LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON APPORTIONMENT OF COSTS AND CONTRIBUTORY NEGLIGENCE: SECTION 3 OF THE NEGLIGENCE ACT

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To The Honourable Colin Gabelmann
Attorney General of the Province of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON APPORTIONMENT OF COSTS AND CONTRIBUTORY NEGLIGENCE: SECTION 3 OF THE NEGLIGENCE ACT

Legal proceedings are often necessary to recover compensation for loss or injury caused by others. A person required to proceed to court will ordinarily recover some compensation for the costs incurred in doing so. But a plaintiff who shares responsibility for personal loss or injury may find the award of costs drastically reduced because of the contributory negligence.

When a plaintiff is contributorily negligent, an award of costs is governed by section 3 of the *Negligence Act*, which provides that the parties' liability for costs is "in the same proportion as their respective liability to make good the loss or damage" although the court has discretion to make a different order. The proper exercise of this discretion when a contributorily negligent plaintiff is successful at trial is a question that has been considered by the courts many times. Emerging from reported cases is an expression of concern that the rules for awarding costs set out in the *Negligence Act* produce an inappropriate result. In this Report the Commission recommends repeal of section 3 of the *Negligence Act*, leaving the *Rules of Court* to determine an appropriate award of costs.

Arthur L. Close, Q.C.
Chairman

January 14, 1993

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CHAPTER I INTRODUCTION

A. Costs of Legal Proceedings

Anyone involved in a legal proceeding quickly discovers that the process is an expensive one. Legal representation is costly and various expenses and disbursements must be met before the matter is concluded by settlement or judgment.

Who should be responsible for these costs? Different jurisdictions adopt different views on the question. In many parts of the United States, for example, parties to litigation must often bear their own costs on the view that to do otherwise might keep people from taking legal proceedings. A rule requiring the unsuccessful party to compensate the successful party for costs of the proceedings is regarded as a disincentive that impedes access to justice.[1]

On the other hand, in British Columbia, as in other Commonwealth jurisdictions, the successful party is usually entitled to recover compensation for costs, although the award is not aimed at providing a full indemnity.[2]

B. Apportionment of Costs

In some cases, responsibility for the loss or damage may be shared by several people, including the person suffering the loss.[3] Section 3 of the *Negligence Act* provides that responsibility for costs

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[1] *See Bradshaw Construction Ltd.* v. *Bank of Nova Scotia*, (1991) 54 B.C.L.R. (2d) 309 (S.C.); *West's Ann. Cal. Codes*, Civ. Proc. s. 1021.

[2] The British Columbia position on costs is described in some detail in *Bradshaw Construction, ibid*. An award of costs (a person's "recoverable costs") is not determined with reference to the actual legal costs and expenses the person incurs in going to court. The *Rules of Court* set out an objective standard for a court officer (a registrar or master) to assess costs: see Rule 57 and Appendix B. Costs are allowed for various steps that will have been taken, such as writing letters, receiving instructions, preparing legal documents, attending at discovery, etc. The *Rules of Court* provide a tariff of costs which sets out a range (on a minimum and maximum basis) of the number of units that may be awarded for each task. The total units are multiplied by a selected dollar value (e.g., 532 units at $20 per unit results in an award of costs of $1064). The appropriate amount is determined with reference to one or more of five "scales." Scale 1 ($20 per unit) is for matters of little difficulty. Scale 5 ($100 per unit) is for matters of unusual difficulty or importance. The court can also award "increased costs" or - higher yet - "special costs" where ordinary costs would yield an unjust result. Even an award of special costs is unlikely to provide any more than about 80 or 90 percent of the amount which the party will actually have to pay in legal fees, and ordinary and increased costs provide proportionally smaller indemnities: *Bradshaw Construction, ibid*.

[3] The Commission examined the general operation of the *Negligence Act* in *Report on Shared Liability* (LRC 88, 1986). That Report did not consider entitlement to costs in cases involving negligence. It considered issues of joint liability, several liability and joint and several liability as well as rights of contribution. It also considered the severance of joint and several liability that arises when a plaintiff is contributorily negligent and recommended that British Columbia adopt legislation based on the *Uniform Contributory Fault Act*, promulgated by the Uniform Law Conference in 1984. Some of these issues were also touched upon in *Report on Settlement*

of a proceeding is determined with reference to how responsibility for the loss or damage is apportioned:

> **Apportionment of Liability for costs**
>
> 3. Unless the court otherwise directs, the liability for costs of the parties to every action shall be in the same proportion as their respective liability to make good the damage or loss. The provisions of section 2 governing the awarding of damage or loss apply, with the necessary changes and so far as applicable, to the awarding of costs, with the further provision that where, 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 shall be a further set off of the respective amounts and judgment shall be given accordingly.

Under this section, if a plaintiff is 20 per cent at fault for loss and the defendant is 80 per cent to blame, the plaintiff is ordinarily entitled to look to the defendant for 80 per cent of its recoverable costs of the proceedings. But the process does not end there. Because the plaintiff is 20 per cent at fault, the plaintiff is responsible for 20 per cent of the defendant's recoverable costs. An example helps demonstrate how section 3 requires entitlement to costs to be calculated in these kinds of cases.

Example

Plaintiff is 20% at fault. Defendant is 80% at fault. Each has recoverable costs of $2000.

Plaintiff is entitled to recover (80% of $2000) = $1600

Defendant is entitled to recover (20% of $2000) = $400

Plaintiff's net recovery from the defendant ($1600 - $400) = $1200

Because the defendant's recoverable costs are deducted from those of the plaintiff, the plaintiff's recoverable costs are effectively reduced (in this case) by 40 per cent.[4]

C. The Problem

Legislation in British Columbia divides responsibility for costs of legal proceedings with

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Offers (LRC 77, 1984). The recommendations for reform described in this Report are integrally related to the work described in these earlier Reports as well as our *Report on Set-Off* (LRC 97, 1988). The relationship between these past projects and revision of section 3 of the *Negligence Act* is described below. Relevant portions of the earlier Reports are set out in Appendices to this Report.

[4] *See, e.g., Lutes* v. *Leonard*, (1967) 58 W.W.R. 321 (B.C.C.A.).

reference to the respective fault of the parties for causing the damage or loss which made it necessary to apply for a court judgment. There is much that can be said in favour of this position, but some argue that it is based on an incomplete view.

There are two effective reasons for disputes ending up in court. The first reason, of course, is the fact that there has been damage or loss. The second reason is that the parties disagree about who is responsible for the damage or loss or about determining an appropriate level of compensation for it. Modern legal policy aims at encouraging people to negotiate and settle their differences because court proceedings are expensive, to them personally and to society in general. Moreover, our courts have a heavy workload which continues to increase, so methods must be found of reducing levels of litigation.

Some hold the view that, in keeping with modern legal policy, costs should be awarded on a different basis. They would argue that a person who has been forced to take legal proceedings in order to recover compensation for loss or damage caused by another should usually be entitled to recover costs without any deduction for personal fault for the loss or damage because legal proceedings were necessary to recover anything at all.

This Report considers the current operation of section 3 of the *Negligence Act* and the arguments in favour of changing the rules that govern the recovery of costs.

D. Consultation

This Report was preceded by a consultative document circulated for comment, criticism and advice on tentative suggestions for changing the law. Because the issues explored in this project are technical and relatively straightforward, the consultative document was given only limited circulation. Consultation was confined to the legal community generally. Copies were sent to judges, lawyers, the Trial Lawyers Association, the Insurance Corporation of British Columbia and sections of the Canadian Bar Association. A number of responses were received, which will be referred to later in this Report, but it is useful at this point to mention that the tentative suggestion outlined in the consultative document for revising the policy of section 3 of the *Negligence Act* received almost unanimous support.

A. The Current Law

Section 3 of the *Negligence Act* has four separate components. For convenience, we set out the section again:

> **Apportionment of Liability for costs**
>
> 3. Unless the court otherwise directs, the liability for costs of the parties to every action shall be in the same proportion as their respective liability to make good the damage or loss. The provisions of section 2 governing the awarding of damage or loss apply, with the necessary changes and so far as applicable, to the awarding of costs, with the further provision that where, 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 shall be a further set off of the respective amounts and judgment shall be given accordingly.

The section provides that:

(1) the portion of costs that a party must pay is determined by that party's portion of fault;

(2) the method of determining loss or damage (set out under section 2) is also used for determining entitlement to costs;[1]

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[1] Briefly, incorporating by reference the provisions of s. 2 in s. 3 has these consequences: costs are measured in dollars (2(a)); fault is expressed as a percentage of total fault (2(b)); principles of set-off apply so that where 2 people owe each other money for costs the obligation is expressed on a net basis by deducting the lesser amount owed from the greater amount (2(d)). S. 2 provides:

> **Provisions governing awarding of damages**
>
> 2. The awarding of damage or loss in every action to which section 1 applies shall be governed by the following provisions:
>
> (a) the damage or loss, if any, sustained by each person shall be ascertained and expressed in dollars;
>
> (b) the degree in which each person was at fault shall be ascertained and expressed in the terms of 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 shall be entitled to recover from that other person the percentage of the damage or loss sustained as 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 shall be set off one against the other, and if either person is entitled to a greater amount than the other, he shall have judgment against that other for the excess.

Paragraph 2(c) has little relevance to the issue under examination in this Report and its effect is difficult to describe briefly but the interested reader will find the import of the paragraph described in some detail in our *Report on Shared Liability* (LRC 88, 1986). The law of set-off is canvassed in our *Report on Set-Off* (LRC 97,

(3) principles of set-off apply;[2] and

(4) the court has a discretion to depart from the section and make a different order.

The section is comprehensive, provides a clear rule for resolving an issue that arises frequently and yet still gives the court ability to tailor the costs order to fit the specific circumstances of the case. What can possibly be defective about this rule?

B. An Example

In many cases an award of costs is sizeable so that the issue of how entitlement to them is calculated is an important one. Responsibility for costs may, for example, result in a substantial reduction of the plaintiff's recovery. Suppose the plaintiff must shoulder 60 per cent of the responsibility for the loss and that both the plaintiff and defendant have recoverable costs of about $10,000. Under section 3 of the *Negligence Act*, the plaintiff will be entitled to receive only 40 per cent ($4000) of recoverable costs and the defendant will be able to recover 60 per cent ($6000) of recoverable costs. Since the defendant's entitlement to costs exceeds the plaintiff's by $2000, the plaintiff will not receive compensation for any legal expenses and the remaining $2000 the plaintiff owes the defendant for costs will be deducted from the plaintiff's damage award. It seems strange to require a plaintiff to compensate a defendant for costs incurred in proceeding to trial if this is the only route available for recovering compensation to which the plaintiff is entitled. Many would regard this kind of result as unfair.

The rule set out in the *Negligence Act* may make sense for apportioning responsibility for costs in cases where there are two or more defendants, but it is not clear that it provides appropriate guidance for determining responsibility for costs when the plaintiff is also at fault.

C. How the Discretion Works

Section 3 of the *Negligence Act* grants the court a discretion to make a different order about

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1988).

[2] *E.g.*, If A owes B $100 and B owes A $200, principles of set-off hold that A's obligation is satisfied immediately and B must pay A $100. The *Negligence Act* gets a little carried away with the idea that where two people owe each other money, the obligations can be blended by deducting the lesser amount from the greater. The Act provides that
(1) set-off applies for damages two people owe each other: s. 2,
(2) set-off applies to costs two people owe each other: this is accomplished by incorporating by reference s. 2 principles in s. 3, and
(3) set-off applies even where one party has a claim for costs and the other is entitled to damages.

It is questionable whether any of this is necessary because the *Rules of Court* already incorporate set-off principles: see 19(13) and 57(13). Moreover if a legislative statement is necessary, simpler drafting methods of achieving the called-for result are available.

costs. Consequently, some might be tempted to argue that even if the general rule under section 3 is inappropriate in a specific case, the court is well placed to order costs on a different basis.

In our work on settlement offers, we briefly considered the impact of the *Negligence Act* when a settlement offer made by a contributorily negligent plaintiff was refused by the defendant:[3]

A plaintiff who is found to be contributorily negligent will have his judgment (and perhaps his costs) reduced by a percentage reflecting the degree of fault attributed to him. The policy underlying this approach is that a person is only entitled to compensation from another to the extent that person was responsible for the victim's injury. If the defendant was only partly to blame, he should have to pay only part of the compensation. That principle applies equally to entitlement to costs, although under the *Negligence Act* the court retains a discretion to award full costs.

The argument in favour of an award of full costs (increased pursuant to Rules 37 or 57) to a person who is contributorily negligent is that these rules are designed to encourage pre-trial settlement, and a party who refuses a reasonable offer vindicated by judgment at trial must accept responsibility for the costs of the trial.

As we observed earlier, the courts exercise a discretion with respect to the award of costs and will not reduce costs because of contributory negligence if the result would be unjust. Moreover, one factor the courts currently take into account in determining whether costs should be reduced because of contributory negligence is whether there was a formal offer to settle. Our conclusion is that the courts do not require further guidance on the issue of awarding increased costs when the plaintiff has been contributorily negligent.

In the eight years since these observations were published, jurisprudence has more fully explored the significance of the court's discretion to make an award of costs that departs from the rule set out in section 3 of the *Negligence Act*.[4] It remains true that a plaintiff's contributory negligence will not affect the increased award made where a defendant rejects a formal settlement offer which, in terms of the result at trial, should have been accepted.[5] However, a different picture has emerged about the court's discretion under section 3 in the absence of a settlement offer.

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[3] *Report on Settlement Offers* (LRC 77, 1984) 32.

[4] The proper application of the section is an issue that has occupied the attention of the courts many times. For early cases *see, e.g., Wegener* v. *Matoff*, [1934] 4 D.L.R. 783 (B.C.C.A.); *Thompson* v. *B.C. Toll Highways & Bridges Authority*, (1965) 51 W.W.R. 62 (B.C.C.A.); *Lutes* v. *Leonard*, (1967) 58 W.W.R. 321 (B.C.C.A.). For cases decided in the past decade, *see: Peters* v. *Davidson*, (1982) 125 D.L.R. (3rd) 753, *aff'd*, (1983) 141 D.L.R. (3rd) 763 (C.A.); *Turner* v. *I.C.B.C.*, (1982) 137 D.L.R. (3rd) 188 (B.C.S.C.); *Swanson* v. *B.C. Packers Ltd.*, (1984) 43 C.P.C. 125 (B.C.S.C.); *McDowell* v. *Barry, Lingnau and B.C. Tel*, [1985] 1 C.P.C. (2d) 278; *Plett* v. *I.C.B.C.*, (1987) 12 B.C.L.R. (2d) 336 (C.A.); *Cook* v. *Teh*, (1988) 28 B.C.L.R. (2d) 300; *Steinhauser* v. *Robinson*, (1984) 49 B.C.L.R. 333 (S.C.); *Griffith* v. *Martin*, (1985) 58 B.C.L.R. 228 (C.A.); *Ferguson* v. *Henshaw*, [1989] B.C.D. Civ. 3572-04 (S.C.).

[5] *See infra*, Appendix C, n. 1.

There are basically two lines of authority on when a court can depart from the rule laid down by section 3. One series of cases has held that the court can make a different order simply to avoid unfairness.[6] A stricter test has emerged in the second series of cases, where it has been held that the court can only make a different order in special circumstances where some element in the case justifies a departure from the statutory rule.[7]

Of these two positions, the stricter test seems to occupy the more dominant position. Consequently, the ability to depart from the *Negligence Act* rule and tailor an award of costs to specific facts of the case is largely illusory. Where rules do not permit much flexibility in their operation it is important that they operate fairly, if not in all then in most cases, achieving objectives generally endorsed by the community. As discussed above, section 3 does not always succeed on this score.

D. Entitlement to Costs When the Plaintiff is Not Contributorily Negligent

It is useful to contrast the operation of the Negligence Act costs rule with the general rule that applies if the plaintiff shares no portion of responsibility for the loss or damage that is the subject of the action. This section discusses the general rule, and the variations on it that come into play if there is a settlement offer or the defendant successfully raises a competing claim against the plaintiff in the same proceedings.

1. In the Absence of a Settlement Offer

The usual rule in civil litigation is that a successful plaintiff (who is not contributorily negligent) is entitled to costs, although the court also has a discretion to depart from this rule.[8] The court might make a different award if the plaintiff is responsible for increasing the costs of the proceedings for some unwarranted reason or the proceedings ought not to have been brought.[9]

A different rule applies where the defendant brings a separate claim in the same proceedings

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[6] *See, e.g., Peters* v. *Davidson, supra*, n. 4; *Steinhauser, supra*, n. 4; *Griffith, supra*, n. 4; *Skov* v. *Friesen*, [1992] B.C.D. Civ. 3572-01 (S.C.).

[7] *See, e.g., Turner* v. *I.C.B.C., supra*, n. 4; *Swanson, supra*, n. 4; *McDowell, supra*, n. 4; *Plett, supra*, n. 4; *Cook, supra*, n. 4.

[8] Rule 57(9) provides that "...costs of and incidental to a proceeding shall follow the event unless the court otherwise orders." Other legislation also specifically adopts this policy: *see, e.g., Libel and Slander Act*, R.S.B.C. 1979, c. 234, s. 16.

[9] *See, e.g., Rusche* v. *I.C.B.C.*, (1992) 4 C.P.C (3d) 12 (B.C.S.C.). Similarly, a defendant who unnecessarily raises issues that prolong the proceedings may be required to pay costs to the plaintiff: *B.C. (Gov't)* v. *Worthington (Canada) Inc.*, (1988) 29 B.C.L.R. (2d) 145 (C.A.).

(either as a set-off or a counterclaim).[10] The defendant is regarded as a plaintiff with respect to the separate claim, and costs will be determined with reference to which of the parties is successful on the issue. Where the plaintiff and the defendant are each successful on their cross claims, each will usually be entitled to an award of costs against the other (subject to principles of set-off). The result in such a case resembles the position under the *Negligence Act* rule, although there is a significant difference between entitlement to costs as a result of bringing a successful claim and entitlement to costs as a reward for reducing the other party's claim. On this point, the positions adopted under the *Negligence Act* and the *Rules of Court* are at odds: the general costs rule under the *Rules of Court* will not ordinarily reward a defendant in costs for merely attacking and reducing a plaintiff's claim (unless the defendant is successful in extinguishing the claim entirely).

The policy underlying the general rule is based on the view that a person required to bring legal proceedings to enforce a claim should be entitled to the costs of the legal proceedings. The defendant's unwillingness to accept responsibility is viewed as the effective cause of the litigation. It is difficult to see why the same policy should not, at least as a starting point, apply when the plaintiff is contributorily negligent.[11]

2. When a Party Makes a Settlement Offer

The *Rules of Court* contain provisions that limit a plaintiff's entitlement to costs where the plaintiff does not accept in full settlement an amount paid into court by the defendant and the plaintiff recovers a judgment that is equal to or less than the amount paid into court. In these circumstances, the general costs rule is displaced. The plaintiff is not entitled to recover costs for proceedings taken after receiving notice of the payment into court. Moreover, the defendant is entitled to recover costs incurred after that date.[12]

E. Summary

The general costs rule under the *Rules of Court* is based on the view that a person who is required to bring legal proceedings to recover compensation for a legitimate claim should be entitled

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[10] Until 1873, there were very few situations in which the defendant could raise a separate claim against the plaintiff in the proceedings brought by the plaintiff. As part of a general policy to discourage a multiplicity of legal proceedings, the law was changed in 1873 to allow the defendant to raise a claim against the plaintiff in the proceedings as a counterclaim. Set-off and counterclaim are discussed in detail in our *Report on Set-Off* (LRC 97, 1988).

[11] *See, e.g., Peters* v. *Davidson, supra*, n. 4. One reason may be the inability of a defendant to make a settlement offer on the question of liability, a point referred to later in this Report.

[12] *See* Rules 37 and 57. The plaintiff is also able to make a settlement offer which, if unreasonably refused by the defendant, will have a costs penalty. *See further Report on Settlement Offers* (LRC 77, 1984). Changes to the settlement offer rules to incorporate some of the Commission's recommendations are under consideration by the Rules Revision Committee (a formal body consisting of judges and lawyers) constituted to keep the *Rules of Court* under review and advise the Attorney General on necessary changes to them. The Rules Revision Committee published a consultative document on this issue early in 1992.

to recover some compensation as well for the costs of those proceedings. Special rules apply in two cases:

(1) where the defendant is successful in reducing the overall impact of the plaintiff's claim by bringing a separate demand (either as a set-off or a counterclaim), and

(2) where the defendant makes a payment into court (in an effort to settle the action), the payment is refused and the plaintiff later fails to achieve a better result at trial.

We do not contemplate changes in legal policy with respect to these two particular categories of cases. In fact, the first of them is merely a reflection of the policy of the general costs rule. An award of costs in a case falling within the second category is aimed at encouraging parties to settle their disputes without going to trial.

The *Negligence Act* rule is based on a different philosophy. It rewards a defendant who is successful in reducing the plaintiff's claim, prejudicing the plaintiff who, nevertheless, was obliged to bring legal proceedings to recover any compensation at all.

Why does the law adopt different rules for determining an appropriate award of costs based on whether the successful plaintiff bears some personal responsibility for the loss or damage that is the subject matter of the legal proceedings? The next Chapter considers whether good reasons can be identified in support of the *Negligence Act* rule and the different philosophical rationale for it, or whether there is a need to revise the existing rules.

CHAPTER III THE NEED FOR REFORM

A. Introduction

Are there sound reasons for adopting different rules to determine a plaintiff's costs that differ depending upon whether the plaintiff bears some measure of personal responsibility for the loss or damage suffered? To answer this question it is useful to make enquiries about the views adopted in other jurisdictions and about the history of British Columbia's present law before turning to an examination of the rule in practice and objections to it.

B. Other Jurisdictions

England has quite a different rule from the one adopted in British Columbia. In England, even a plaintiff who is contributorily negligent will ordinarily receive costs without deduction for fault.[1]

A division of opinion on this issue has emerged among Canadian provinces. A few have legislation resembling British Columbia's.[2] Most follow the English approach, under which the plaintiff will normally receive costs without any deduction.[3] Most Canadian jurisdictions, consequently, use the same rule for determining entitlement to costs whether or not the plaintiff is contributorily negligent.

C. History of Section 3 of the *Negligence Act*

The British Columbia *Negligence Act* is based upon uniform legislation promulgated in 1924 by the Commissioners on Uniformity of Legislation in Canada (now the Uniform Law Conference).[4] Many provinces enacted legislation based on the Uniform Act, but British Columbia was one of only

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1 *Halsbury's Laws of England* (4th) 34 "Negligence" 76.

2 *Contributory Negligence Act*, R.S.S. 1978, c. C-31, s. 12; *Contributory Negligence Ordinance*, R.O.N.W.T. 1974, c. C-13, s. 4; *Contributory Negligence Act*, R.S.Y.T. 1986, c. 32, s. 3; *Contributory Negligence Act*, R.S.N.B. 1973, c. C-19, s. 7.

3 *Negligence Act*, R.S.O. 1990, c. N.1, s. 7; *Tortfeasor's and Contributory Negligence Act*, R.S.M. 1987, c. T-90, s. 8; *Contributory Negligence Act*, R.S.N.S. 1989, c. 95, s. 6; *Contributory Negligence Act*, R.S.A. 1980, c. C-23; *Contributory Negligence Act*, R.S.P.E.I. 1988, c. C-21, s. 10.

4 *Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada* (1924) 281. The apportionment rules were based on the *Maritime Convention Act*, but the costs rule was an innovation. In admiralty law, if the plaintiff is contributorily negligent the parties bear their own costs: *see The Bravo*, (1913) 108 L.T. 430. Some cases, however, have apportioned costs on a discretionary basis to accord with the division of liability: *see, e.g., The Modica*, [1926] P. 72; *The Robert Koeppen*, [1926] P. 81; *The Salabangka*, [1943] P. 13.

a few that adopted the Uniform Act's position on costs.

When the Conference opened the Uniform Act for reconsideration in 1935, it deleted the section dealing with costs.[5] The intention was that a province's general rules on costs (under which the successful party normally receives an award of costs without reduction) should also apply when the plaintiff is contributorily negligent.[6] In 1953, the Uniform Act was revised by restoring to it a section dealing with costs based on the general rule but confirming that the court retained discretion to depart from it in appropriate circumstances.[7] The current *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference in 1984, is silent on the issue of costs.

To the extent that the policy of section 3 of the *Negligence Act* can be defended on the basis of uniformity with the laws of other Canadian provinces, the argument lost what weight it had by 1935. The British Columbia position on costs when the plaintiff is contributorily negligent seems always to have been out of the Canadian legal mainstream.

D. Objections to the Policy of Section 3

That other jurisdictions have adopted different views on this issue does not help much in establishing what the law should be in British Columbia, but it does suggest that a reconsideration of policy is in order. The following discussion, consequently, focuses on how section 3 operates, and identifies features of the law that are open to criticism.

1. Inconsistent Costs Rules Lead to Unjustifiable Results

In proceedings under the *Negligence Act*, there are two general issues to be resolved:

(a) who is at fault for the loss or damage? and

(b) what amount of money will compensate for the loss or damage?

Section 3 of the *Negligence Act* compensates a defendant for costs incurred in successfully establishing that the plaintiff is partly to blame, but does not compensate a defendant whose success is confined to challenging the value the plaintiff places on the loss or damage. On the question of quantum, consequently, the Act follows the usual rules about costs. It is only on the question of liability that a different, inconsistent costs rule applies. Consider these cases:

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[5] *Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada* [1935] 239.

[6] *Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada* [1933] 32.

[7] The section read: "Where the damages are occasioned by the fault or negligence of more than one party, the court has the power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just." This provision is substantially similar to the corresponding section in the Ontario *Negligence Act, supra*, n. 3.

Case 1: *Plaintiff claims damages of $10,000. Defendant A admits liability but successfully contests the assessment of damages, reducing the judgment by $2500.*
Result: *Plaintiff receives $7500 and costs.*

Case 2: *Plaintiff claims damages of $10,000. Defendant B successfully contests liability. The plaintiff is found 25 per cent contributorily negligent.*
Result: *Plaintiff receives $7500 but costs are reduced by 25 per cent and the plaintiff is responsible for 25 per cent of the defendant's costs.*

Case 3: *Plaintiff claims damages of $10,000, but concedes being 25 per cent contributorily negligent. Defendant C unsuccessfully challenges quantum and any responsibility for the loss. The plaintiff is found 25 per cent contributorily negligent.*

Result: *Plaintiff receives $7500 but costs are reduced by 25 per cent and the plaintiff is responsible for 25 per cent of the defendant's costs.*[8]

A review of these examples suggests that section 3 of the *Negligence Act* has the potential to achieve mischievous results. Few members of the public would understand, and not all lawyers and judges would defend,[9] the distinction drawn between Case 1 and Case 2, since in each case the plaintiff is successful for the same amount. The discrepancies between Case 2 and Case 3 are equally unexpected.[10] The fundamental point overlooked by the rule is that the plaintiff has been compelled to incur costs bringing the action in order to recover any compensation at all, and these costs remain the same whether it is established that the plaintiff is blameless or shares some portion of the fault for the loss.

2. The Rule is Arbitrary

When

(a) the operation of section 3 leads to a reduction in costs recovered by the plaintiff, and

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[8] In each of these cases, the court has a discretion to make a different award of costs. As mentioned earlier, however, there are two lines of cases as to when a court can make a different order, and even if the court has, in the circumstances, jurisdiction to do so, there is disagreement concerning what is an appropriate award of costs.

[9] *See, e.g., Hogan* v. *Italian Mosaic & Tile Co. Ltd*, (1926) 60 O.L.R. 101, 102, *per* Grant J., who could not see "any difference, with regard to the matter of costs, between the recovery by the plaintiff in the case at bar of $2025, being 75 per cent of the total damages, and recovery by him of a verdict for $2,025 without any finding of contributory negligence at all."

[10] It is open to the plaintiff in Case 3 to make a settlement offer to ensure that the defendant will not receive costs. Similarly, the plaintiff could apply to the court for a different order about costs, with some anticipation of success. The argument works both ways, however, since applying the general rule (allowing the plaintiff full costs) would still allow the defendant who is anxious to settle to make a payment into court, or apply to the court for a different award of costs where some blame must attach to the plaintiff for bringing the proceedings or spending too much time on particular issues.

(b) the costs are determined (as is customary) on a global basis without regard to individual parts of the proceedings,

it will be purely chance if the adjustment bears any relationship to the amount of time spent contesting liability. In some trials, the issue of liability may consume most of the court's time. In others, only a small portion of the proceedings will be devoted to the question. In either case, the law requires a general reduction of all the plaintiff's costs and a proportionate award of costs to the defendant corresponding to the apportionment of liability.[11] But a global reduction of all costs would seem defensible, if at all, only where more time was devoted to resolving the question of liability than to the other issues.

3. The Rule Places Unfair Pressure on the Plaintiff to Settle

Another objection to the policy underlying section 3 of the *Negligence Act* is that because the legislation compensates a defendant for the costs of successfully reducing a plaintiff's entitlement, it has the potential to encourage a defendant to contest the plaintiff's claim. Viewed from the plaintiff's perspective, the rule places (arguably unfair) pressure on the plaintiff to accept less than an adequate compromise for the dispute, or risk a severe penalty in costs. The rule, consequently discourages a plaintiff from litigating.

There is much to be said in favour of encouraging settlement but as mentioned above the *Rules of Court* already set out comprehensive methods (also framed in terms of awards of costs) to encourage the parties to bargain in good faith.[12] It is difficult to see why these specific rules need to be enhanced by section 3 of the *Negligence Act*.

Moreover, to the extent that section 3 acts as an inducement to settle, the philosophical basis upon which it operates differs from that which underlies the specific settlement offer rules. Section 3 of the *Negligence Act* requires a person who is partly to blame for personal loss to bear (as a matter of course) a portion of the costs of legal proceedings dealing with the loss. That is a viewpoint which seems to assume that legal proceedings are unavoidable. Modern policy, however, is to encourage settlement. A trial is not seen as inevitable. This perspective underlies the settlement procedure set out in the *Rules of Court*: costs should be paid by the person who, unwilling to settle, makes it necessary to resolve the matter through court process.

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[11] The court has a discretion to depart from the usual rule: *see* Rules 57(9) and 57(15); *see also Griffith* v. *Martin*, (1985) 58 B.C.L.R. 228 (C.A.). But the court will not always do so: *Swanson* v. *B.C. Packers Ltd.*, (1984) 43 C.P.C. 125 (B.C.S.C.); *Plett*, v. *I.C.B.C.*, (1987) 12 B.C.L.R. (2d) 336 (C.A.). Even where the court applies s. 3 of the *Negligence Act*, however, it may provide for the full recovery of expenses (as opposed to legal fees) incurred by the successful party on particular parts of the litigation. *E.g.*, if the defendant successfully establishes that the plaintiff is contributorily negligent, the court may decline to grant the plaintiff costs but may still award the plaintiff 100 per cent of disbursements incurred in establishing the appropriate level of damages: *Swanson, ibid.; Plett, ibid*. Referring to time spent at trial is, in some respects, misleading since the amount of trial preparation may bear little relation to the time spent before a judge.

[12] Rules 37 and 57.

Possibly section 3 can be defended on the basis that it promotes settlements of legal proceedings. It should be observed, however, that much of this role has been assumed, and is better performed, by the *Rules of Court*.[13]

4. Summary

The *Negligence Act* costs rule is open to objection on at least three grounds. Problems arise from having two different costs rules. The *Negligence Act* rule operates in an arbitrary fashion, all too often producing an unfair result. Lastly, it is out of step with modern legal policy relating to settlement offers.

E. Reform in Other Canadian Jurisdictions

Three Canadian law reform bodies have considered whether the law governing the entitlement to costs of the contributorily negligent plaintiff is in need of reform.[14] The Alberta Law Reform Institute concluded that the fairest approach was to adopt the usual rule that the successful party is entitled to costs, subject to the discretion of the court. There was no need, consequently, for legislation governing contributory negligence to deal expressly with costs. Both the Uniform Law Conference, as evidenced by the provisions of the *Uniform Contributory Fault Act*, and the Ontario Law Reform Commission[15] agreed with this position. In each of these cases, the conclusion has been to reject the notion underlying the British Columbia rule that contributory fault is a legitimate ground in itself for apportioning costs.

F. Court Time

A matter of concern when considering any modification to the law relating to legal proceedings is whether it will decrease or increase the heavy burden already placed on our courts. A rule about costs which necessarily entails for its operation the consumption of additional court time would be undesirable. To the extent that the current rule under the *Negligence Act* is applied, consequently, it functions well in the sense that it does not ordinarily require the court to consider the issue of costs.

Revising the rule, however, should operate satisfactorily provided the courts are only prepared to depart from it in special circumstances. The general rule that the successful party is entitled to costs functions this way and there is no reason to suspect that it will be any less efficient when

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[13] *See also Stone* v. *Abbass*, (1992) 2 C.P.C. (3d) 309 (N.S.T.D.).

[14] *See* Alberta Institute of Law Research and Reform (now the Alberta Law Reform Institute), Report No. 31, *Contributory Negligence and Concurrent Wrongdoers* (1979) 90; Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988).

[15] *Ibid*., at 255-7.

applied to proceedings involving negligence.

G. Conclusion

The discussion above leads to the conclusion that there is a need to change the policy advanced by section 3 of the *Negligence Act*. Options for reform and our advice on this issue are discussed in the next Chapter.

CHAPTER IV REFORM

A. Consultation

The consultative document preceding this Report observed that section 3 of the *Negligence Act* could be revised to bring it into step with the general rule about costs, under which a successful plaintiff is entitled to costs without deduction (unless the court otherwise orders). It also observed that simply repealing section 3 would also bring about the appropriate result, since the provisions about costs in the *Rules of Court* would then apply equally in proceedings involving negligence.

B. Comment on the Working Paper

The consultative document expressed a tentative preference for the second option - repeal - and invited advice on a number of related matters (referred to below). These were the questions posed in the consultative document:

1. *Do you agree that the successful party, even one who is contributorily negligent, should ordinarily be entitled to recover costs without deduction in proceedings involving negligence (unless the court otherwise orders)?*

2. *Do you think section 3 of the Negligence Act should be re-vised? or repealed?*

3.(a) *Do amendments need to be made to the Rules of Court to confirm that the usual rule in cases involving negligence is that the successful party is entitled to costs without deduction?*

3.(b) *Would it be necessary to provide that the contributory negligence of a successful party is not in itself sufficient reason to reduce entitlement to costs, or award costs to the defending party?*

3.(c) *Would it be useful to set out in the Rules of Court that if the court decides to apportion responsibility between the defendants, it can do so in accordance with their respective portions of fault.*

Everyone who commented agreed that the policy of section 3 must be revised and most agreed that this should be accomplished by repealing the section, leaving Rule 57 (the general rule about costs) to govern the issue. On the specific questions raised, there was virtual unanimity that no changes had to be made to the *Rules of Court* to provide guidance on how entitlement to costs should be determined in particular circumstances. The comment we received is discussed in more detail in Appendix C.

Two further issues of concern arose during the process of consultation. These related to the relationship between section 3 of the *Negligence Act* and the portion of the Rules of Court governing settlement offers. In particular,

(a) there was some sentiment that repeal of section 3 should only take place if the settlement offer procedure were revised to allow offers to be made on the issue of liability, and

(b) it was suggested that further consideration should be given to the settlement offer rules relating to offers by two or more jointly liable defendants.

Our thoughts on these issues are set out below.

C. New Issues: Settlement Offers and Liability

1. Settlement Offers

Under the *Rules of Court*[1] a plaintiff can make a formal offer to settle with the defendant. If the defendant does not accept the offer and the plaintiff receives a judgment for a sum equal to or greater than the offered amount, the plaintiff is entitled to recover compensation on a higher scale for costs associated with the trial arising after the defendant received notice of the offer. A similar procedure is available to the defendant, who can make a payment into court. If the plaintiff does not accept the payment, and fails to receive a judgment that exceeds the sum paid into court, the defendant is entitled to compensation for costs arising after the payment is made, while the plaintiff is disentitled to such compensation.

2. Suggested Changes to the *Rules of Court*

In *Report on Settlement Offers*, the Commission (as then constituted) concluded that several amendments to the *Rules of Court* would improve the operation of the settlement offer procedures. The Commission suggested, for example, that a defendant - who can now only make an offer to settle in the form of a payment of money into court - should be able to make a written offer to settle. If the plaintiff accepted the offer, there would be a set time in which the defendant would be required to perform, failing which the plaintiff could take judgment in the terms of the accepted offer.

The Commission also suggested that a plaintiff or a defendant should be able to make an offer to settle on the issue of liability, something not currently available under the *Rules of Court*. The portion of the Report dealing with this issue is set out in Appendix A.

The approach recommended in the Report for dealing with settlement offers dealing with liability is of course, only one among a number of options for allowing litigants to make an offer to

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[1] Rules 37 and 57.

settle on this issue. The Commission, as then constituted, concluded that a detailed structure was necessary, but we have received indications that there is some support for a simpler approach, under which the court would simply be permitted to take into account the terms of a formal offer to settle on liability and be empowered to adjust entitlement to costs as may be appropriate in the circumstances.

Recently, the Rules Revision Committee[2] circulated a discussion draft of amended Rules dealing with settlement offers. Some of the Commission's recommendations are endorsed, but on the question of settlement offers on liability, the Committee had this to say:

> The proposal by the Law Reform Commission in recommendation 11 that litigants be entitled to offer to accept a portion of liability rather than offering to pay a dollar amount has not been accepted. It was not considered by the Committee to be an essential component of an offer to settle scheme and, while it had certain attractions, it was felt that the new scheme should be put in place and experience gained before considering the introduction of this concept.

Although the Commission is on record as favouring the amendment of the *Rules of Court* to recognize formal settlement offers on the issue of liability, nevertheless, we also recognize the value of the cautious approach of the Rules Revision Committee in wishing to monitor the amended settlement offer procedures to ensure that the first set of innovations works well before introducing additional changes. Moreover, the Rules Revision Committee is well placed to proceed on this question in the future if it is satisfied with the consequences of the (contemplated) changes to the Rules.

Should reform of section 3 of the *Negligence Act* await these developments? It is our conclusion that the repeal of section 3 will have a beneficial effect even if it is decided not to amend the settlement offer procedure.

For one reason, it is probably already open to a defendant who disputes liability to make a written offer to settle that issue outside the *Rules of Court* procedure. This practice is available for offers to settle about monetary issues and various non-monetary remedies which are not (possibly cannot be) formalized in accordance with the rules. Such a written offer is frequently referred to as a "*Calderbank*" letter, after the English case that recognized the validity of the practice.[3] A *Calderbank* letter is evidence about whether the parties made reasonable efforts to settle (it is generally assumed that a party who refuses a written settlement offer and is unable to obtain a better result at trial has obliged the other to incur costs unnecessarily). It is open to a court to take these kinds of factors into account when considering whether to exercise its general discretion to award

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[2] *See further, supra*, Chapter II, n. 12.

[3] *Calderbank* v. *Calderbank*, (1975) 3 All E.R. 333. The letter is written on a "without prejudice" basis while expressly reserving the right to introduce the letter when the court considers an appropriate award of costs. *Calderbank* letters have been used in England to make settlement offers about liability. For examples of the English practice, *see* O'Hare, "Payments into Court and *Calderbank* Offers," (1992) N.L.J. 1722.

costs.[4] Even in the absence of any settlement offer, a plaintiff might be entitled to increased costs, possibly amounting to a full indemnity, if the defendant's actions have unreasonably driven the dispute to trial.[5] Reasons from a recent Ontario decision[6] provide a useful example of the judicial perspective:[7]

> In my respectful view this is one of those cases in which justice can only be done by complete indemnification for costs. The factors which lead me to this conclusion are as follows.
>
> ... It was or should have been obvious within a short time after the occurrence at the hospital that the plaintiff was blameless and that liability rested with one or more of the defendants. Despite that position the plaintiff has had to embark on an extremely difficult, complex, and costly course of litigation. The adversarial position of the defendants varied. Some were prepared to admit matters. Others were not.
>
> The real struggle in this case, as I perceive it, was between the defendants. Nevertheless it was left to the plaintiff to prosecute and prepare the case against each of the defendants. One need only look at the mass of exhibits assembled in this courtroom to appreciate the extent of the plaintiff's preparation. Thus the plaintiff has been caught up in a contest that far exceeded the ordinary, the cost of which can seriously erode the plaintiff's recovery.

It is also worth pointing out that even if a party cannot, under the *Rules of Court*, directly make a formal offer to settle on the issue of liability, such an offer can be made indirectly. The offer to settle for a certain sum of money, for example, can be adjusted. If a defendant assesses a plaintiff's loss at $10,000 but believes that the plaintiff was 25 per cent contributorily negligent, the defendant can adjust the offer to reflect this factor by paying into court $7500.

For these reasons, we see no need to postpone amending the policy underlying section 3 of the Negligence Act until suitable amendments, such as those outlined in our Report on Settlement Offers, are made to the *Rules of Court*.

4. Multiple Defendants

The *Rules of Court* currently provide that defendants sued jointly who choose to make a

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[4] A note of caution: B.C. courts are sometimes reluctant to vary entitlement to costs based on a *Calderbank* letter where the defendant attempts to "unfairly" put pressure on the plaintiff. In this context, unfairness is sometimes said to arise where the defendant uses a *Calderbank* letter to avoid making a payment into court. Some judges hold the view that a written offer to settle is an empty promise, and that a plaintiff should not face a costs penalty unless it is clear that the defendant's offer to settle was legitimate and enforceable, something signified by a payment into court. *See, e.g., Ferris* v. *Kirstiuk*, [1989] B.C.D. Civ. 3596-03 (S.C.); *Higgs* v. *Fainstein*, [1992] B.C.D. Civ. 3596-04 (S.C.). But why should a plaintiff be compensated for costs incurred obtaining a judgment less satisfactory than one the defendant was prepared to consent to before trial?

[5] For one reason, an important role of an award of costs is seen as the suppression of unnecessary litigation: *Scott-Elliot* v. *Hatzic Prairie Co.*, (1913) 18 B.C.R. 668 (C.A.); *Higgs* v. *Fainstein, supra*, n. 4.

[6] *Dube* v. *Penlon Ltd.*, (1992) 10 O.R. (3d) 190 (Ont. Gen. Div.).

[7] *Ibid*., at 191-2.

payment into court to facilitate settlement must do so jointly. The draft rules on settlement offers circulated by the Rules Revision Committee do not depart from this position, but the Rules Revision Committee made the following comments in relation to a proceeding that involves more than one defendant:

> ... Under the proposed Rule 37(19), multiple defendants will still be restricted from making separate offers to settle except in cases of defamation. This issue is, however, still under study by the Committee....The Committee would particularly welcome submissions on this topic.

It is easy enough to see that a settlement procedure allowing jointly liable defendants to act independently presents some practical difficulties.[8] If the plaintiff accepts a payment into court made by one defendant, relating to only a portion of the plaintiff's claim, what affect does that have on rights against the other defendants? What rights of contribution would the other defendants enjoy against the defendant who made the payment into court? If the plaintiff does not accept the payment into court, but the defendant's share of the final judgment is less than the payment in, what costs consequences should follow?[9]

Two features of the current law complicate the position even further. Technical distinctions are drawn between various kinds of settlements entered into by a plaintiff and one (or more, but not all) of several jointly liable defendants. In some cases, for example, a plaintiff who formally releases one defendant from liability may unintentionally release all. In *Report on Shared Liability*, we recommended that a plaintiff should be able to settle with one of several jointly liable defendants without risking the loss of rights against the other defendants.

The second feature of the law which presents some difficulties is linked to the first and relates in part to rights of contribution. Consider some questions that have arisen in the past: If the plaintiff settles with one defendant while retaining the right to proceed against the others, what is the position of these other defendants? What if the plaintiff accepted too little money in settlement? Should the plaintiff still be permitted to claim the balance of compensation for the loss or damage from the remaining defendants? What rights would these defendants have to claim contribution from the defendant who entered into the settlement? These issues were also addressed in *Report on Shared Liability*.

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[8] If two or more people cause loss or damage to a person who also bears some portion of responsibility for the loss or damage, the B.C. *Negligence Act* provides that they are severally, not jointly, liable to the plaintiff. This feature of B.C. law is described in greater detail in our *Report on Shared Liability*. Nothing prevents a defendant who is severally liable from making an individual payment into court, but the process is complicated by the fact that it is not always clear whether the plaintiff was contributorily negligent.

[9] On this last point, it is important to bear in mind that if the defendants are jointly liable, the plaintiff is entitled to look to any of them to satisfy the whole of the judgment, not just a proportionate share. (A defendant called upon to pay more than a share commensurate with the defendant's fault, however, is entitled to seek contribution from the others who are liable to the plaintiff.) Because of this feature of joint liability, it is difficult to fault a plaintiff who rejects a payment in respect to a portion of liability from a defendant who, if the plaintiff is successful at trial, will be liable for the whole of the plaintiff's loss. The usual principles for determining whether a settlement offer is reasonable, consequently, break down when more than one jointly liable defendant is involved.

The portion of the Report dealing with the Commission's reasoning and conclusions about revising the law governing releases of liability, and the position of the remaining defendants following a formal release is set out in Appendix B. Briefly, however, it was recommended that where one defendant is released from liability (and this may happen in a variety of ways in addition to a formal release, such as a contractual or statutory exemption or the expiration of a limitation period) the plaintiff's rights of recovery should be reduced by the proportion of fault attributable to that defendant, not the dollar value the plaintiff may have received from the defendant. In this way, the remaining defendants are protected.

Adopting these two reform measures would provide a cleaner legal background for revising the principles that should govern settlement offers when the claim is against two or more defendants who are jointly liable to the plaintiff. Even so, these issues relating to settlement offers touch only tangentially upon the question of the repeal of section 3. They are not directly linked to it. While we remain convinced that it is important to implement the changes to the law recommended in *Report on Shared Liability*, we see no need to wait for this event before dealing with section 3 of the *Negligence Act*.

D. Conclusion and Recommendations

The Commission recommends that:

(1) Section 3 of the *Negligence Act* be repealed.

(2) The repeal of section 3 does not require making consequential amendments to the *Rules of Court*.

In the additional issues raised for our consideration, we would like to see:

(a) amendments to the *Rules of Court* expanding the settlement offer process (see *Report on Settlement Offers*);

(b) amendments to the law governing joint and joint and several liability (see *Report on Shared Liability*.)

We see no need, however, to postpone reform of the costs rule in the *Negligence Act* until these other measures are achieved.

E. Acknowledgments

We are grateful for the advice we received from the profession and individual judges on the issues examined in this project. As the discussion above reveals, even a seemingly discrete and straightforward matter such as the provisions of section 3 of the *Negligence Act* may raise complex

issues to ensure that legal change is in harmony with related areas of the law. The comments we received, and our further examination of the issues in the light of those comments, has highlighted the need not only to repeal section 3 of the *Negligence Act*, but to act upon the recommendations set out in two past reports: Settlement Offers and Shared Liability.

APPENDIX A

EXCERPT FROM REPORT ON SETTLEMENT OFFERS
LRC 77, 1984, pp. 39-44

7. Offers on Liability

(a) England

Currently a litigant may not make an offer to settle on the issue of liability subject to the possibility of increased costs. The Winn Committee[25] identified several problems with the current system of payments into court that arise because a plaintiff may not make an offer to settle on the issue of liability:

(a) An innocent plaintiff who will succeed against one of several defendants, all of whom contest liability, may reject a joint payment in and be faced with substantial costs of a lengthy trial concerned primarily with resolving the defendants' respective liabilities;

(b) A plaintiff may also become responsible for costs where quantum is not in issue:[26]

> But even a straightforward case may be hard on the plaintiff. The plaintiff and the defendants' legal advisers may agree informally that the case is worth £1,000 but the defendants press for 25 per cent contributory negligence. They pay in £760. The trial of liability takes four days. The trial of quantum lasts only 15 minutes, since the medical reports have been agreed and are read to the Court. The judge's award on quantum is distinctly on the low side at £750 but he finds full liability. On the issue on which most of the costs were incurred, the defendants were wrong and the plaintiff right. Yet the plaintiff pays the whole of the costs.

In effect, the current payment into court procedure may operate unfairly because a litigant may not make a formal offer to settle on the issue of liability. Even apart from that concern, however, there will be cases where the plaintiff must incur legal costs in settling the apportionment of liability among defendants where, from the plaintiff's perspective, it is irrelevant which among them is liable to him and in what degree. The Winn Committee recommended the adoption of a formal notice of offer procedure, that would deal with liability or quantum or both. It also recommended that the court award costs separately on the issues of liability and quantum.

This approach was criticized by the Cantley Committee[27] on the ground that one or the other

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[25] *Report of the Committee on Personal Injuries Litigation*, Cmnd. 3691 (1968), at 144 et seq.

[26] *Ibid*., at 144.

[27] *Report of the Personal Injuries Litigation Procedure Working Party*, Cmnd. 7476 (1979).

party will be unable to properly assess liability or quantum and therefore will be penalized by the procedure. They concluded that the Winn Committee approach would only work if permitted after the completion of full discovery by both sides, in which case such a system would result in increased expense and delay. The Committee recommended that the defendant be able to make an offer to accept a specified portion of liability only if a "split trial" (in which the issue of liability is tried before that of damages) is ordered.

More recently, Justice, an English society interested in law reform, has endorsed the Winn Committee approach with several modifications. It has recommended a system of offer and counter offer in which a party can be required to explain the basis of calculation of his offer.[28] That approach ensures that a litigant has sufficient information to determine whether to accept an offer. Costs would be assessed by reference to the reasonableness of the parties in the circumstances.

Rule 31, discussed earlier, provides an analogous procedure for the admission of facts. Under that rule, a party may, by notice, request another party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document.[29] The admission is deemed to be made by the party receiving the notice unless, within 14 days[30]

(a) it is specifically denied;
(b) detailed reasons are given why the admission cannot be made;
(c) the matter is privileged, irrelevant or improper.

A party who unreasonably refuses to admit the truth of a fact or the authenticity of a document may be ordered to pay the costs of proving it, or deprived of costs, as the court thinks just.[31]

(b) Notice to Admit Liability

A similar procedure could be devised to permit litigants to request an admission of liability. For example, in an automobile personal injury action the plaintiff could, by notice, request the defendant to admit 100% liability. If the defendant refuses to make that admission, the plaintiff would become entitled to increased costs if successful on that issue at trial.

Like the notice to admit facts, a notice to admit liability would require a reply from the defendant. Failure to reply, subject to the court's subsequent order, would constitute an admission of liability. A denial of liability would leave the defendant open to the risk of increased costs. On the other hand, this procedure would also be available to the defendant. Suppose he thinks the plaintiff is contributorily negligent. He could deliver a notice to admit liability to the plaintiff.

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[28] *Payment into Court*, Memorandum by a Sub-Committee on Civil Procedure (Justice, 1981).

[29] R. 31(1).

[30] R. 31(2).

[31] R. 31(6).

The problems observed by the Cantley committee are answered in large measure by permitting the recipient of the notice to explain why he cannot make the admission of liability. Perhaps he is unable to judge liability until he has further information. If the person giving the notice is successful at trial on the issue of liability, the trial judge would then consider whether the person who received the notice was unable to accept or deny liability. The trial judge should be able to order that increased costs run, not from the date of the notice to admit liability, but from when the person who received the notice was in a position to accept or deny liability. A full explanation may permit the person giving notice to provide further information which will allow the parties to reach a settlement. In order to encourage a full explanation of the reasons why liability cannot be admitted, the court should not be able to hear further submissions from the person receiving the notice when the question of costs arises except, perhaps, to comment on the explanation itself.

(c) Notice Accepting Liability

If there are several defendants involved in the action, separate notices to litigants might prove to be unwieldy. For example, a plaintiff, P, brings an action against A, B, C and D. P may issue separate notices to admit liability. Each of the defendants may issue notices to admit liability in differing portions. This approach might well confuse the litigation rather than encourage its settlement.

A simpler approach is to permit a litigant to issue a notice that stipulates the portion of liability the litigant is prepared to accept. If the issue of liability is settled on these terms, then only the question of an appropriate remedy remains. Even if that question must be resolved at trial, nevertheless the proceedings will be simplified and shortened. If liability is not settled, a litigant who has issued a notice stipulating the portion of liability he was prepared to accept should be entitled to increased costs for that portion of the litigation dealing with liability where the result at trial on that issue is resolved as or more favourably to the litigant than provided in the notice. An identical approach would work between defendant and third party.

Example 8:

P brings an action against D for damages arising from a motor vehicle collision. P gives D notice that P is prepared to accept 40% of the liability for the accident. D is unprepared to accept the balance of liability. D gives P notice that D is prepared to accept 50% of the liability for the accident. P is unprepared to accept that apportionment of liability.

Variation 1: At trial, D is found to be 80% and P 20% liable for the collision. P should be entitled to increased costs for that portion of the litigation dealing with liability.

Variation 2: At trial, D is found to be 40% and P 60% liable for the collision. D should be entitled to increased costs for that portion of the litigation dealing with liability.

This approach should work well even when multiple defendants are involved in the litigation provided the defendants are severally liable. If the defendants are jointly liable, different problems arise. If defendants are jointly liable, then each defendant is responsible for the full amount of damages. The plaintiff may pursue his remedies against any defendant or any combination of them. Consequently, joint defendants must act in concert for this approach to work. The plaintiff might issue a notice accepting 10% of the liability. If the joint defendants accept that notice, then all that remains to resolve the issue of liability is the apportionment of fault among the defendants. The plaintiff need not take part in that portion of the proceedings. If the notice is refused but vindicated by the result at trial, the plaintiff should be entitled to increased costs for that portion of the proceedings.

(d) Offers Among Co-Defendants

An issue which does not involve the plaintiff, but concerns only defendants who share joint liability, is how to apportion that liability among them. One of the defendants may, for example, satisfy the plaintiff's claim. That defendant will frequently be entitled to contribution from others who share liability with him, according to the degree their fault contributed to the plaintiff's loss. In our opinion, a person who is jointly liable with others should be able to issue a notice to them that stipulates the portion of liability he believes the joint defendants should accept as regards the plaintiff, as well as what degree of fault he is prepared to accept with respect to rights of contribution among the defendants. If the notice does not result in settlement of either issue, the person who issues the notice should be able to look to his co-defendants for increased costs for the portion of litigation dealing with liability or apportionment of fault if at trial it is found that his estimation of joint liability or apportionment of fault is equal to or less than that which he was prepared to accept.

(e) Consequences of a Refusal of a Notice Accepting Liability

Increased costs following refusal of a notice accepting liability vindicated by the result at trial should be calculated in the same manner as increased costs following refusal of a settlement offer justified by the result at trial. It should be open to a litigant to deliver notice accepting a portion of liability at any time, and costs should be calculated from the date of service of the notice. The court should have discretion to determine whether further time was needed to determine whether the stipulated portion of liability was reasonable, and calculate increased costs from another date. A notice issued by one defendant to defendants with whom he shares liability would be subject to a

similar costs sanction. The difference in that case is that the defendants' liability for costs with respect to the plaintiff would be unaffected by such a notice. The sanction would involve new rights of contribution and indemnity among co-defendants.

Example 9:

P brings an action against D1 (the driver of a motor vehicle) and D2 (the owner of a motor vehicle) for damages arising from a motor vehicle collision.

Variation 1: D1 and D2 jointly issue a notice accepting 90% of liability for the damages. P does not accept that apportionment. At trial it is found that D1 and D2 are only 80% liable. D1 and D2 would be entitled to increased costs for that portion of litigation relating to liability.

Variation 2: D1 and D2 cannot agree on the degree of their joint liability. D2 gives D1 notice that D2 is prepared to accept with D1 90% of the liability for damages caused the plaintiff. Whatever the finding on liability, D2's notice also provides that he is prepared to accept 0% of the fault causing the damages. (D2 asserts a right of contribution from D1 for 100% of their joint liability. This is contested by D1 who asserts that the vehicle was improperly maintained, leading to the accident.) At trial, it is found that the defendants share 80% of the liability for the accident. It is also held that D2 is entitled to contribution from D1 for 100% of damages paid by D2 to the plaintiff. Under the approach we are discussing, D2 should be entitled to increased costs from D1 for that portion of the litigation relating to apportionment of fault and contribution between the defendants.

Variation 3: The facts are the same as in Variation 2, except that at trial the defendants are found to be 90% jointly liable for the damages caused the plaintiff and that as between D1 and D2 for the purposes of contribution the degrees of fault are apportioned 90% to D1, 10% to D2. Under the approach we are discussing, D2 would still be responsible to P for costs of the proceedings, but he would be entitled to contribution from D1 for costs paid to P as well as for his own costs for that portion of the litigation relating to liability (but not for apportionment of fault between D2 and D1).

In the procedure described above, it is contemplated that the person giving notice will accept a portion of liability. The person giving the notice should not be prejudiced by indicating what portion of liability he will accept. It should not constitute an admission if settlement does not ensue.

(f) Recommendation

The Commission recommends that:

11. A rule be added to the Supreme Court Rules providing that:

(1) (a) A litigant may give a notice to an adverse party accepting a portion of liability.
(b) "Litigant" means any party capable of making an offer to settle.
(c) Joint litigants may only
(i) issue a notice to an adverse party accepting liability, or
(ii) accept a notice from an adverse party jointly.
(d) A litigant who, it is alleged, is jointly liable with other parties may give a notice to those parties accepting
(i) a portion of liability, to an adverse party, or
(ii) for the purposes of contribution, a portion of fault for joint liability, or
(iii) both a portion of liability to an adverse party and a portion of fault for joint liability

(2) If a notice delivered in accordance with (1) does not result in settlement of the issue of liability or degree of fault, and the party who gives the notice is successful on that issue, he should be entitled to increased costs from the adverse party or contribution and increased costs from parties who share liability with him, as the case may be, for that portion of the proceedings.

(3) The court may order increased costs from the date of the notice or such other time as may be reasonable in the circumstances.

(4) A litigant who gives a notice accepting a portion of liability or of fault is not bound by that notice unless the recipient of the notice accepts settlement of the issue according to the portion of liability or of fault stipulated in the notice.

(5) "Costs" means
(i) contribution for costs payable to a litigant adverse in interest, or
(ii) in accordance with Recommendation 8.

(6) A notice accepting liability or a portion of fault may be withdrawn
(i) before acceptance by its recipient; or
(ii) after acceptance by its recipient with leave of the court.

Some objections may be raised to this recommendation. First, a point which has concerned the Commission is whether litigants will, as a matter of course, issue notices accepting 0% of liability in straightforward actions, automatically making the opposing party or parties subject to a penalty in increased costs without facilitating settlement. Our conclusion is that, if the issue of liability is straight-forward, that matter should not be in dispute. If a litigant wishes to contest liability, he must pay for that privilege where he is incorrect. Even if the notice is for 0% liability, that should bring pressure on adverse parties to settle, and that result is desirable.

Further concerns may be raised. Complex situations may arise where the courts are left in doubt as to how the new rule is intended to operate. For example, after notices are issued, perhaps even after a portion of the dispute has been settled, further parties may be added to the litigation. Problems of this nature are resolved in part by permitting a party to withdraw a notice before acceptance, or after acceptance, withdraw a notice with leave of the court. It is virtually impossible to draft a rule that will cover every variation that might arise. It should be remembered, however, that costs (including increased costs) is in the discretion of the court. Whatever variations or complexities that may arise, the courts should be able to resolve them, guided by the principle underlying the recommended rule: a party who issues a notice to accept a portion of liability that is vindicated at trial should be compensated for costs needlessly incurred by pursuing that issue at trial. A party who is unprepared to settle according to the terms a notice accepting a portion of liability vindicated at trial should compensate the litigant, who issued the notice, for costs needlessly incurred.

APPENDIX B

EXCERPT FROM REPORT ON SHARED LIABILITY

LRC 88, 1986, pp. 26-30 [Footnotes omitted]

C. Releases and Judgments

Currently, a release of one person releases the others with whom he shares liability. A covenant not to sue, which is functionally similar to a release, does not have that effect.

The effect of a release follows from the nature of joint liability. Release of an indivisible obligation, the argument goes, must discharge all. While in the abstract, logic might well justify that sort of result, the practical consequences of the rule cannot be overlooked. The rule has the tendency to discourage settlement. A person liable to another will be unlikely to settle the matter unless he is released from further liability. A person who has suffered damages will be unlikely to execute a release (releasing all who share liability) unless the settlement applies to all of his damages. He would be unwise, for example, to accept settlement limited to a person's degree of liability.

The Uniform Act [the Uniform Contributory Fault Act, promulgated by the Uniform Law Conference of Canada in 1984] provides that an action against concurrent wrongdoers is not barred by the release of, or judgment against, any other concurrent wrongdoer. The Uniform Act refers to two kinds of releases:

(1) a partial release, which is a release of one or more, but not all concurrent wrongdoers; and
(2) a full release, which releases all concurrent wrongdoers.

A concurrent wrongdoer who receives a partial release is neither entitled nor subject to contribution from other concurrent wrongdoers. A partial release does not bar subsequent actions against other concurrent wrongdoers.

A full release is treated in the same manner as if the concurrent wrongdoers who gave consideration for the release had satisfied a judgment. They are entitled to contribution from other concurrent wrongdoers. In that case, contribution is based on the lesser of the value given for the release, and the value of the consideration that in all the circumstances it would have been reasonable to give for the release.

We have concluded that it is desirable to address the consequences of a release on rights to contribution, and that the approach taken by the Uniform Act should be adopted with one exception. Under the Uniform Act, a person who gives consideration for a partial release is not entitled to contribution. In some cases, some but not all persons who share liability will be the subject of the release, and a person who gives consideration for the release should be entitled to contribution from

those who are thereby released from liability.

The Commission recommends that:

5. *A person who gives consideration for a release, whether he was liable or not, should be entitled to contribution from those who are thereby released from liability, 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 would have been reasonable to give for the release.

6. *A release of one or more persons does not bar an action against others whose fault contributed to the same damage or loss in respect of which the release is made.*

A plaintiff is not entitled to more compensation than the measure of his damage or loss, and Recommendation 6 is not intended to alter that principle.

Recommendation 5 is not intended to provide a right of contribution against a person who would not have been liable to the plaintiff. Currently, a person who ostensibly shares liability with others, but who has a defence to the plaintiff's claim, is not required to contribute. It is a precondition of the right to resort to contribution that there be liability to the plaintiff. Our recommendations do not contemplate alteration of that principle.

It is unnecessary to refer to the consequences of a judgment. A judgment against a person does not bar action against others with whom he shares joint and several liability, only where their liability is joint. Earlier we recommended that joint liability should be deemed to be joint and several. This problem is addressed by Recommendation 1.

D. Limits on Contribution

There are a number of circumstances where a person will share liability with others but his obligations are limited to less than his degree of fault. A person's liability may be affected by contract, statute or a rule of law or equity. For example, the plaintiff and one of the defendants may enter into a contract which provides that in the event of loss, the defendant's liability will be limited to a certain amount, or that the defendant will not be liable in any event. Limitation clauses or exclusion clauses of this kind are common. In effect they represent an agreement that the plaintiff, not the defendant, accepts the risk of damage or loss, and probably will insure against it. Similar provisions are to be found in legislation. Common carriers are permitted to limit their liability in the interests of commerce. A railroad company may transport goods worth millions of dollars at a cost which reflects the goods' weight or volume, not their value. Requiring owners who ship goods to insure against loss keeps transportation costs down, and this is perceived as in the community's best interests.

Liability may be limited for other reasons. In the last section we discussed releases. A plaintiff may settle his dispute with one of several codefendants for less than his claim is worth, to avoid or simplify litigation.

In some cases, a plaintiff may not be permitted to proceed against one of several defendants because he was not diligent in bringing his action. As a matter of policy, at some time there should be an end to litigation. Legislation provides that after a certain period of time, depending on the nature of an action, proceedings may not be brought. Similarly, in some circumstances it is perceived to be unfair if a plaintiff delays too long before proceeding, and even if there is no limitation period involved, equity will not permit the plaintiff to proceed for an equitable remedy. That is the doctrine of laches.

The Uniform Act identifies situations where a right to contribution will not lie:

(1) No person is entitled to contribution from a person entitled to indemnification from him for the damages for which contribution is sought.
(2) Contribution may not be had from a person exempt from liability for damages under a statute, such as the *Workers Compensation Act*, or by release.

The Uniform Act also provides that contribution may not be recovered from a person held not liable for the damages in issue. That is not really an exemption. It provides that a person is not subject to "double jeopardy." His liability cannot be tested again in subsequent proceedings for contribution.

This approach favours finality in proceedings. On the other hand, it might be perceived as unfair that a person's right to contribution can be foreclosed by the results of proceedings to which he was not a party. While it is to be hoped that the earlier proceedings were unobjectionable, the possibility that the finding was incorrect cannot be ruled out. Perhaps evidence was missing, the proceedings were conducted incompetently, or the parties conspired together. These occurrences are possible, but there is no evidence to suggest they are likely.

In all of these cases, the effect on a defendant's liability also has an effect on his co-defendants' rights of contribution from him. If his liability is extinguished, he is not required to contribute. His co-defendants' liability is unaffected, however. They will be responsible for the whole of the damages.

In each case, by reason of public policy, fairness, or the plaintiff's actions, a defendant is protected from full responsibility for the plaintiff's loss. His co-defendants, however, shoulder full responsibility and, consequently, will often be prejudiced by the current law.

The Uniform Act provides a method for more fairly apportioning responsibility to satisfy a judgment where a person is exempt from contribution. In those cases, the Uniform Act provides the amount of damages, liability, degrees of fault and rights of contribution are first determined as if there were no exemption. The amount of damages is then reduced as if the exempt person had

satisfied the judgment according to his degree of fault. The co-defendants are not responsible for that portion of the damages. Apart from this, liability and rights of contribution of those sharing liability are unaffected by another's exemption. It is difficult to devise any other approach to resolving these questions and we have concluded that it should be adopted.

The Uniform Act then specifically identifies a number of circumstances where this approach is to operate. It is our tentative conclusion that underlying all of these cases is a single principle: where, by reason of public policy, fairness or the plaintiff's conduct, the liability of one of several co-defendants is limited or extinguished, the plaintiff should bear that portion of his loss. In the recommendation that follows, we define these circumstances in terms of a "special defence." Where one co-defendant has a special defence that limits or extinguishes his liability, the damages recoverable by the plaintiff are reduced by an amount proportionate to that co-defendant's fault. In that respect, our recommendation corresponds to the approach adopted by the Uniform Law Conference. It differs, however, in one important aspect. If the defendant's liability is not wholly extinguished then, we recommend, the plaintiff's judgment should include the amount for which the defendant remains liable. The plaintiff should be able to recover that amount from the other defendants who share liability, and they should be entitled to seek contribution from the defendant to the extent of his liability.

The Commission recommends that:

7. (1) For the purposes of this recommendation, "special defence" means

(a) a defence or a plea in abatement of damages which arises under, through the operation of, or by reason of
(i) a release,
(ii) a contract,
(iii) an enactment,
(iv) the expiration of a limitation period, or
(v) a rule of equity or public policy

which limits or extinguishes a person's liability for the damages in issue, or

(b) any case or instance in which the plaintiff by his conduct has disabled himself from obtaining full recovery from a defendant.

(2) No contribution may be recovered from a person

(a) whose fault, it has been found in a previous proceeding, did not contribute to, or
(b) whose liability is extinguished by a special defence with respect to

the damages in issue.

(3) The contribution recoverable from a person whose liability for damages is limited

by a special defence shall not exceed the amount of the limitation.

(4) Where the contribution recoverable from one or more parties is reduced or extinguished under paragraph (2) or (3), damages payable by the parties found liable who do not have a special defence shall not exceed an amount calculated as follows: the whole of the damages less an amount proportionate to the fault of the person benefitting from the special defence plus the amount, if any, payable by the person benefitting from the special defence.

> Example: P's property is damaged by D1, D2, D3 and D4, who are jointly and severally liable for the damages. P's damages are $100,000. P and D1 had entered into a contract limiting D1's liability to $1000. Liability is apportioned among D1, D2, D3 and D4. Each is 25% at fault.

The Current Law: The position under the current law is not entirely clear. P can recover from D2, D3 and D4, or any of them, $100,000. Say P recovers $100,000 from D4. D4 can seek contribution from his codefendants. He can recover $25,000 from both D2 and D3. He can probably only recover $1000 from D1 and not the $24,000 that D1 is exempt from paying.

Under Recommendation 7: P can recover from D2, D3 and D4, or any of them, $76,000. (This amount is calculated pursuant to Recommendation 7(4) as follows:

Total damages	$100,000
- D1's proportionate share	-$ 25,000
+ the amount payable by D1	+$ 1,000
=	$ 76,000).

Say P recovers $76,000 from D4. D4 can recover $25,000 from both D2 and D3 and $1000 from D1. If D4 is successful in recovering contribution from his co-defendants, he will only pay $25,000. The $24,000 that D1 is exempt from paying is borne by the plaintiff.

It is our view that the issue of limits on contribution is best dealt with through a legislative statement of principle, and Recommendation 7 is drafted accordingly. In our deliberations Recommendation 7 was tested in a wide variety of situations, in all of which this approach appeared to operate satisfactorily. In the Working Paper that preceded this Report, comment was invited on whether this approach might embrace circumstances where the plaintiff should be able to proceed against co-defendants for the whole of his damages, or whether it failed to include circumstances where co-defendants' rights of contribution have been affected. Comment we received endorsed the recommended approach.

APPENDIX C

ANALYSIS OF RESPONSES TO THE CONSULTATIVE DOCUMENT

A. Introduction

Comment we received on the consultative document that preceded this Report on Section 3 of the *Negligence Act* is described below. The following discussion is structured by the questions posed in the consultative document, and grouped under these headings:

1. Policy,
2. Repeal of Section 3 of the *Negligence Act*,
3. Confirming the "Usual Rule,"
4. Contributory Negligence, and
5. Apportioning Responsibility Between Defendants.

B. Analysis of Comment

1. Policy

> *1. Do you agree that the successful party, even one who is contributorily negligent, should ordinarily be entitled to recover costs without deduction in proceedings involving negligence (unless the court otherwise orders)?*

Everyone who commented agreed that the policy of section 3 of the *Negligence Act* must be revised.

2. Repeal of Section 3 of the *Negligence Act*

> *2. Do you think section 3 of the Negligence Act should be revised? or repealed?*

The majority of those who commented agreed that section 3 of the *Negligence Act* should be repealed, leaving Rule 57 (the general rule about costs) to govern the issue.

One dissenting voice suggested changes to section 3 which would, in effect, restate the principles of Rule 57 in the *Negligence Act*. As a matter of modern drafting practice, it is customary to sever from statutes procedural issues. An exception is sometimes made if a departure from the procedure set out in the *Rules of Court* is called for.

Another dissent hinged repeal of section 3 on amending the *Rules of Court* to allow a defendant to make an offer on liability. Another commentator (who favoured repealing section 3) also raised concerns about the inability of a litigant to make a settlement offer about liability. We

are already on record as endorsing such a refinement to settlement offer procedures currently available (the reader should refer to our Report on Settlement Offers as well as the discussion in Chapter IV of this Report, in the section titled "New Issues: Settlement Offers and Liability.")

Finally, one person was uncomfortable about approving changes to section 3 of the *Negligence Act* before further consideration of the costs consequences following an offer to settle by one of several defendants. This issue is also examined in the section in Chapter IV titled "New Issues: Settlement Offers and Liability."

3. Confirming the "Usual Rule"

> *3. (a) Do amendments need to be made to the Rules of Court to confirm that the usual rule in cases involving negligence is that the successful party is entitled to costs without deduction?*

One submission from a group felt that it would help matters if the *Rules of Court* were amended confirming the usual rule in favour of compensating a successful party for costs, but no specific reason was given in support of this conclusion. Another commentator felt that clarifying the usual rule would be useful, but also thought that legislation should confirm that the rule applied only after taking into account the impact of any settlement offer that may have been made. It would seem that this commentator's concern relates more precisely to expanding the ambit of settlement offers, since under current practice it is clear that the existence of a settlement offer which should have been accepted displaces the general rule about entitlement to costs.[1]

Most of our correspondents felt that the *Rules of Court* should not be revised to clarify the operation of the usual rule, and the various letters we received set out a number of (explicit and implicit) reasons for this conclusion.

It was said, for example, that there is no need to set out the rule in detail because, once section 3 is repealed, judges will as a matter of course award successful plaintiffs all of their costs. As one correspondent observed:

> ... In most instances, a judge will likely give the plaintiff all of his or her costs where there is substantial success on the issue of liability. Problems may arise in situations where the plaintiff only succeeds to the extent of around 30 per cent or lower. However, these instances are relatively rare.

Moreover, stating in legislation how the usual rule will work may prove difficult. One correspondent warned, for example, that:

> ... what amounts to "success" will vary widely from case to case.

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[1] The courts, however, choose inconsistent methods for determining entitlement to costs when there is divided responsibility for loss and one party has made a settlement offer or payment into court that should have been accepted: *see, e.g., Freund* v. *Locke*, (1980) 22 B.C.L.R. 158 (S.C.); *Rae* v. *I.C.B.C.*, [1983] B.C.D. Civ. 3577-01 (C.A.); *Haynes* v. *Fontaine*, (1980) 19 B.C.L.R. 51 (S.C.).

As well, it was argued, there will be a continuing need for judicial flexibility:

> I know my position lacks the desirability of certainty, but in the area of costs flexibility is a desirable goal. Experience tends to confirm that the more rules you have the more litigation you attract. While the idea of judicial discretion is far from perfect, in the area of costs it is a far better master than more detailed rules.

Finally, we were told that judges should be free to develop the principles on a case-by-case basis and in this way will inevitably provide the necessary guidelines:

> We consider that the jurisprudence will develop to provide guidelines for the exercise of a judge's discretion regarding costs in the variety of contributory negligence cases which can arise.

4. Contributory Negligence

> *3. (b) Would it be necessary to provide that the contributory negligence of a successful party is not in itself sufficient reason to reduce entitlement to costs, or award costs to the defending party?*

Although everyone concluded that it would be unnecessary to set out a rule about the effect of contributory negligence on entitlement to costs, only one person offered a reason for this conclusion - that a rule about the effect of contributory negligence might possibly be too inflexible:

> There is no compelling reason to add such a provision and in certain cases contributory negligence may, indeed, justify a reduction in entitlement to costs.

5. Apportioning Responsibility Between Defendants

> *3. (c) Would it be useful to set out in the Rules of Court that if the court decides to apportion responsibility between the defendants, it can do so in accordance with their respective portions of fault.*

While there was some support for amending the Rules of Court to provide a rule about apportioning costs between defendants, again most felt that such a refinement was unnecessary. For one reason:

> ... if the Court decides to apportion responsibility for costs between the Defendants, it can do so in accordance with their respective degrees of fault. This is an unnecessary limit on the discretion of the Court which would, in all probability, consider degrees of fault as a factor in the exercise of its discretion with respect to costs in any event.