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Backgrounder

LRC 131—Report on Apportionment of Costs and Contributory Negligence: Section 3 of the Negligence Act

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Legal proceedings are often necessary to recover compensation for loss or injury caused by others, but they can be an expensive process. A person required to proceed to court will recover some compensation for their legal costs if they are successful, but a plaintiff who shares responsibility for personal loss or injury may find the award of costs drastically reduced. Many argue that this result is unfair, as a plaintiff forced into commencing an expensive legal action to recover compensation should be entitled to recover costs without any deduction. This report examines the operation of section 3 of the *Negligence Act* and the arguments in favour of changing the rules that govern the recovery of costs.

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 court many times. The dominant test to exercise this discretion is 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. This discretion is rarely used.

The rule for awarding costs in the *Negligence Act* can produce an inappropriate result, and there are several reasons to change it. Most other provinces in Canada follow the rule in England in which plaintiffs who are contributorily negligent receive costs without deduction for fault. When compared to claims in which the plaintiff is not contributorily negligent, section 3 of the *Negligence Act* rules lead to unjustifiably different results. In those cases the general rule will not reward a defendant with costs if they succeed in reducing the claim unless they extinguish it entirely, while a plaintiff found contributorily negligent can see their costs awards diminished significantly. The rule is also arbitrary, as the adjustment of costs is not tailored to be in line with the amount of time spent contesting liability. The rule further places unfair pressure on the plaintiff to settle.

The Commission recommends repeal of section 3 of the *Negligence Act*, leaving the *Rules of Court* to determine an appropriate award of costs. During the consultation process, most of the respondents supported revising the policy of section 3 by repealing it. That amendments to the *Rules of Court* expanding the settlement offer process should be made, as well as amendments to the law governing joint and joint and several liability. Both of these issues are discussed in more detail in the *Report on Settlement Offers* (LRC 77, 1984) and the *Report on Shared Liability* (LRC 88, 1986) respectively.

Further Developments

The report's recommendations have not been implemented.