BRITISH COLUMBIA LAW INSTITUTE

BRITISH COLUMBIA LAW INSTITUTE

1822 East Mall, University of British Columbia
Vancouver, British Columbia V6T 1Z1
Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: bcli@bcli.org
Website: www.bcli.org

Backgrounder

Consultation Paper on Contribution after Settlement under the Negligence Act

Date: 26 March 2013

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 the 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 setting 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 the 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 setting 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 the consultation paper. The responses we receive will be considered and will help us in drafting the project's final report.