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Backgrounder

LRC 88—Report on Shared Liability

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Responsibility for civil wrongs is usually seen as being individual. A person who fails to observe a legal responsibility to another will be liable to make good that failure. In many cases, though, it is possible to identify more than one cause of a result or more than one person responsible for bringing it about. When more than one person is responsible, determining the rights of recovery becomes relatively complex.

When two or more people share liability, or the person who suffers damage also shares responsibility for that damage, then the liability must be *apportioned*. In other words, courts must determine how each of the responsible persons should bear the loss caused by their actions. Further, a plaintiff who receives judgment against several co-defendants who share liability is under no obligation to seek recovery even-handedly. The plaintiff may look to one, or to any combination of them, as the source of payment. When a co-defendant satisfies more than its fair share of a judgment (however that fair share is determined), then that co-defendant might be entitled to recover the additional amount from the other co-defendants. This involves suing them for a *contribution*.

When two or more persons share liability to another, difficult procedural and substantive issues may arise. How is liability to be apportioned between the liable persons? What rights of contribution or indemnity should they have? Many problems flow from a distinction that the law makes between “joint liability” and “joint and several liability.” Joint liability is a shared obligation. It is not cumulative. Joint and several liability is a separate obligation. It is cumulative. The main distinction that flows from this is procedural. If liability is joint, then the plaintiff must usually proceed against all who share liability in the same proceeding. If liability is joint and several, then the plaintiff may elect to proceed against defendants separately.

After an introductory chapter setting out its broad outlines, the report proceeds to discuss the distinction between joint liability and joint and several liability. It begins by examining the two concepts. Then, it discusses three areas where the principles yield different results: (1) joinder of parties to a lawsuit; (2) death of a person who shares liability with others; and (3) judgment against one person who shares liability with others. Finally, the chapter

concludes with a discussion of the options for reforming the law and recommends that legislation be enacted deeming joint liability to be joint and several liability.

Chapter three takes a closer look at contributory negligence and the *Negligence Act*. At common law, it was thought that liability could not be apportioned, because this was too vague a concept. As a result, a person who was partly to blame for damage to their own person or property was not entitled to any other person contributing to that damage. As this rule can lead to harsh results, it was reversed by legislation—in British Columbia, the *Negligence Act*. The report considers the position of the Act on apportionment in light of several contemporary court decisions and makes recommendations to improve the workings of the Act.

Chapter four examines issues related to contribution. At common law, a person who satisfied a contractual obligation that was shared with others could call upon them to contribute. There was no similar common law right to contribution of shared liability arising in tort. This position has been altered by the *Negligence Act*, which provides that, in the absence of agreement, persons who share liability are liable to make contribution and indemnify each other according to the degree in which they were at fault. The legislation does not define “fault,” and this has caused some confusion over the word’s scope. The report compares the *Negligence Act* with the *Uniform Contributory Fault Act* (which was prepared by the Uniform Law Conference of Canada) on this issue and on several others, including the effect of vicarious liability on contribution, releases and judgments, and limits on contribution. The report concludes by recommending that an amended *Uniform Contributory Fault Act* be enacted in British Columbia.

Further Developments

The report’s recommendations have not been implemented by legislation.