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

CONTRIBUTION AFTER SETTLEMENT UNDER THE NEGLIGENCE ACT

Backgrounder

Introduction to Contribution after Settlement under the Negligence Act Project

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INTRODUCTION

In court proceedings in British Columbia with multiple defendants, the *Negligence Act*[1] defines how the amount of damages must be divided in proportion to each defendant's liability. The act also sets out a scheme for the parties' right of contribution where they are found to be jointly and severally liable. However, if one of the defendant previously settled their liability with the plaintiff, they may still be required to make a contribution or indemnify the other defendant, following a court proceeding between the plaintiff and the other defendant. This disconnect potentially undermines the incentive to settle in multi-party disputes.

This backgrounder is an introduction to the BCLI's Contribution after Settlement under the Negligence Act project. It begins by briefly setting out some basic information on contributions and indemnity under the *Negligence Act*, then it describes how the aforementioned conflicts with settlements in multi-party litigation have been dealt with in British Columbia. It then moves on to flag some of the types of legal and policy issues that may be considered in the project, and concludes by describing how the project will be carried out over its timeline.

LEGAL BACKGROUND

The *Negligence Act* gives British Columbia a legal framework for apportioning liability in legal actions with multiple defendants based on their proportional degree of fault. The act combines joint and several liability among defendants with a system of contribution and indemnity.[2]

1 RSBC 1996, c 333.
2 See *Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 at para 19, Neilson JA ("The terms

The issues addressed by this project arise when a plaintiff is involved in a lawsuit with two (or more) jointly and severally liable defendants, and chooses to accept an offer of settlement from one of them. Following the settlement, the plaintiff will commence or sustain proceedings against the other defendant(s) – who may issue a third-party notice to the party who previously settled their case with the plaintiff. The court is then free to issue a judgement which may result in the settling defendant having to pay more than what was already settled-upon. A brief hypothetical scenario can be used to illustrate this situation:

Suppose that the plaintiff, P, is injured when D1's car collides with him. D1 was swerving to avoid D2, who had run into the road. P's loss is calculated at $10,000, and he negotiates a settlement with D1. The two agree that D1 was 50% at fault, and D1 pays P $5000 in a final settlement. P then commences proceedings against D2 for the remainder of the damages, but D2 serves a third-party notice on D1, requiring the latter to appear as well. The court finds that both parties were jointly and severally liable, but D1's fault (75%) is greater than D2's fault (25%).[3]

Under the current law, the *Negligence Act* allows P to recover $5000 from D2 thanks to section 4 which provides that:

> **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 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.

Since D1 and D2 are jointly and severally liable for the full $10,000 of P's loss, and D1 has already compensated P with $5000, from P's point of view, D2 is responsible for the remaining $5000 at the end of the trial. However, D2 may rely on section 4(2)(b) of the act to obtain contribution from D1 with respect to the $5000 judgement, since D1 was found to be 75% at fault. A contribution of $2500 by D1 to D2 would bring the actual amounts paid

'contribution' and 'indemnity' both refer to a restitutionary remedy rooted in unjust enrichment that provides a right of contribution toward a plaintiff's damages as between concurrent tortfeasors. A claim for indemnity seeks recovery of the entire amount that a tortfeasor has paid to the plaintiff. A claim for contribution seeks only a portion of that amount.").

3 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, 1998) at 99.

to P by D1 ($5000 to P, contributes $2500 to D2) and D2 ($5000 to P, receives $2500 from D1) into alignment with the court's ruling.

While the law is advantageous for P, as it protects his interests and assures he receives full compensation to which he is entitled, it undermines D1's ability to negotiate a settlement. The question then becomes: if the law currently allows for a defendant who has settled a case to be ordered to make further payments, what effect does this have on parties who negotiate settlements in multi-party litigation where only some of the joint or concurrent defendants are willing to settle?

This project will strive to examine these consequences. An examination of the issue's legal history provides a good starting point, and effectively highlights the complex state of the current law.

Current position of the law

As the *Negligence Act* itself is silent on the matter, it falls to the courts of British Columbia to clarify the impact of Section 4. The position adopted by the province in *Westcoast Transmission Company Ltd. v. Interprovincial Steel and Pipe Corporation Ltd*[4] was the first widely-accepted step towards addressing contribution after settlements in multi-party disputes. In this 1985 case, the court held that where there is no joint and several liability, a defendant cannot be found liable to pay a plaintiff any damages on account of a second defendant's fault, and would have no claim of contribution or indemnity against that second defendant. A non-settling defendant could only have a right of contribution under Section 4 if they paid an amount on account of the plaintiff's loss that is properly attributable to a second defendant. However, this cannot occur if the second defendant settles with the plaintiff – as this fully and finally deals with that aspect of the action.[5] The consequence of this is borne by the plaintiff, who is prohibited from recovering damages from the non-settling defendant any portion of a judgement which may be attributable to the settling-defendant's negligence.[6]

Westcoast Transmission stood as the leading case in British Columbia for six years, and was widely accepted until 1991. At this point, *British Columbia (Public Trustee) v. Asleson*,[7] adopted the position that a plaintiff's decision to settle with one joint or concurrent tortfeasor did not sever, limit, or bar another joint or concurrent tortfeasor's right to contribution and indemnity under section 4 of the *Negligence Act*.[8]

The primary justification for dismissing the defendants' argument in *Asleson* was to assure that the plaintiff would receive full compensation for her loss. The trial judge wrote “it would be manifestly unfair if a rule was designed to prevent double-compensation, or over-compensation, could be used in this case to prevent the plaintiff from making a full

4 (1985), 60 BCLR 368, 31 ACWS (2d) 19 (SC). [Westcoast Transmission cited to BCLR].
5 *Ibid.*, at 373.
6 Ibid.
7 (1991), 62 BCLR (2d) 78 (SC), affd (1993), 78 BCLR (2d) 173 (CA) [Asleson cited to BCLR].
8 *Ibid.*, at para 171.

recovery."[9] If the plaintiff were unable to benefit from section 4 of the act, she would have been left with an approximate $200,000 deficit.

This conclusion was affirmed on appeal, and has been cited favourably or followed since its decision. While this has lent stability and certainty to the law, it does not resolve the underlying issues that remain in this area. Until *Asleson*, the *Westcoast Transmission* reasoning was adopted across British Columbia.[10] However, after 1991, the position of the law changed dramatically. While *Asleson* remains the leading case dealing with this subject (having been uncontested for twenty years)[11] the issues arising from the decision, and its conflicted past, raise issues of whether or not the current approach is the most appropriate.

ISSUES TO CONSIDER

There appear to be three major competing interests in these cases: (1) the importance of maintaining the finality of settlements, both in principle and as a way to avoid costly and lengthy court proceedings, (2) the importance of assuring plaintiffs receive full compensation for their suffering, and (3) the importance of not making defendants pay more in damages than they ought to.

Any effort made to reform this area of the law must ultimately focus on these principles, and devise a way to balance them as efficiently as possible. In addition, legislative reform must also strive to make the law as clear and workable as possible – lest we continue to have to develop ever-more complex arrangements with varying degrees of success to overcome the flaws of the current system.[12]

HOW THE BCLI PLANS TO CARRY OUT THE PROJECT

Methodology

This project will be carried out through research and consultation. The plan is to research these emerging issues in BC and abroad, and to use that research to compose a Consultation Paper with tentative recommendations. This Consultation Paper will be the basis of consultation with the public. Once these consultations are complete, the results for them will be included in the project's final report which will set out the BCLI board's final recommendations for reform and draft legislation.

9 *Ibid.*, at para 133.

10 *See Sylte v. Jackson Brothers Logging Co.* (1988), 27 BCLR (2d) 357; *Cook v. Teh* (1988), 28 BCLR (2d) 300; *Krusel v. Firth* (1991), 54 BCLR (2d) 392.

11 *See Gordon v. Krieg,* [2011] BCJ No. 1781, 2011 BCSC 1248; *Horvath v. Thring* (2003), 39 BCLR (4th) 124, 2005 BCCA 127 (wherein *Asleson*'s distinction between concurrent and joint tortfeasors is upheld by the BC Court of Appeal); *Strata Plan LMS 1751 v. Scott Management Ltd.*, 3 BCLR (5th) 326, 2010 BCCA 192.

12 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 at 209-11.

Timeline

This project will run from 20 August 2012 to 31 October 2013.

- The Consultation Paper is targeted for publication in April 2013.
- The final report, recommendations, and draft legislation are targeted for publication in October 2013.

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The British Columbia Law Institute was incorporated in 1997 under the British Columbia Society Act. Its 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.

CONTACT

Kevin Zakreski
Staff Lawyer
British Columbia Law Institute
1822 East Mall, University of British Columbia
Vancouver, BC V6T 1Z1
Tel.: (604) 827-5336
E-mail: kzakreski@bcli.org