th) 298 (Gen. Div.) [*Petty* cited to OR].

108. See, e.g., *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, 8 BCLR (5th) 316.

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A leading Canadian case has said that “a typical Mary Carter agreement contains the following features”:

- (1) [D1] guarantees [P] a certain monetary recovery and the exposure of [D1] is “capped” at that amount.
- (2) [D1] remains in the lawsuit.
- (3) [D1’s] liability is decreased in direct proportion to the increase in [D2’s] liability.
- (4) The agreement is kept secret.<sup>109</sup>

The effect of such an agreement is to provide security and certainty for P and D1. As a result of a *Mary Carter* agreement “[D1] guarantees a minimum total recovery to [P] regardless of whether [P] wins or loses at trial”<sup>110</sup> and D1 is assured that it will only be out the amount paid under the agreement.

That said, *Mary Carter* agreements have attracted considerable criticism. Much of this criticism has been focussed on the fourth element cited above, the secrecy of many early *Mary Carter* agreements. Adverse court rulings<sup>111</sup> and changing professional practices<sup>112</sup> have largely diminished this aspect of *Mary Carter* agreements.

Other issues may arise from elements (2) and (3). In a *Mary Carter* agreement, D1 remains an active participant in the proceedings, and so is subject to the time and costs of pre-trial procedures, such as discovery. In addition, the structure of the agreement gives P and D1 a strong economic incentive to maximize D2’s share of the

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109. *Pettey*, *supra* note 107 at 732, Ferrier J. See also *British Columbia Children’s Hospital v. Air Products Canada Ltd.*, 2003 BCCA 177 at para. 62, 11 BCLR (4th) 28, Huddart JA (dissenting) (citing *Pettey*’s description of a *Mary Carter* agreement).

110. Knapp, *supra* note 97 at 17.

111. See *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973) (overruling *Mary Carter*, *supra* note 106, and permitting *Mary Carter* agreements only on production of agreement for examination before trial). See also *Elbaor v. Smith*, 845 SW 2d 240 (Tex. 1992) [*Elbaor*] (finding *Mary Carter* agreements void in Texas as a violation of public policy).

112. See The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, Vancouver: Law Society of British Columbia, 2013, r. 5.1-2, commentary para. 1 (“In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.”).

fault for P's damage or loss. By acting on this incentive, P and D1 may potentially distort the trial process through collusion or other means.<sup>113</sup>

### (d) *Pierringer* Agreements

In response to some of the problems caused by *Mary Carter* agreements, American lawyers developed the *Pierringer* agreement.<sup>114</sup>

An American law professor has characterized the typical *Pierringer* agreement as having “four elegant strokes,” which make up its “critical elements”:

- (1) a complete release of [D1];
- (2) a discharge of the claim to the extent of the “portions or fractions or percentages of causal [wrongdoing]” of [D1], as later determined by the [court] at trial;
- (3) a reservation of the claim against [D2]; and
- (4) an indemnification of [D1] against any future claims of contribution.<sup>115</sup>

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113. See, e.g., *Lum v. Stinnett*, 87 Nev. 402 at 411, 488 P. 2d 347, Gundersen J. (“[The settling defendants under a *Mary Carter* agreement] cannot, we think, suggest they did not bargain for and utilize its inherent advantages, which we find inimical to true adversary process. If they wanted no more than a fair trial against appellant Lum, why was the agreement framed to retain [the settling defendants] as sham ‘adverse parties’ in the case? It is no answer to say appellant was not stabbed in the back. If his hands were tied, it matters little that he could see the blow coming.”); *Elbaor*, *supra* note 111 at 250, Gonzalez J. (“As a matter of public policy, this Court favors settlements, but we do not favor partial settlements that promote rather than discourage further litigation. And we do not favor settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment. The bottom line is that our public policy favoring fair trials outweighs our public policy favoring partial settlements.”); Entman, *supra* note 97 at 329–30 (noting “two distinct problems caused by *Mary Carter* agreements”: (1) the continuing participation of the settling defendant in the proceedings; and (2) the distorting effect of the agreement on judicial apportionment of fault among multiple wrongdoers).

114. See *Pierringer v. Hoger*, 124 NW 2d 106 (Wis. 1963) [*Pierringer*]. Sharp-eyed readers will have noticed that the *Mary Carter* case, *supra* note 106, was decided (in 1967) later than the *Pierringer* case (1963). So how can *Pierringer* agreements be described as a response to some of the failings of *Mary Carter* agreements? As it turns out, the names of these agreements come from the first court cases that provided a seal of approval for their use. The agreements themselves were in use before this seal of approval was given. In fact, *Mary Carter* agreements “can be traced back to 1934, when the Wisconsin Supreme Court invalidated a secret agreement in which the plaintiff and a settling tortfeasor sought to impose greater liability on the nonsettling tortfeasor than the settling tortfeasor.” See *Restatement (Third) of the Law of Torts (Apportionment of Liability)* § 24, rep. note (1999) (citing *Trampe v. Wisconsin Tel. Co.*, 252 NW 675 (Wis. 1934)). This early setback provided Wisconsin lawyers with the incentive to develop the agreement approved in the *Pierringer* case.

115. Knapp, *supra* note 97 at 13 (quoting McComas, *supra* note 97 at 540–42).

The reference to a “complete release” in element (1) requires some further explanation. First, the use of *release* is deliberate, for reasons that have to do with the law of the state that first approved the use of *Pierringer* settlements, Wisconsin. Much of the decision in *Pierringer* was concerned with interpretation of the settlement agreement. The court decided that it was properly classified as a release, rather than a covenant not to sue.<sup>116</sup> But the release did not have the effect of releasing all settling *and* non-settling defendants because it met criteria to avoid this harsh result which had previously been articulated by the Wisconsin courts.<sup>117</sup>

Second, the key word in the passage is actually *complete*, because it points to one of the defining features of a *Pierringer* agreement. As a recent case notes, “[t]he device of a *Pierringer* agreement allows [D1] to extract itself from participating in the litigation in whole or in part.”<sup>118</sup> (The reference to “in part” is a nod to some *Pierringer* agreements, which call for D1 to participate to the extent of facilitating discovery and other procedural and evidentiary matters.)<sup>119</sup> As the court in *Pierringer* concluded, the agreement allows D1 to “[buy its] peace.”<sup>120</sup>

So *Pierringer* agreements allow for certainty and finality in settling the dispute between P and D1. But they also hold out the hope of enhanced “fairness to [D2,]” by promising, in effect, “that, no matter what the outcome at trial, [D2] will pay no more than [its] ‘fair share’ of the verdict.”<sup>121</sup> In an ideal world, “the *Pierringer* release seemed to promise something for everyone.”<sup>122</sup> But in the real world it’s simply not possible to satisfy the divergent interests of all parties to multiparty litigation to the utmost. Problems of trial distortion and misallocation of resources can occur in the wake of a *Pierringer* agreement. But the American consensus appears to be that

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116. See *Pierringer*, *supra* note 114 at 110, Hallows J.

117. See *ibid.* at 110–12.

118. *Moore v. Bertuzzi*, 2012 ONSC 3248 at para. 85, 110 OR (3d) 611 [*Moore*], Perell J. See also *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2011 NSCA 121 at para. 10, 346 DLR (4th) 68, Farrar JA (MacDonald CJ and Oland JA concurring) (describing *Pierringer* agreement as “an agreement which allows parties to a proceeding to settle claims and [D1] to withdraw from the litigation”), *leave to appeal to SCC granted*, [2012] SCCA No. 88 (QL).

119. See *Moore*, *supra* note 118 at para. 84.

120. *Supra* note 114 at 112. The framing of the release itself was the key to this conclusion, because in Wisconsin it had the effect of “bar[ring]” (*ibid.* at 111) D2’s contribution claim. The promise of indemnity from P to D1 in the event of a contribution claim was described as “second-line protection” (*ibid.* at 108), useful only if the drafting of the release failed to achieve its purpose.

121. Knapp, *supra* note 97 at 4 [footnote omitted].

122. *Ibid.*

these problems do not occur with *Pierringer* agreements on anything like the scale with which they plague *Mary Carter* agreements.<sup>123</sup>

### (e) *BC Ferry Agreements*

A homegrown form of proportionate share settlement agreement emerged in the immediate aftermath of *Asleson*. In *British Columbia Ferry Corp. v. T & N plc*,<sup>124</sup> the Court of Appeal for British Columbia approved a type of agreement that came to be known as the *BC Ferry* agreement.

The *BC Ferry* agreement bears something more than a passing resemblance to the *Pierringer* agreement. As is the case in *Pierringer* agreements, the typical *BC Ferry* agreement commits P to foregoing in the proceedings that portion of its claim that can be attributed to the wrongdoing of D1.<sup>125</sup> P also agrees to indemnify D1 for any amount claimed by D2 as contribution.<sup>126</sup> The result of these clauses in a *BC Ferry* agreement is not to deprive D2's of its right to contribution under the *Negligence Act*, but to make the exercise of that right unnecessary in practice.<sup>127</sup>

The main differences between the two types of settlement agreement relate to how they each handle certain procedural questions. The typical *BC Ferry* agreement requires P to amend the pleadings by deleting any references to D1 and by expressly waiving any rights to recover from D2 any portion of P's damage or loss attributable to D1, and for which D2 may claim contribution from D1.<sup>128</sup> The rationale for this clause can be traced back to the judgment in *BC Ferry* itself.<sup>129</sup> Under *BC Ferry*

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123. See *ibid.* at 20–22.

124. (1995), [1996] 4 WWR 161, 16 BCLR (3d) 115 (CA) [*BC Ferry* cited to BCLR].

125. See *ibid.* at para. 5, Wood JA (Cumming and Donald JJA concurring) (“the plaintiffs entered into agreements with several of the third parties, including all of the respondents to these appeals, in which the plaintiffs agreed that they will not seek to recover from the defendants any portion of the losses they claim in the action which a court or any other tribunal may attribute to the fault of the third parties”).

126. See Allard, *supra* note 96 at 4.2.6–4.2.7 (setting out clauses typically found in *BC Ferry* agreements).

127. See *supra* note 124 at para. 14 (“if the defendants are saved harmless from any damages caused or contributed to by the fault of a concurrent tortfeasor, there is no need to exercise that right”).

128. See Allard, *supra* note 96 at 4.2.7.

129. See *supra* note 124 at para. 15 (“In order to avoid any uncertainty that may arise with respect to the need for a determination at trial of the degree of fault, if any, attributable to non-defendants, I am of the view that the express waiver should properly form part of the pleadings in this action, and that a further amendment should be made to the Statement of Claim, wherein the sub-

agreements it has also proved far more typical for D1 to remain involved in the proceedings, to the extent of ensuring that D2's rights to discovery and other pre-trial procedures are not impaired. This can also be traced back to the judgment in *BC Ferry*.<sup>130</sup>

### 3. RELATED CASES: LAPSED LIMITATION PERIODS, STATUTORY IMMUNITY, AND CONTRACTUAL EXCLUSION CLAUSES

D1's liability for P's damage or loss can also be limited or extinguished by a lapsed limitation period,<sup>131</sup> statutory immunity,<sup>132</sup> or a contractual exclusion or limitation-of-liability clause.<sup>133</sup> Although these topics fall outside the scope of this consultation paper, it is worthwhile briefly noting their existence. This is because these cases and cases involving settlement agreements have mutually influenced each other over the years. *Asleson* cited one of the leading cases involving a lapsed limitation period and drew a parallel between it and the case before the court.<sup>134</sup> In turn, the development

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stance of that waiver is clearly set out. When that is done, there will be no doubt as to the limits of the plaintiffs' claim for damages, nor will there be any uncertainty as to the obligation of the trial judge to determine what fault, if any, for the plaintiffs' loss is attributable to others than the defendants.").

130. See *ibid* at para. 31 ("It would, in my view, be manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action on which all parties had joined issue. But that is precisely what will occur here if the defendants are denied the declaratory relief they seek under Rule 5 (22) [now r. 20-4 (1)]. In those circumstances, I am of the view that the third party claims for declaratory relief should be allowed to proceed."). This reasoning has been questioned. See *Amoco Canada*, *supra* note 5 at paras. 24 ("The difficulty with the *B.C. Ferry* approach is its emphasis on the potential prejudice a non-settling party might suffer. Indeed, it is likely that a non-settling party will always be able to allege some possible disadvantage when it remains as the sole target for liability after other parties abandon the litigation. That is true whether a partial settlement occurs during the course of litigation or even before an action is launched. The *B.C. Ferry* approach would seem to permit an action for declaratory relief to be maintained for purely procedural purposes against anyone who settled, whether or not they were ever a named party to the litigation, and even though there were no possibility that they might be liable."), 27 ("The *B.C. Ferry* approach undervalues the importance of settlement.").

131. See, e.g., *Parkland*, *supra* note 75; *Marelj v. Gosselin*, 2001 BCSC 1491, 94 BCLR (3d) 351.

132. See, e.g., *Pearse v. Canpar Transport Ltd.*, 2001 BCSC 594, 88 BCLR (3d) 312 [*Pearse*]; *Horvath v. Thring*, 2005 BCCA 127, 39 BCLR (4th) 124; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2009 BCCA 540, 313 DLR (4th) 651.

133. See, e.g., *Giffels Associates*, *supra* note 33.

134. See *Asleson* (SC), *supra* note 46 at para. 171 (citing *Parkland*, *supra* note 75 and asserting "no real distinction between a plaintiff settling with one joint tortfeasor, on the one hand, and a plaintiff losing his right to sue one joint tortfeasor due to a time limitation bar").

of the case law in these related areas has been influenced by the reasoning in *Asleson*.<sup>135</sup> The result has been a large and complex body of case law.

In *Scott Management*, a recent decision of the court of appeal, the court tried to impose some order on this jurisprudence.<sup>136</sup> The court did this by distinguishing between two categories of cases.

“The first category,” in the court’s analysis, “covers situations in which the potential future liability between these parties was allocated by contract or legislation prior to any tortious event, and a tortfeasor who was not covered by that pre-tort arrangement seeks to advance a claim for contribution against the immune party after the tort.”<sup>137</sup> This category embraces cases involving contractual exclusion clauses and statutory immunity.<sup>138</sup>

The court’s second category “covers situations in which, at the time the tort occurred, the concurrent tortfeasors became potentially jointly and severally liable to the plaintiff under s. 4(2) of the [*Negligence*] Act. Subsequent action or inaction by the plaintiff . . . then extinguished her cause of action against one tortfeasor, but another tortfeasor nevertheless advanced a claim for contribution against that party.”<sup>139</sup> This category embraces settlement agreements and lapsed limitation periods.<sup>140</sup>

In the court’s view, the “temporal aspect” implicit in setting up these categories is the key to “reconcil[ing]” the cases in this area.<sup>141</sup> In first-category cases, D2 cannot claim contribution from D1. In second-category cases, D2 can claim contribution from D1.<sup>142</sup>

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135. See, e.g., *Pearse*, *supra* note 132 at para. 14, Bauman J.; *Scott Management*, *supra* note 27 at para. 54.

136. See *ibid.*

137. *Ibid.* at para. 32.

138. *Ibid.* at para. 34 (citing *Giffels Associates*, *supra* note 33, as an example of the first type of case and *Pearse*, *supra* note 132, as an example of the second).

139. *Supra* note 27 at para. 33.

140. *Ibid.*

141. *Ibid.* at para. 31.

142. See *ibid.* at paras. 34–39. The court noted that some second-category cases, such as *Parkland*, *supra* note 75, reach a different result, but it cited differing legislation as the source of this apparent inconsistency.



## CHAPTER III. ISSUES FOR REFORM

### A. Introduction

This consultation paper examines three issues for reform. First, it discusses arguments for and against amending the *Negligence Act* to deal with the issues arising in the wake of *Asleson*, relating to partial settlements and contribution. Second, it sets out options for reform on how to amend the *Negligence Act* to deal with partial settlements and contribution. Third, it explores whether legislation is needed to confirm the right of a settling defendant (D1) to claim contribution from a non-settling defendant (D2).

Although this can be a highly technical area of the law, it is important to bear in mind that some important policy considerations are at play. The Ontario Law Reform Commission has written an excellent summary of the main policy considerations.

- (1) “[T]he interest in encouraging settlement of liability without resort to litigation.”<sup>143</sup> The commission goes on to note that “[i]t is obviously good policy to minimize the occasions on which the expenses and delays of litigation are incurred by individuals, and to ensure that judicial resources are not spent wastefully. Any satisfactory rules should not discourage settlements by either imposing unduly severe consequences upon parties who make an unfavourable settlement, or withholding finality from a settlement made in order to avoid the possibility of litigation.”<sup>144</sup>
- (2) “[T]he injured party should be able to recover proper compensation for those legal wrongs that have caused his loss.”<sup>145</sup>
- (3) “[T]hose who are not parties to a settlement should not be prejudiced by an agreement made between an injured person and one of the wrongdoers.”<sup>146</sup>
- (4) There is a “need to provide clear and workable rules by which the rights and duties of the parties are regulated.”<sup>147</sup>

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143. Ontario Report, *supra* note 6 at 97.

144. *Ibid.*

145. *Ibid.*

146. *Ibid.*

147. *Ibid.*

As the commission concludes, it is not possible to achieve all these policy goals to their maximum extent by legislative reform; the best that can be hoped for is to find a means to strike a working balance among them in the most broad-based and general way.<sup>148</sup>

**B. Should the Negligence Act Be Amended to Expressly Provide Guidance on a Wrongdoer’s Right to Contribution from Another Wrongdoer Who Has Settled with the Injured Person?**

The main criticism levelled against the current law in British Columbia is that it fails to advance the first policy goal listed in the previous section. Critics have pointed out that *Asleson* and subsequent decisions have had the effect of discouraging defendants and potential defendants from settling actions.<sup>149</sup>

Settlement of litigation in advance of trial obviously has a value for the parties involved, as it allows them to plan their affairs and avoid the uncertainties of protracted litigation. There is also a social value to encouraging early settlement of complex, multiparty actions, as it frees up scarce and valuable court time.

*Asleson’s* approach to contribution after settlement makes partial settlements more difficult to achieve. D1 will only have an incentive to settle if it perceives some advantage in striking a deal with P. But if D1’s advantage can be snuffed out by a subsequent claim for contribution by D2, then D1 will be very reluctant to take any bargain.<sup>150</sup> So P may lose the ability to “play one defendant off against the other,” and as a result “[t]he tune will be called by the toughest defendant—the one most reluctant to compromise.”<sup>151</sup>

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148. *See ibid.* (“It will become apparent that it is extremely difficult to satisfy all these interests to the fullest extent, and that the task for reformers is to strike the best balance in as many situations as possible.”).

149. *See* Martin, *supra* note 82 at 205 (“The evolution in recent years of the case law regarding third-party claims for contribution and indemnity has created challenges and pitfalls for those attempting to resolve multi-party litigation short of trial.”).

150. *See* Fleming James Jr., “Contribution among Joint Tortfeasors: A Pragmatic Criticism” (1941) 54 Harv. L. Rev. 1156 at 1161 (“Usually a man will settle a claim against him only to save money—that is, where the compromise figure is less than the probable amount of an adverse verdict. But if, in spite of his agreement with the plaintiff, one tortfeasor can be called upon to pay his share of any verdict which may be rendered against his fellow tortfeasors, he will not settle unless they all do.”).

151. *Ibid.* at 1161–62. *See also* Amoco Canada, *supra* note 4 at para. 25 (“Litigation, including settlement, is all about advantage, and corresponding disadvantage or prejudice. Settlement, after all, is nothing more than a compromise, in which parties gamble by trading prospective rights for

In practice, P and D1 have been able to blunt the force of the *Asleson* line of cases by entering into a *BC Ferry* agreement,<sup>152</sup> which makes it clear that P will not pursue D2 for any amount of the judgment that can be attributed to the fault of D1. But the development of the *BC Ferry* agreement may not have solved all issues with the current law.

First, leaving it to the parties to sort out issues of contribution and settlement shifts the burden of tailoring the settlement agreement to achieve the desired result on to them. This generates both additional costs (as settlement agreements become more complex to negotiate and to draft) and additional uncertainty (as the parties cannot be absolutely assured that a court subsequently interpreting the agreement will confirm that it adequately addresses the issues). This uncertainty creates traps that can ensnare even experienced lawyers.<sup>153</sup> An amendment to the *Negligence Act*, on the other hand, can both encourage settlement and further policy (4)<sup>154</sup> by making the law simpler, clearer, and more certain.<sup>155</sup>

Second, it is worthwhile to note that this issue has been examined by many law-reform agencies over the years,<sup>156</sup> and the preference among Canadian agencies has

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certainty. Nor does prejudice run in only one direction. Failure to allow settlement by parties who want an exit ramp from costly and prolonged litigation may give a party who refuses to settle an even stronger tactical advantage. An unreasonable party can hold the other parties at ransom, virtually dictating the terms of settlement.”).

152. See, above, section II.C.2 (e) at 26.

153. See, e.g., *FBI Foods Ltd.—Les Aliments FBI ltée. v. Glassner*, 2001 BCSC 1472 at paras. 10–13, 95 BCLR (3d) 385.

154. See, above, section III.A at 29.

155. See Martin & Van Hinte, *supra* note 82 at 860 (“The law in the area of multi-party litigation continues to evolve as the courts struggle to resolve the issues in a way that provides some certainty and balances the interests of the parties.”); Martin, *supra* note 82 at 211 (“[T]he increasing complexity and uncertainty of the risks associated with the ‘partial’ settlement of a multiple-party action operate as a strong disincentive to parties pursuing settlement among some, but not all, of the parties to an action. Some of this costly complexity could be avoided if legislative change returned us to the *Westcoast Transmission* era, when a settlement by the plaintiff with one joint and several tortfeasor resulted in the remaining tortfeasors being severally liable only.”).

156. See British Columbia Report, *supra* note 18; Alberta Law Reform Institute, *Report on Contributory Negligence and Concurrent Wrongdoers*, ALRI Rep. No. 31 (Edmonton: The Institute, 1979) [Alberta Report]; Ontario Report, *supra* note 6; Uniform Law Conference of Canada, *Uniform Contributory Fault Act in Proceedings of the Sixty-sixth Annual Meeting* (Ottawa: The Conference, 1984); New South Wales Law Reform Commission, *Report on Contribution between Persons Responsible for the Same Damage*, NSWLRC Rep. no. 89 (Sydney: The Commission, 1999) [New South Wales Report]; New Zealand Law Commission, *Apportionment of Civil Liability: A Discus-*

been to recommend amending legislation.<sup>157</sup> In most cases, these agencies have favoured legislation as a way to promote settlement of court proceedings. In view of these past recommendations for reform, an argument could be made that proposing an amendment to the *Negligence Act* would also promote harmony with previous law-reform efforts.

There are arguments to be made in favour of the current state of the law. Recalling the list of policy goals set out earlier in this consultation paper,<sup>158</sup> if recommending legislation would tend to promote policies (1) (encouraging settlement) and (4) (advancing clarity in the law), then retaining the current law would tend to support policies (2) and (3).

Policy (2) involves ensuring that P is fully compensated for his or her injuries. Under the current law, as the Ontario Report points out, if P “makes a poor bargain with one wrongdoer, he [is] able to take full advantage of the existence of another wrongdoer whose conduct also caused his loss.”<sup>159</sup> “[A]llow[ing] contribution policy to determine the primary rights of the injured person,” diverts the law from this overriding objective, in effect “permit[ting] the tail to wag the dog.”<sup>160</sup>

Policy (3) calls for ensuring that a party to a settlement agreement is not prejudiced by the agreement’s terms. This is, in essence, an argument for basic fairness in the law’s treatment of D2.<sup>161</sup>

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*sion Paper*, NZLC PP 19 (Wellington: The Commission, 1992) [New Zealand Discussion Paper]; Uniform Law Commission, *Uniform Comparative Fault Act*, s. 6. *See also*, below, appendix B at 53 (for the relevant provisions of the *Uniform Contributory Fault Act* and the *Uniform Comparative Fault Act*).

157. *See* BC Report, *supra* note 156 at 26–27; Alberta Report, *supra* note 156 at 56 (“It is important that parties should be encouraged to settle claims. This suggests that P should be able to settle with D1 and that a release of D1 should also release D1 from any claim of contribution by D2: otherwise D1 has very little incentive to settle with P.”); *Uniform Contributory Fault Act*, *supra* note 156, s. 11 (2). The Ontario Report is the exception; *see supra* note 6 at 105–08. Overseas law-reform agencies were also cool to any changes in the law. *See* New South Wales Report, *supra* note 156 at paras. 4.30–4.38 (recommending no change to law allowing D2 to claim contribution from D1); New Zealand Discussion Paper, *supra* note 156 at paras. 215–19.

158. *See*, above, section III.A at 29.

159. *Supra* note 6 at 105.

160. *Ibid.* [footnote omitted].

161. It is worthwhile noting that policy (3) could also be advanced by an amendment to the *Negligence Act*, depending on how that amendment is framed. The tentative recommendation proposed by the BCLI does achieve this goal. *See*, below, section III.C at 33.

Another argument in favour of the status quo is that, in practice, the law appears to have enough flexibility to allow for similar outcomes as those that would flow from the proposed legislative amendment. So long as P and D1 take care to bring their settlement agreement within the strictures set out in the *BC Ferry* case,<sup>162</sup> they will be able to ensure that D1 will not be required to contribute to D2.

The BCLI tentatively recommends:

*1. The Negligence Act should be amended to expressly provide guidance on a wrongdoer's right to contribution or indemnity from another wrongdoer who has settled with the injured person.*

## **C. How Should an Amended Negligence Act Deal with Partial Settlement and Contribution?**

### **1. INTRODUCTION**

There is a wide variety of options to reform to consider in deciding how to amend the *Negligence Act* to address partial settlements and contribution. The Alberta Report<sup>163</sup> and the Ontario Report<sup>164</sup> have helpfully canvassed the leading choices. In the Alberta Report the options are boiled down to four “rules”:

When P settles with D1 and releases D1 from liability [and the legislation provides that D2 will not have a contribution claim against D1, as a result of the settlement], P's claim against D2 could be reduced by:

- (1) the amount received by P from D1,
- (2) the amount of D1's share of the liability to P,
- (3) the greater of (1) and (2),
- (4) the lesser of (1) and (2).<sup>165</sup>

The Alberta Report points out that the operation of these rules in practice can be best illustrated by a comparative table.<sup>166</sup> Here is such a table, modified to draw on

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162. *See supra* note 124.

163. *See supra* note 156 at 57–60.

164. *See supra* note 6 at 98–105.

165. *Supra* note 156 at 57.

166. *See ibid.* at 57–58.

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the figures from the car-bicycle collision example set out at the start of this consultation paper.<sup>167</sup>

**Table (1): P's loss \$100 000; P settles with D1 for \$50 000; D1 75% at fault; D2 25% at fault**

<u>Rule</u>	<u>P's claim against D2 reduced by</u>	<u>P's claim against D2 amounts to</u>	<u>P's total recovery from D1 &amp; D2 is</u>
(1)	50 000	50 000	100 000
(2)	75 000	25 000	75 000
(3)	75 000	25 000	75 000
(4)	50 000	50 000	100 000

By way of contrast, here is how the rules would operate if P struck a particularly good settlement with D1, one that resulted in a payment that was over and above what the court ultimately found to be D1's share of the fault for the accident.<sup>168</sup>

**Table (2): P's loss \$100 000; P settles with D1 for \$90 000; D1 75% at fault; D2 25% at fault**

<u>Rule</u>	<u>P's claim against D2 reduced by</u>	<u>P's claim against D2 amounts to</u>	<u>P's total recovery from D1 &amp; D2 is</u>
(1)	90 000	10 000	100 000
(2)	75 000	25 000	115 000
(3)	90 000	10 000	100 000
(4)	75 000	25 000	115 000

The following sections discuss the strengths and weakness of these four options for reform. Amending the *Negligence Act* to implement any one of these options would achieve at least one overriding policy goal: encouraging settlement of multiparty proceedings. So the sections that follow tend to focus on how the options would fare in relation to the other three policy goals discussed earlier:<sup>169</sup> ensuring fair compensation for P, limiting prejudice flowing to D2 from the agreement, and advancing clarity in the law.

### 2. OPTION (1): P'S CLAIM AGAINST D2 REDUCED BY THE AMOUNT RECEIVED BY P FROM D1

Rule (1) does not appear to have been tested in practice. Its main advantage would be that it ensures that P receives full compensation for its damage or loss. It achieves

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167. See, above, section I at 2.

168. See Alberta Report, *supra* note 156 at 58.

169. See, above, section III.A at 29.

this result regardless of whether, from the point of view of monetary compensation alone, P strikes a particularly good or a particularly bad settlement with D2.

But it achieves this result at the cost of potential unfairness to D2. If P makes a poor settlement with D1, then D2 ends up bearing the burden of making up for the cost of that settlement to P. Table (1) illustrates how this would work in practice. The court, in this example, has found D2 to be 25% at fault for the damage or loss, but D2 has been called upon to provide 50% of P's compensation.

### 3. OPTION (2): P'S CLAIM AGAINST D2 REDUCED BY THE AMOUNT OF D1'S SHARE OF THE LIABILITY TO P

Rule (2) is the option favoured by both the Alberta Report<sup>170</sup> and the British Columbia Report.<sup>171</sup> The option also forms the basis for a provision in the Uniform Law Conference of Canada's *Uniform Contributory Fault Act*<sup>172</sup> and the American Uniform Law Conference's *Uniform Comparative Fault Act*.<sup>173</sup> In addition, this option comes closest to reflecting the law in British Columbia under *Westcoast Transmission*<sup>174</sup> and the results of a typical *BC Ferry* agreement.<sup>175</sup>

"The key feature of this alternative is that," as the Ontario Law Reform Commission puts it, "in litigation between P and D2, the court determines whether D2 is liable to P, assesses P's recoverable loss, but gives judgment against D2 only for the amount of P's loss that is proportionate to D2's degree of fault."<sup>176</sup> So this option leaves it to P to run the risk of less than full compensation due to a poor settlement (or, more positively, have the opportunity of obtaining more than full compensation from a good settlement).

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170. *See supra* note 156 at 61 ("We recommend that if D1 settles with P and obtains a release for himself but the settlement does not purport to settle P's claim in full, P's claim against D2 should be reduced by the full amount of D1's share of the responsibility to P. Neither D1 nor D2 should have any right of contribution in the case of a settlement on the part of one defendant which purports to settle only his share of the loss.").

171. *See supra* note 156 at 28–30.

172. *See supra* note 156, s. 11 (2). *See, below*, appendix B at 53 (for the text of this provision).

173. *See supra* note 156, s. 6. *See, below*, appendix B at 55 (for the text of this provision).

174. *See supra* note 45.

175. *See, above*, section II.C.2 (e) at 26.

176. *Supra* note 6 at 99.

The strength of this option is that it encourages settlement of actions by ensuring the finality of a settlement agreement between P and D1, but does so in a way that protects D2's interests as well.<sup>177</sup> Another advantage is that "the proposal does not unduly strengthen or weaken P's bargaining position with D1. . . ."<sup>178</sup> P would both bear the risk of making a poor settlement with D1 and reap the benefits of making a favourable settlement with D1. A final advantage is that, by virtue of this rule's popularity with Canadian law-reform agencies and relative continuity with British Columbia case law, this rule holds out the best hope of resulting in a clear legislative provision that can be implemented with a minimum of disturbance to existing practice in multiparty litigation.

But this approach also erodes the fundamental tort-law principle that P should be fully compensated for his or her injuries. "By denying a right of contribution to D1," the Ontario Law Reform Commission observes, "and reducing P's recovery against D2 to the latter's proper share, the scheme puts a premium on the stronger party in the settlement exerting maximum pressure upon the other in order to obtain the most favourable settlement."<sup>179</sup> If the stronger party is D1, the P likely will wind up with an amount that is not full compensation for the loss.

#### 4. OPTION (3): P'S CLAIM AGAINST D2 REDUCED BY THE GREATER OF THE RESULTS UNDER RULES (1) AND (2)

Rule (3) is based on an academic proposal,<sup>180</sup> which has been enacted in Ireland<sup>181</sup> and the Australian state of Tasmania.<sup>182</sup> The author of this rule was concerned that the application of rule (2) in certain cases could result in the overcompensation of P. Table (2) shows how this might happen. If P drives a hard bargain against D1, and D2 refuses to settle, P will be in a position to obtain compensation in excess of the damage or loss suffered. This struck the author of rule (3) as an unfair result.<sup>183</sup>

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177. See Alberta Report, *supra* note 156 at 60 ("We believe that the appropriate proposal flowing from the two criteria of fairness between wrongdoers and encouragement of settlements is to treat P's settlement with D1 as his agreement to the apportionment of liability between D1 and D2 according to their respective degrees of responsibility.").

178. Ontario Report, *supra* note 6 at 100.

179. *Ibid.* at 101.

180. See Williams, *supra* note 73 at § 43.

181. See *Civil Liability Act, 1961*, s. 17 (2). See, below, appendix B at 52 (for the text of this provision).

182. See *Wrongs Act 1954*, s. 3 (3). See, below, appendix B at 53 (for the text of this provision).

183. See Williams, *supra* note 73 at § 43.

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This option does have the advantage of encouraging settlements, at least from D1's point of view. D1 is secure in knowing that D1 will not have to contribute in a subsequent action, so its settlement will be a final end to the proceedings for it. Further, "[t]he scheme also prevents D2 from being unfairly affected by the settlement between P and D1 because D2 can never be made liable for more than his judicially determined share of the liability."<sup>184</sup> A final advantage of this rule is that it has actually been enacted and become part of the law of two jurisdictions outside British Columbia. The track record of applying this provision in Ireland and Tasmania would give legislators in this province useful insights into how such a provision might fare here.

The major disadvantage of this approach is that it exposes P to the risk of receiving less than full compensation for its loss, should it strike a bad bargain with D1. Further, unlike the case under rule (2), this risk is not offset by the possibility that P could retain the fruits of a good bargain. These considerations may sap P's incentives to enter into a settlement.<sup>185</sup> Another disadvantage of rule (3) is its complexity. Among the rules, it likely does not represent the clearest approach to the issues.

### 5. OPTION (4): P'S CLAIM AGAINST D2 REDUCED BY THE LESSER OF THE RESULTS UNDER RULES (1) AND (2)

Rule (4) does not appear to have been implemented in any jurisdiction. This option would be the most favourable to P's interests, in that it would reap the benefits of a good settlement with D1, but would not be exposed to the downsides of a bad settlement. P would always be assured of being fully compensated for its damage or loss.

The weaknesses of this option are similar to the weaknesses for the first and third options. It favours P's interests, but at the expense of D2's contribution rights.<sup>186</sup> It also represents a complex, unfamiliar, and (in the case of this rule) untested approach to the issues.

### 6. SUMMARY AND TENTATIVE RECOMMENDATION

The BCLI favours an amendment to the *Negligence Act* that would implement rule (2). This option for reform appears to strike the best balance for British Columbia among the varying policy goals of legislation relating to this issue for reform. The

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184. Ontario Report, *supra* note 6 at 105.

185. *See ibid.* at 104.

186. *See* Alberta Report, *supra* note 156 at 58 ("The whole function of contribution, which is to share the liability between defendants fairly, would be defeated by rules 1 and 4.").

option encourages settlement agreements and is fair to non-settling defendants. It is also a relatively clear rule (when compared to the other rules considered as options for reform), which would have some familiarity to lawyers and litigants in this province. The one main concern about this option is that it does open up the prospect of a plaintiff receiving compensation in an amount lower than the amount of the plaintiff's damage or loss, as ultimately assessed by the court. But this result only occurs as the consequence of the parties' negotiations in a specific case. The fact that sometimes a plaintiff may be worse off under this option does not trump the general value, both to litigants and the broader society, of encouraging settlements of multi-party litigation.<sup>187</sup>

The BCLI tentatively recommends:

*2. The proposed amendment to the Negligence Act should:*

*(a) apply when*

- (i) a person (the "injured person") suffers damage or loss as a result of the wrongdoing of several concurrent wrongdoers,*
- (ii) the injured person is not responsible for any of that damage or loss through the injured person's contributory negligence, and*
- (iii) the injured person agrees to settle his or her claim against one or more of these concurrent wrongdoers, but the settlement does not purport to settle the entire claim in full;*

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187. One issue that has received a great deal of attention in the commentary is whether a proportionate share settlement agreement has the effect of converting the joint and several liability among non-settling defendants into several liability. See Boothman, *supra* note 96 (arguing, at 2.1.1, that "a BC Ferry settlement agreement severs joint liability entirely"); DeJong, *supra* note 96 (arguing, at 5.3.17, that "absent intervention by the legislature, there is no real risk that a court will find a B.C. Ferry Agreement has the effect of severing the joint liability of non-settling tortfeasors"). This consultation paper is not concerned with how this issue should be resolved for private agreements, but questions about this issue could arise in relation to the BCLI's tentative recommendations for legislative reform. Since examining the merits of joint and several liability is outside the scope of this consultation paper, in our view section 4 (2) (a) of the *Negligence Act* (which provides for joint and several liability among defendants) should continue to govern after our proposed reforms are implemented. We note also that this result would align best with the main rationale for the reforms proposed in this consultation paper, as it would encourage settlements. In contrast, a rule that provided for several (as opposed to joint and several) liability among non-settling defendants after a partial settlement of a plaintiff's claim would expose the plaintiff to the risk of a substantial reduction in compensation, if one or more of the non-settling defendants turned out to be insolvent at the time of judgment, or if for some other reason the plaintiff was unable to realize on its judgment against one or more of the non-settling defendants. Such a risk would have a chilling effect on partial settlements. See DeJong, *ibid.*

(b) provide, in the circumstances described in paragraph (a), that

- (i) the injured person's claim is reduced by an amount proportionate to the degree to which the settling wrongdoer or wrongdoers are found to be at fault for the damage or loss, and
- (ii) a wrongdoer who has settled with the injured person is not required to make a contribution to or to indemnify any of the other several concurrent wrongdoers who are liable for the injured person's damage or loss.

#### **D. Should a Wrongdoer Who Enters into a Settlement with an Injured Person Have a Right to Contribution from a Non-settling Wrongdoer?**

Up to this point this consultation paper has been concerned with situations in which D1 has settled with P for an amount that ended up being less than the amount D1 ultimately would have been liable for after fault for P's damage or loss is apportioned by the court. What about the other side of the coin? Should D1 be able to claim contribution from D2 if D1 settles for an amount that turns out to be greater than what D1 would have been required to pay under the court's apportionment of fault?

In law-reform studies, this issue has been analyzed in three distinct situations. The first situation involves P and D1 making a partial settlement of P's claim. The second concerns D1 making a full settlement of P's claim. And the third is when D1 has made a payment to settle P's claim and ultimately has been found to be blameless for P's damage or loss.

None of these situations has received much attention from the British Columbia courts. Intuitively, this makes sense. When P enters into a settlement agreement with D1, P typically discounts the value of its claim to induce D1 to settle. In this way, P receives the certainty and security of immediately obtaining a definite payment on account of its claim, without having to endure the delays and uncertainties of litigating the claim through to judgment (and then seeking to enforce that judgment). So there should be many more occasions in which D1 has settled for an amount that ends up being less (rather than greater) than the amount that D1 would have been responsible for, if the claim had proceeded through to judgment.<sup>188</sup>

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188. One situation in which D1 may effectively overpay to settle a court proceeding is when D1 "is rationalizing the costs of the settlement as a nuisance payment"—that is, when it is entering into a settlement agreement simply to be rid of marginal litigation. See *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149 at para. 36, [2011] OJ No. 2340 (QL), Perell J.

When D1 enters into a partial settlement with P in British Columbia and ends up paying more than what the court ultimately determines its share of the blame to be, then it appears that D1 has a valid contribution claim against D2.<sup>189</sup>

Law-reform agencies have extensively considered this situation. They have proposed a number of different reforms. Summarizing the law-reform work, the Ontario Law Reform Commission has noted that these proposals can be boiled down to three distinct rules: (1) no rights to contribution between D1 and D2 after a partial settlement; (2) D1 and D2 both have rights to contribution after a partial settlement; and (3) D1, but not D2, has a right to contribution after a partial settlement.<sup>190</sup> Each of these rules has its supporters. No strong consensus has formed behind any one of the rules.

Some law-reform agencies have said that D1, having made a voluntary settlement with P, should be satisfied with the results of that settlement and should not be able to use the courts to obtain contribution.<sup>191</sup> This is in effect the position of the *Uniform Contributory Fault Act*, which provides for no contribution between wrongdoers after a partial settlement of a proceeding.<sup>192</sup>

The second rule corresponds to the current state of the law in British Columbia. It has some support among law-reform agencies, on the basis that it reflects a basic level of fairness in the treatment of D1 and D2.<sup>193</sup> The rule has been adopted in legislation in force in the United Kingdom.<sup>194</sup>

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189. See *Welk v. Mantelli*, [1995] 6 WWR 485, 5 BCLR (3d) 387 at para. 31 (SC), Errico J. [*Welk*] (D1 “not barred from claiming indemnity under s. 4 of the *Negligence Act* by reason of the voluntary nature of the settlements he had made with [D2] or his denial of liability therein”); *Mainland Sawmills Ltd. v. United Steel, Paper and Forestry, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-3567*, 2007 BCSC 1734, 163 ACWS (3d) 130.

190. See Ontario Report, *supra* note 6 at 98–105.

191. See Alberta Report, *supra* note 156 at 60–61 (“We believe that it is fair to D1 to deny him any right of contribution against D2 because D1 has settled only for himself. D1 does not have any intention of compensating P for any more than for his own share. In addition, the settlement is consensual and D1 need not make it if he does not think that it is to his advantage to do so.”).

192. See *Uniform Contributory Fault Act*, *supra* note 156, s. 12 (2). See, below, appendix B at 53 (for the text of this provision).

193. See Ontario Report, *supra* note 6 at 107 (“if the wrongdoer who has partially settled the injured person’s claim is under a duty to contribute when he has settled well, it is only fair that he should have a right to contribution when he has made a poor settlement”).

194. See *Civil Liability (Contribution) Act 1978* (UK), c. 47, s. 1.

The third rule, which has been described as “one-way contribution,”<sup>195</sup> was favoured by Prof. Glanville Williams.<sup>196</sup> The rationale for the rule is to encourage settlement and to strike the best balance possible between the competing interests of the parties.<sup>197</sup> This rule has been adopted in Irish<sup>198</sup> and Tasmanian<sup>199</sup> legislation.

The second situation concerns what has been called a *full settlement*. In this situation, D1 has settled P’s claim in full, but wishes to assert a contribution claim against another wrongdoer, D2. There does not appear to be any case law on this situation in British Columbia, but other provinces have enacted legislation that confirms D1’s right to contribution in these circumstances.<sup>200</sup> Law-reform agencies and commentators have also tended to favour a legislative provision dealing with contribution in the case of a full settlement, because it would act as a further incentive to settle proceedings<sup>201</sup> and would simplify civil procedure by not requiring D1 to “claim contribution from D2 only if D1 litigates P’s claim.”<sup>202</sup>

The third situation cropped up in a fairly recent British Columbia case. In *Welk*, the proceedings arose from a motor-vehicle accident. D1 was the driver of a car carrying three passengers that collided with a taxi carrying one passenger. Five separate court proceedings were commenced, involving various combinations of D1, the taxi company, the taxi driver, and the passengers in the two cars. D1 settled two of these claims, involving the taxi driver and one of the passengers in D1’s car. The other claims proceeded to trial, and D1 was ultimately found not to be at fault for the accident. D1 then launched a new proceeding, claiming contribution from the taxi company and the taxi driver for the amounts paid under the two settlements. The court rejected D1’s claim, holding that the right of contribution only extends to a wrongdoer—that is, to a person who has been found to be at fault for P’s damage or loss.<sup>203</sup>

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195. Ontario Report, *supra* note 6 at 104.

196. *Supra* note 73 at § 43.

197. *Ibid.*

198. *See Civil Liability Act, 1961*, s. 17 (2). *See*, below, appendix B at 52 (for the text of this provision).

199. *See Wrongs Act 1954*, s. 3 (3). *See*, below, appendix B at 53 (for the text of this provision).

200. *See* Ontario: *Negligence Act*, RSO 1990, c. N.1, s. 2; Saskatchewan: *The Contributory Negligence Act*, RSS 1978, c. C-31, s. 10; Nova Scotia: *Tortfeasors Act*, RSNS 1989, c. 471, s. 4 (2). *See*, below, appendix B at 52 (text of Ontario’s provision, which is substantially the same as the provisions in the other provinces).

201. *See* Williams, *supra* note 73 at § 43.

202. Alberta Report, *supra* note 156 at 55. *See also* *Uniform Contributory Fault Act*, *supra* note 156, s. 12 (3).

203. *See Welk*, *supra* note 189 at para. 31 (“[I]t has nevertheless now been established after trial that

This conclusion seems counterintuitive, but it does accord with a strict reading of the statute. Section 4 of the *Negligence Act* provides for rights of contribution or indemnity between wrongdoers who are at fault for the injured person's damage or loss, but if someone is not at fault, then that person has failed to meet the statute's condition for extending the right. But this result is at odds with how courts in other provinces, which have taken a broader view to interpreting similar legislation, have resolved this issue.<sup>204</sup>

Law-reform agencies commenting on this situation have tended to favour enacting legislation that provides the D1 may claim an indemnity from D2 after settling P's claim. The rationale for these recommendations is to encourage settlements.<sup>205</sup>

The BCLI has decided that a specific amendment to the *Negligence Act* is not necessary to address these situations. All three situations arise only in rare circumstances, so there does not appear to be a pressing need for legislative reform.

The BCLI tentatively recommends:

*3. The Negligence Act should not be amended to address the right of a settling wrongdoer to contribution or indemnity from other wrongdoers.*

### **E. Postscript: Effect of These Tentative Recommendations on Civil Procedure**

A considerable amount of the commentary on these issues in British Columbia concerns the effect of proportionate share settlement agreements on certain pre-trial procedures, such as discovery of documents. It is understandable that these concerns would appear in articles that have set out to grapple with the effects that settlement agreements may have on civil procedure. Since those agreements are private contracts, they may address these concerns in subtly different ways, and may require greater judicial intervention and oversight.

A statutory rule of general application, along the lines of the BCLI's tentative recommendations in this consultation paper, may help to limit some of these concerns

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[D1] was not at fault and accordingly his claim under s. 4 must fail, for that right of contribution or indemnity only arises where two or more persons are at fault for the loss to a person or persons not at fault.”).

204. See, e.g., *Marschler v. G. Masser's Garage*, [1956] OR 328, 2 DLR (2d) 484 (SC).

205. See Alberta Report, *supra* note 156 at 54; Ontario Report, *supra* note 6 at 108. See also *Uniform Contributory Fault Act*, *supra* note 156, s. 12 (3).

around civil procedure. Nevertheless, some issues may remain, even after the enactment of our proposals. This consultation paper has not addressed the impact of our tentative recommendations on civil procedure. This approach is due, in part, to such issues being outside the scope of our project. In addition, since this project is focussed strictly on reform of the *Negligence Act*, it would be difficult for us to generate the best possible solutions for these procedural issues, as amending a statute of general application is not the best route for effecting change in the procedural arena.

But as a result, any procedural concerns that may arise from our proposals may, by default, have to be resolved by the courts on a case-by-case basis. It may be worthwhile to consider avoiding this result. Recent cases have noted that the impact of proportionate share settlement agreements on procedural issues raise questions that can go to the heart of civil procedure.<sup>206</sup> The appropriate forum for addressing such questions may be with those charged with amending the *Supreme Court Civil Rules*.<sup>207</sup>

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206. *See Re Hollinger Inc.*, 2012 ONSC 5107 at paras. 88–92, [2012] OJ No. 4346 (QL), Campbell J. (discussing proportionate share settlement agreements and discovery in light of overriding principle of proportionality in civil litigation).

207. BC Reg. 168/2009.





## CHAPTER IV. CONCLUSION

Looked at in one way, the subject matter of this consultation paper raises a narrow technical issue. But it is our hope that this consultation paper has shown that the resolution of this issue requires grappling with some of the fundamental principles of tort law and civil procedure, such as the degree to which settlement agreements should be encouraged and the extent to which legal rules can promote fair treatment of all plaintiffs and defendants. We hope to hear from a broad cross-section of the public on our proposals to resolve the issues raised in this consultation paper.



## APPENDIX A

### *List of Tentative Recommendations*

1. *The Negligence Act should be amended to expressly provide guidance on a wrongdoer's right to contribution or indemnity from another wrongdoer who has settled with the injured person. (30–33)*

2. *The proposed amendment to the Negligence Act should:*

*(a) apply when*

- (i) a person (the “injured person”) suffers damage or loss as a result of the wrongdoing of several concurrent wrongdoers,*
- (ii) the injured person is not responsible for any of that damage or loss through the injured person's contributory negligence, and*
- (iii) the injured person agrees to settle his or her claim against one or more of these concurrent wrongdoers, but the settlement does not purport to settle the entire claim in full;*

*(b) provide, in the circumstances described in paragraph (a), that*

- (i) the injured person's claim is reduced by an amount proportionate to the degree to which the settling wrongdoer or wrongdoers are found to be at fault for the damage or loss, and*
- (ii) a wrongdoer who has settled with the injured person is not required to make a contribution to or to indemnify any of the other several concurrent wrongdoers who are liable for the injured person's damage or loss. (33–39)*

3. *The Negligence Act should not be amended to address the right of a settling wrongdoer to contribution or indemnity from other wrongdoers. (39–42)*



## APPENDIX B

### *Selected Legislation and Law Reform Proposals*

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#### **BRITISH COLUMBIA**

#### **Negligence Act, RSBC 1996, c. 333**

##### **Apportionment of liability for damages**

- 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

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### Awarding of damages

- 2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:
- (a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;
  - (b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;
  - (c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;
  - (d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess.

### Apportionment of liability for costs

- 3
- (1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.
  - (2) Section 2 applies to the awarding of costs under this section.
  - (3) If, as between 2 persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there is a further set off of the respective amounts and judgment must be given accordingly.

### Liability and right of contribution

- 4
- (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
  - (2) Except as provided in section 5 if 2 or more persons are found at fault
    - (a) they are jointly and severally liable to the person suffering the damage or loss, and
    - (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

### Negligence of spouse in cause of action that arose before April 17, 1985

- 5
- (1) In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, if one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity are recoverable for the portion of loss or damage caused by the fault or negligence of that spouse.

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- (2) The portion of the loss or damage caused by the fault or negligence of the spouse referred to in subsection (1) must be determined although that spouse is not a party to the action.
- (3) This section applies only if the cause of action arose before April 17, 1985.

### Questions of fact

- 6 In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

### Actions against personal representatives

- 7 (1) If a person dies who, because of this Act, would have been liable for damages or costs had the person continued to live, an action or third party proceedings that, because of this Act, could have been brought or maintained against the person who has died may be brought and maintained or, if pending, may be continued against the personal representative of the deceased person.
- (2) The damages and costs recovered under subsection (1) are payable out of the estate of the deceased person in similar order of administration as the simple contract debts of the deceased person.
- (3) If there is no personal representative of the deceased person appointed in British Columbia within 3 months after the person's death, the court, on the application of a party intending to bring or continue an action or third party proceedings under this section, and on the notice to other parties, either specially or generally by public advertisement, as the court may direct, may appoint a representative of the estate of the deceased person for all purposes of the intended or pending action or proceedings and to act as defendant in them.
- (4) The action or proceedings brought or continued against the representative appointed under subsection (3) and all proceedings in them bind the estate of the deceased person in all respects as if a duly constituted personal representative of the deceased person were a party to the action.
- (5) An action or third party proceeding must not be brought against a personal representative under subsection (1), or against a representative of the estate appointed under subsection (3), after the time otherwise limited for bringing the action.

### Further application

- 8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

## Limitation Act, SBC 2012, c. 13 [not in force]

### Discovery rule for claims for contribution or indemnity

- 16 A claim for contribution or indemnity is discovered on the later of the following:
  - (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;

- (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.

## ONTARIO

### Negligence Act, RSO 1990, c. N.1

#### Recovery as between tortfeasors

- 2 A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

## IRELAND

### Civil Liability Act, 1961

#### Release of, or accord with, one wrongdoer

- 17 (1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.
- (2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest.
- (3) For the purpose of this Part, the taking of money out of court that has been paid in by a defendant shall be deemed to be an accord and satisfaction with him.

#### Identification

- 35 (1) For the purpose of determining contributory negligence—
- ...
- (h) where the plaintiff's damage was caused by concurrent wrongdoers and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability



of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged;

....

## TASMANIA

### Wrongs Act, 1954

#### Proceedings against, and contribution between, wrongdoers

3 ...

(3) A release of, or accord with, one person granted or made by a person by whom damage is suffered—

- (a) does not discharge another person unless the release so provides; and
- (b) relieves the person to whom it is granted or with whom it is made from liability to make contribution to another person—

and has effect to reduce the claim of the person by whom damage is suffered—

- (c) in the amount of the consideration paid for the release or accord;
- (d) in any amount or proportion by which the release or accord provides that the total claim of that person shall be reduced; or
- (e) to the extent that the person to or with whom the release or accord is granted or made would have been liable to make contribution to another person if the total claim of the person by whom damage is suffered had been paid by the other person—

whichever is the greatest.

...

## UNIFORM LAW CONFERENCE OF CANADA

### Contributory Fault Act

#### Interpretation

1 In this Act,

“concurrent wrongdoers” means

- (a) two or more persons whose wrongful acts contribute to the same damagesuffered by another, and any other person liable for the wrongful act of any of those persons; or
- (b) a person whose wrongful act causes damage suffered by another and a person liable for the wrongful act;

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“**damage**” includes economic loss;

“**fault**” means an act or omission that constitutes

- (a) a tort,
- (b) a breach of a statutory duty that creates a liability for damages,
- (c) a breach of duty of care arising from a contract that creates a liability for damages, or
- (d) a failure of a person to take reasonable care of his own person, property or economic interest,

whether or not it is intentional.

“**release**” includes a settlement or any other agreement limiting the liability of a person for damages, either in whole or in part,

“**wrongful act**” means an act or omission that constitutes

- (a) a tort,
- (b) a breach of contract or statutory duty that creates a liability for damages, or
- (c) a failure of a person to take reasonable care of his own person, property or economic interest,

whether or not it is intentional.

\*\*\*

- 12** (1) This section applies where a person suffering damage enters into a release with a concurrent wrongdoer, whether before or after the damage is suffered.

### **Reduction of liability when partial release**

- (2) Where the person suffering the damage does not release all concurrent wrongdoers, the liability for damages of those concurrent wrongdoers who are not released is reduced by an amount of the damages proportionate to the degree to which the wrongful acts of the concurrent wrongdoers who are released contributed to the damage, and there shall be no contribution between those concurrent wrongdoers who are released and those who are not released.

### **Contribution when full release**

- (3) Where all concurrent wrongdoers are released, a person who gives consideration for the release, whether he is a concurrent wrongdoer or not, is entitled to contribution in accordance with this Act from any other concurrent wrongdoer based on the lesser of
- (a) the value of the consideration actually given for the release; and
  - (b) the value of the consideration that in all the circumstances it would have been reasonable to give for the release.

### **Effect of holding of no liability**

- 13** In proceedings against a person for contribution under this Act, the fact that the person has been held not liable for damages in an action brought by or on behalf of the person who suf-

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ferred the damage is conclusive proof in favour of the person from whom contribution is sought as to any issue that has been determined on its merit in the action.

### Execution between concurrent wrongdoers

- 14** Unless the person suffering the damage has been fully compensated or the court otherwise orders, a concurrent wrongdoer shall not issue execution on a judgment for contribution from another concurrent wrongdoer until
- (a) he satisfies that amount of the total damages that is proportionate to the degree to which his wrongful act contributed to the damage; and
  - (b) the court makes provision for the payment into court of the proceeds of the execution to the credit of those persons that the court may order.

### Releases and judgments

- 15** An action against one or more concurrent wrongdoers is not barred by
- (a) a release of any other concurrent wrongdoer; or
  - (b) a judgment against any other concurrent wrongdoer,
- and may be continued notwithstanding the release or judgment.

## [AMERICAN] UNIFORM LAW COMMISSION

### Comparative Fault Act

#### Effect of release

- 6** A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.



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